

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

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

**APPEAL FROM THE
DISTRICT COURT OF THE NORTHEAST JUDICIAL DISTRICT
THE HONORABLE M. RICHARD GEIGER PRESIDING**

BRIEF OF APPELLEE

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[¶3] STATEMENT OF ISSUES

- I. [¶4] The Trial Court's Denial of Spousal Support to Alane Was Not Clearly Erroneous and Was Supported by the Evidence and Testimony Received
 - A. [¶5] Division of the Marital Estate and Spousal Support Must be Examined Together
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- V. [¶19]The Trial Court’s Determination Not to Award Attorney’s Fees to Alane Was not Clearly Erroneous

[¶20]STATEMENT OF THE CASE

[¶21]This is an appeal from the Walsh County District Court, which began as an action for divorce including two minor children, namely K.S., born 1998, and L.S., born 2001. The issues before the trial court were the valuation and division of the marital estate, and whether to award spousal support. All issues involving the minor children, including residential responsibility, decision-making responsibility, parenting time, and child support were previously stipulated to by the parties. The trial court correctly valued and distributed the marital estate, and correctly declined to award spousal support to the Appellant, (“Alane”).

[¶22]Alane filed her Summons and Complaint on August 20, 2014. The Appellee (“Richard”) filed his Answer and Counterclaim on August 26, 2014. A Pretrial Conference was held on March 4, 2015, wherein the parties executed and filed a Rule 8.3 Joint Property and Debt List. A Stipulation was also filed on March 4, 2015, which resolved issues regarding the minor children, the children’s financial assets, the equal division of Richard’s military retirement between the parties, parties’ responsibility for post-separation debts in their individual names, equal division of appraisal costs; Richard’s responsibility for the payment of the children’s mobile phones, as well as maintenance and insurance for the children’s vehicles; parties’ retention of their individual retirement interests, bank accounts, automobiles, and personal property already in their possession. (Appellee 4-18).

[¶23]A bench trial was held on March 10, 2015. The parties’ filed their Post Trial Briefs on April 1, 2015, and Richard filed his Post Trial Reply Brief on April 14, 2015. The Findings of Fact, Conclusions of Law, and Order for Judgment were entered on June

11, 2015. The Judgment and Decree of Divorce was entered on June 16, 2015, with the Notice of Entry of Judgment entered on June 17, 2015. Alane filed a Notice of Appeal and Order for Transcript on July 23, 2015.

[¶24]STATEMENT OF FACTS

[¶25]Alane and Richard are both forty-eight (48) years old. (App. 13). The parties were married on August 22, 1987. (App. 13). Both parties have high school degrees, with Richard having received additional vocational training in the United States Air Force. (App. 15). Alane has no current health issues. Richard is a combat wounded, disabled veteran who was severely wounded while deployed in Afghanistan. (App. 14).

[¶26]Throughout the marriage, Alane had several different jobs, having been employed by Grafton Public Schools for the last eleven (11) years, and more recently a second job with Demester Commercial Cleaning. (App. 15). For the majority of the marriage, Richard was employed with the United States Air Force, followed by employment with Alchem, employment as a private military contractor, and currently with American Crystal Sugar.

[¶27]Alane has not worked full-time for the last eleven (11) years (Tr. 119:15-18), and has no desire to work full-time (Tr. 119:19-23). In contrast, Richard, at times, worked 2-3 jobs (Tr. 150:2-5), or worked twelve (12) hour days for 120+ days in a row. (Tr. 160:7-19). Richard's combat related injuries will make it difficult for him to work until age 65. (Tr. 248:1-3). Since the parties' separation in September 2014, Richard has been solely responsible for all of the expenses related to the marital home, and has voluntarily paid Alane \$1,600.00 per month. (Tr. 146:7-13).

[¶28]SUMMARY OF THE ARGUMENT

[¶29] In an appeal regarding spousal support, the Appellant must prove that the trial court's findings were clearly erroneous, meaning the trial court's findings 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. The Appellant fails to meet her burden with respect to every issue on appeal.

[¶30] The trial court made detailed findings, spanning thirty-one (31) pages, wherein it provided a point-by-point analysis of the applicable law against the relevant evidence and testimony. The Appellant does not appeal the trial court's valuation and distribution of the marital estate, thus it is unclear how she can dispute the court's findings with respect to the Ruff-Fischer guidelines.

[¶31] While the Appellant argues the court erred in establishing Richard's income, a review of the findings provides a detailed, four-page analysis of how the trial court calculated Richard's income. The trial court provided a similarly detailed analysis of the parties' monthly expenses, and its determination that Alane does not have a need for spousal support, nor does Richard have the ability to pay spousal support. The trial court's findings with respect to spousal support, continuing jurisdiction, and attorney's fees, should be affirmed in all respects.

[¶32] ARGUMENT

[¶33] I. The Trial Court's Denial of Spousal Support to Alane Was Not Clearly Erroneous and Was Supported by the Evidence and Testimony Received.

[¶34] The North Dakota Supreme Court has said:

The district court's findings of fact in deciding whether to award spousal support will not be reversed on appeal unless they are clearly erroneous.

A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, no evidence exists to support the finding, or this Court is convinced, based on the entire record, a mistake has been made.

Klein v. Klein, 2015 ND 236, ¶9, 869 N.W.2d 750.

While the district court need not make a finding on each factor, the court must explain its rationale for its determination.

Klein at ¶8.

[¶35]A. Division of the Marital Estate and Spousal Support Must be Examined Together.

[¶36]In a divorce action, the issues of “property division and spousal support cannot be considered separately or in a vacuum, but ordinarily must be examined and dealt with together.” Demers v. Demers, 2006 ND 142, ¶19, 717 N.W.2d 545, 553. The trial court was clear that an analysis of the Ruff-Fischer factors examined with respect to the division of the marital estate were incorporated by reference into its analysis of whether to award spousal support. (App. 42). The trial court provided a detailed analysis for each factor. (App. 39-41).

[¶37]B. Alane Did Not Appeal the Trial Court’s Valuation Nor Division of the Marital Estate.

[¶38]Alane argues that the trial court’s conclusions with respect to the guideline factors are erroneous. However, Alane did not appeal the trial court’s distribution of the marital estate which is based on the trial court’s analysis of the guideline factors. Thus, Alane’s argument is that the court’s analysis of the Ruff-Fischer guidelines was correct with respect to the division of the marital estate, but somehow flawed with respect to the determination of spousal support.

[¶39]The court adopted Alane’s proposed value for the marital home (App. 31), and for the shop located at 824 Hill Avenue. (App. 32). The parties stipulated to the value of tools and equipment located in the shop. (Tr. 101:9-12). The parties agreed to the value (Appellee 1-3) and disposition (Appellee 13-16) of the their retirement accounts, the EMC life insurance policy, their vehicles, their personal property, Richard’s military retirement, and their credit card debt. The trial court adopted Alane’s proposal with respect to the value and distribution of the tax liability for the 2011 and 2012 tax years, as well as the potential tax liability for the 2013 tax year. (App. 25). Ultimately, the trial court awarded Alane fifty-five percent (55%) of the total net equity in the marital estate. (App. 38).

[¶40]II. The Trial Court’s Detailed Analysis of the Ruff-Fischer Guidelines Clearly Supports a Denial of Spousal Support.

[¶41]When determining whether an award of spousal support is appropriate, the trial court must consider all relevant factors under the Ruff-Fischer guidelines. Klein at ¶7. In Klein, this court stated

This Court has disposed of the disadvantaged spouse doctrine in determining spousal support and reemphasized "the importance of a comprehensive analysis under the Ruff-Fischer guidelines.

Klein at ¶7.

[¶42]In the present matter, the trial court provided a detailed analysis of all of the Ruff-Fischer guideline factors. (App. 39-41).

[¶43]A. The Respective Ages of the Parties.

[¶44]Both parties are forty-eight (48) years old. (App. 13). Alane has no health issues, and will likely be able to work until she is 65, if not beyond. It is unclear how long Richard, due to his injuries, will be able to maintain his current level of employment.

[¶45]B. The Parties' Earning Ability.

[¶46]In Lindberg v. Lindberg, 2009 ND 136, 770 N.W.2d 252, this court found that “[a] finding of underemployment is a consideration in determining a party's need for spousal support.” Lindberg at ¶33. “Income is a finding of fact,” subject to the clearly erroneous standard of review on appeal. Klein at ¶9. The trial court made detailed findings regarding the parties’ employment histories, earning abilities, and current incomes. Alane testified that Richard “worked very hard” to provide for the family, sometimes working 2-3 jobs at one time. (Tr. 150:1-5). In contrast, despite early in the parties’ marriage working full-time, Alane has for the last eleven (11) years only worked part-time since beginning her employment with Grafton Public Schools.

[¶47]Alane testified that she has no desire to get a full-time job (Tr. 119:19-23), nor pursue further education that may enable her to obtain more lucrative employment. (Tr. 24:3-4). Alane does not want to work full-time so that she can be there for the children. (Tr. 139:8-9). Alane did work full-time earlier in the children’s lives. The children are now seventeen (17) and fourteen (14), and Alane testified that the children are home alone when she is working for Demester Cleaning. (Tr. 139:12-18). It is Alane’s preference to work part-time. (Tr. 140:10-13).

[¶48]Prior to 2014, Alane did not work during the summer. (Tr. 22:10-12). Alane testified that while she worked for three weeks during the summer of 2014, she “just chose not to” work for the remainder of the summer. (Tr. 149:20-25;150:1). Alane will

likely be working with the “migrant school for seven (7) weeks during the summer of 2015. (Tr. 233:1-13). Alane makes \$13.18 per hour (Tr. 25:7-9), and receives yearly raises. (Tr. 23:14-16). Alane works 7.25 hours per day, and worked a total of 1,382 hours for Grafton Public Schools in 2014. (Tr. 118:6-8,15-20).

[¶49]Alane argues that the court erred in calculating her income, but the evidence is very clear. Alane worked a total of 1382 hours x \$13.18 equals \$18,214.00, the amount the trial court established as Alane’s income from her school year employment. (App. 30). Each party will receive one-half of Richard’s military retirement, equal to a yearly gross amount of \$7,332.00.

[¶50]Alane argues the trial court’s determination of her potential summer income is flawed. However, if Alane were to find employment with a comparable wage to what she receives from the school, for the approximate twelve (12) weeks during the summer, she could very easily earn \$6,000.00, as \$13.18 x 40 hours per week x 12 weeks equals \$6,326.00.

[¶51]Alane earns \$9.50 per hour working part-time for Demester Cleaning. (Tr. 28:20-23). Alane argues the court’s determination of her income from her employment with Demester Cleaning is flawed because the imputed income amount requires her to work 8.3 hours per week. Alane testified that she works for Demester “ten hours a week roughly.” (Tr. 119:15). Thus, the court’s determination of Alane’s income from Demester Cleaning is low. \$9.50 x 10 hours x 52 weeks equals \$4,940.00. Even calculating for 50 weeks would equal \$4,750.00. Despite Alane’s argument that the trial court’s determination of her current income greatly overstates her earning ability, the trial court was quite measured in its determinations.

[¶52]Alane argues the trial court failed to properly calculate Richard's current income. Alane does not contest the findings regarding Richard's one-half of his military retirement, \$7,332.00, nor Richard's gross annual disability benefit of \$18,827.28. The trial court rejected both parties' proposals for calculating Richard's income, electing to provide its own four (4) pages of analysis of how it determined Richard's income.

[¶53]Richard was employed full-time with Lockheed Martin until February 2014, and then "just enough to have the benefits until June of that year." (Tr. 232:11-12). Richard began his employment at American Crystal Sugar ("ACS") at the end of April 2014. (Tr. 156:8). In its analysis, the trial court extrapolated what Richard's earnings would have been at ACS had he been employed there for all of 2014. (App. 28). Alane's only argument regarding the trial court's calculations regarding Richard's income from ACS is that the trial court failed to include any overtime pay. The trial court correctly chose not to include any overtime in its calculation of Richard's income from ACS because overtime is not necessarily guaranteed (Tr. 173:14-18), and Richard does not receive overtime in the summer. (Tr. 175:18-20).

[¶54]Alane argues that the court erred by not including in its calculation the income Richard received from Lockheed Martin in 2014. However, this would require the court to double count Richard's income for the first four months of the year. Additionally, using information from Richard's former employer would not provide an accurate income number for Richard, nor an accurate estimate of Richard's future earning potential.

[¶55]Alane argues the trial court's income calculations do not accurately reflect Richard's true earning ability given his past employment, particularly his work as a

private military contractor. Throughout the pendency of this matter, Alane has argued Richard's employment as a private military contractor is an accurate gauge of Richard's earning ability. However, Alane fails to acknowledge several facts that make Richard's prior employment an inappropriate litmus test for future earning potential.

[¶56]Richard testified that the availability of private military contractor jobs has diminished (Tr. 248:22-23), and those jobs are not available locally. (Tr. 159:19-22). Additionally, given the tax issues the parties are currently facing, overseas contracting work is not economically advantageous. (Tr. 248:24-25;249:1-5). More importantly, Richard does not want to spend more time away from his children. (Tr. 249:6-8). While Alane refuses to work full-time so she can spend more time with the children, Richard simply wants to be able to work full-time in close proximity to the children.

[¶57]Richard's employment with ACS is the most lucrative employment available in the area. Richard could work as an aircraft mechanic in Grand Forks earning \$10.00 less an hour (Tr. 158:23-25), but he chooses instead to work at ACS, doing a job he enjoys far less, in order to provide for his children. (Tr. 158:19). Additionally, Richard testified regarding the "horrible" working conditions involved with the contracting work. Richard stayed in eight man tents, working twelve (12) hours a day, every day, for 120+ days at a time. (Tr. 248:17-19).

[¶58]The trial court accurately calculated the parties' income using all of the evidence available. Alane actively chooses to be underemployed, a fact she repeatedly testified to at trial. By imputing income to Alane, the trial court acknowledged Alane's voluntary underemployment. The trial court found that Richard does not have the ability to earn the type of income that was available when he was working as a private military

contractor. There are no private contractor jobs available locally, Richard is not physically able to do that type of work anymore, and given the parties' income tax issues, overseas contracting does not make financial sense. Additionally, Richard wants to be present and available in the children's lives, something that Alane should be able to appreciate.

[¶59]C. The Duration of the Marriage and Conduct of the Parties During the Marriage.

[¶60]Both parties agree the marriage was long-term, a fact also noted in the findings. (App. 39). Alane argues that Richard's conduct diminished the value of the marital estate, but it was due to Richard's efforts that the marital estate was worth as much as it was.

[¶61]Alane argues that she sacrificed career advancement for the sake of Richard's career, but quite the opposite is true. Alane testified that during the parties' marriage they lived in Grafton (Tr. 43:5;46:20;55:13;62:12), GF (Tr. 44:20; 46:13;58:15), and Larimore (Tr. 48:13). The trial court found the parties never moved from Grand Forks or Walsh County. (App. 43). Alane only lived outside of North Dakota for one month, when, very early in their marriage, she accompanied Richard to Texas for training. (Tr. 45:16-22). Alane was "very homesick" in Texas. (Tr. 45:20). Richard sacrificed career advancement for Alane.

[¶62]Throughout the parties' marriage, Alane had a series of retail jobs (Tr. 43:9; 49:12-20; 50:2-6), positions in child care (47:20;51:16;53:3-9;54:16), and she worked at a nursing home (Tr. 49:5). For the last eleven (11) years, Alane has worked as a paraprofessional for Grafton Public Schools. (Tr. 20:22-25;21:4-5). More recently, Alane started a second job working part-time for Demester Commercial Cleaning, a company

owned by her sister. (Tr. 27:23-25). The trial court correctly found that “[t]here is no evidence that indicates Alane sacrificed a career both that would have led to greater future income for Alane in order to enhance Richard’s own career.” (App. 42).

[¶63]Richard testified in his military career, he was originally assigned to the B-52(G), but then transitioned to the B-1. (Tr. 242:10-17). Richard worked for five (5) years as ground crew, and two (2) years as a crew chief on the B-1. (Tr. 242:19-20). If Richard had stayed with the B-1 program, he would have been stationed at one of three Air Force bases, Dyess in Abilene, TX; Ellsworth in Rapid City, SD, or March Air Force Base in California. (Tr. 243:1-5). Rather than stay with the B-1 program, Richard chose to transition to the KC-135 because he knew Alane “was very homesick” and doing so would allow Alane to be near her family. (Tr. 242:23-25). Had Richard stayed with the B-1 program he likely would have progressed in rank more quickly given his extensive knowledge of that aircraft. (Tr. 243: 6-9).

[¶64]After leaving the Air Force, Richard worked at Alchem, ultimately as the maintenance manager. (Tr. 244:2). In 2005, the parties agreed that Richard would enlist in the National Guard so that he could complete his twenty (20) years of military service, and retire with full benefits. (Tr. 67:7-13). Soon after reenlisting, Richard was deployed to southern Afghanistan. (Tr. 244:16-17). While in Afghanistan, Richard was seriously injured on August 26, 2006. (Tr. 245:11). After recovering from his extensive injuries, Richard ultimately retired in 2008. The parties jointly made the decision, due to their state of “financial despair,” that Richard would join Battlespace as a private military contractor. (Tr. 70:6-11), and then take a similar position with Lockheed Martin. (App. 16). Richard deployed as a private military contractor five (5) times from 2010 to 2014.

(App. 16). Richard worked 12 hour days, every day, while at times sleeping in a dirt floored tent.

[¶65]Alane argues that she was left alone to take care of the “home and family.” Richard does not seek to diminish the role of military spouses, nor Alane’s importance in the children’s lives. However, Alane testified that when Richard was deployed, she “made him pay everything” online, except the water bill. (Tr. 81:6-9). When Richard went overseas, he had people lined up to mow the ditches, plow the driveway, and assist with any other home or vehicle issues. (Tr. 147:17-23). Alane only had to make a call or two to have an issue resolved. (Tr. 148:5-13).

[¶66]Alane argues that the trial court failed to account for Richard’s actions regarding the parties’ credit card debt and tax liabilities when determining whether to award spousal support, but that is simply not true. The division of the marital estate and the determination of whether to award spousal support are topics intertwined around the Ruff-Fischer guidelines. This court has said that “all marital debts and assets must be included under the Ruff-Fischer guidelines. Mertz v. Mertz, 2015 ND 13, ¶15, 858 N.W.2d 292. Alane did not question the court’s division of the marital estate.

[¶67]While the net worth of the marital estate was diminished by the credit card debt and tax liabilities, those situations did not manifest in a vacuum. Richard used the credit cards when the parties separated, and he was forced to pay all of the expenses related to the marital home, replace items Alane took from the marital home, while also voluntarily giving Alane \$1,600.00 per month. Additionally, Alane admitted that she abused the joint Target card during the marriage. (Tr. 144:25;145:1-5). Both parties benefited from the tax refunds in 2011 and 2012. Additionally, the court used Alane’s

values for the marital home and shop, and placed those values on Richard's side of the ledger.

[¶68]Alane received a greater percentage of the net equity of the marital estate, a \$21,000.00 property settlement, and left the marriage relatively debt free. (App. 33). While Alane attempts to argue Richard was found at fault for the divorce, the parties were granted a divorce on the grounds of irreconcilable differences, exactly the relief Alane asked for in her Complaint. (App. 44). Alane argues that Richard's conduct diminished the value of the marital estate, but it was Richard's hard work and sacrifice that increased the value of the marital estate. The court offset any fault on Richard's part with its division of the marital estate, an issue that is not on appeal.

[¶69]D. The Parties' Station in Life.

[¶70]Alane argues that Richard's station in life "appears significantly higher than Alane's," but appearances can be deceiving. Alane argues that Richard purchased the cabin in Wisconsin, and then "just gave up his interest." In reality, Richard was bought out for what he had already paid in because Alane did not want the property. (Tr. 182:14-22). Alane took issue with several trips Richard recently took to Wisconsin. (Tr. 113:7-9). While these trips could "appear" to be leisure trips, in fact Richard was visiting his very ill father. (Tr. 330:10-14).

[¶71]Alane argues that Richard does not need the shop to "work on cars." On the surface, the shop would "appear" to be a potentially unneeded expense. However, pursuant to the parties stipulated agreement, Richard is responsible for all of the maintenance on the children's vehicles. (App. 54-55). The cost for Richard to repair the children's vehicles at his shop is roughly ten percent (10%) of what it would cost for

Richard to take the vehicle to another shop. (Tr. 262:7-11). With an annual mortgage of \$4,000.00, and the children's aging vehicles, keeping the shop makes fiscal sense. (Tr. 262:15-16). Additionally, Richard stores items at the shop, at no charge, for members of Alane's family. (Tr. 190:11-12).

[¶72]Alane argues that during the marriage she and Richard "drove newer vehicles, remodeled their home often, and took trips together; while her current budget "includes none of these items." Alane fails to indicate where the line items for these types of expenses are included in Richard's budget. The court seeks to equalize the burden of divorce, not ensure one spouse continues to enjoy her previous lifestyle.

[¶73]Alane's vehicle is three years newer than Richard's. (App. 32). Richard's recent trips were to visit his dying father. While Alane laments her current residence as smaller and older, it is large enough for both of the children to have their own rooms, something that was not possible in the marital home. (Tr. 82:10-12). When the parties separated, Richard gave Alane the option of staying in the marital home, but she chose not to. (Tr. 82:14-16).

[¶74]Alane wants to continue enjoying the same standard of living she had when the parties were married, that is simply not possible. While Alane argues what is not in her budget, the trial court found that Richard's current budget includes a \$16,500 annual shortfall that Richard must negotiate while continuing to pay child support to Alane, while coping with the reduction of half of his military retirement. (App. 43). Neither of the parties has an extravagant lifestyle. Alane may not enjoy the same amenities she once did, but she was able to pay all of her bills even before she starts receiving an additional \$500.00 a month from Richard's military retirement. (Tr. 150:16-19).

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[¶75]E. The Circumstances and Necessities of Each Party.

[¶76]This factor will be discussed in detail in Section III.

[¶77]F. The Parties' Health and Physical Condition.

[¶78]Alane is in good health. (Tr. 20:3-4). On August 26, 2006, while Richard was deployed as a military police officer in Afghanistan, the Humvee he was riding in hit an improvised explosive device. (Tr. 245:10-25). Richard was in the gunner's turret when the Humvee hit the IED. (Tr. 245:10-25). The Humvee was blown on its side, and Richard was blown out of the turret. (Tr. 245:10-25). While Alane testified that Richard only broke his arm, his injuries were actually much more severe. (Tr. 68:22-24) Richard's arm was broken in four places, muscle was torn from his shoulder, he suffered a concussion, and a traumatic brain injury (TBI). (Tr. 245:10-25). The PCL ligaments in Richard's left knee were torn, the damage cannot be repaired, and the knee will eventually need to be replaced. (Tr. 246:1-8).

[¶79]As a result of his injuries, Richard has arthritic pain in his knees and elbows, which has increased in severity with time. (Tr. 246:11-15). As a result of the traumatic brain injury, Richard has trouble sleeping, and experiences severe headaches 1-2 times per week, lasting 1-2 hours each time. (Tr. 246:16-24). Richard also suffers from post-traumatic stress disorder (PTSD). (Tr. 247:11-13). In 2009, the Veteran's Administration determined that Richard was fifty-percent (50%) disabled. (Tr. 165:1-8). The Veterans Administration increased Richard's disabled rating to seventy-percent (70%) in December 2014. (Tr. 163:19-21).

[¶80]Alane's allegations that Richard's combat-related injuries have "no real significance" and that Richard's life has been enhanced by his injuries is at best

unseemly, and demonstrates a complete disrespect for the sacrifices Richard has made. Alane is correct that Richard's income did increase after his injury, when he made the decision to return to Afghanistan, and work punishing hours in grueling and dangerous conditions to provide for the family.

[¶81]Richard has no choice but to work through the constant pain. (Tr. 247:3). Richard hopes he will be able to work until he is 65, but it will be difficult to do so. (Tr. 248:1-3). Richard's position at ACS is a very physical job, and because of his injuries, Richard no longer has the energy for that type of physical labor anymore. (TR. 281:5-8). Richard is unsure how much longer he will be physically able to work at ACS. (Tr. 281:9-10).

[¶82]Alane argues that Richard will likely earn another retirement pension working at ACS, but given Richard's health issues this is pure speculation. The trial court correctly found that both parties agreed to Richard's enlistment in the National Guard. (App. 17). Alane benefited from Richard's enlistment, as she will be receiving one-half of Richard's military retirement, that he qualified for as result of completing his twenty (20) years of service. (Tr. 90:22-25). However, in addition to the benefits, both parties also accept the fact that Richard's enlistment also exposed him to greater risk, and his earning capacity is reduced as a result of his combat-related injuries. (App. 17).

[¶83]G. The Parties' 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.

[¶84]Alane argues that pursuant to the trial court's division of the marital estate, that Richard is receiving "nearly all of the property." However, Alane did not appeal the trial court's division of the marital estate. The trial court used Alane's values for the real

property, and Richard was awarded the vast majority of the parties' debt. Additionally, the trial court awarded Alane a greater percentage of the net equity in the marital estate.

[¶85]Alane argues that the shop has income producing potential, but this is contrary to the evidence and testimony received. Richard testified that after working twelve hours at ACS, he does not have the energy for side jobs, and has not done any side jobs since starting at ACS. (Tr. 281:2-6). Even when Richard had the time and stamina for side jobs, the income he earned was minimal since most of the work was done for friends and family. (Tr. 280:13-24).

[¶86]Alane did not appeal the trial court's division of the marital estate which was based on the court's analysis of the Ruff-Fischer guidelines. The trial court adopted its analysis with respect to the division of the marital estate into its determination regarding an award of spousal support. The trial court provided a detailed analysis of why it correctly chose not to award spousal support in this matter.

[¶87]III. The Trial Court's Determination That Alane Does Not Have the Need For Spousal Support, Nor Does Richard Have the Ability to Pay Spousal Support Was Not Clearly Erroneous.

[¶88]In discussing the topic of spousal support this court has said:

[S]pousal support determinations must be made in light of the needs of the spouse seeking support and of the supporting spouse's needs and ability to pay and that support can be denied if no need for support is established, or the supporting spouse shows no ability to pay.

Hagel v. Hagel 2006 ND 181, ¶13, 721 N.W.2d 1, 5.

The district court must adequately explain the basis for its decision, but we will not reverse a district court's decision when valid reasons are fairly discernable, either by deduction or by inference.

Mertz at ¶10.

[¶89]A. Alane Does Not Have the Need for Spousal Support.

[¶90]The trial court provided a detailed monthly budget for Alane of \$4,298.60. (App. 35). Most of the amounts were left unchanged from Alane's proposed budget. Alane testified that her proposed monthly budget of \$5,032.60 would allow her "to be comfortable." (Tr. 90:5-8). The trial court reduced Alane's proposed monthly budget by \$734.00. However, evidence was received that suggests Alane's monthly expenses are even lower, and further calls into question Alane's need for spousal support.

[¶91]One of the exhibits offered by Alane was the Request for Innocent Spouse Relief form she filed with the Internal Revenue Service. (Appellee 22). As part of that form, Alane was required to provide a list of her monthly expenses. (Appellee 22). Alane provided the amounts for the monthly expenses on the form. (Tr. 313:6-8). On the IRS form, Alane listed her total monthly expenses at \$1,810.00, or \$3,223.00 less than her proposed budget. (Appellee 22).

[¶92]While the budget on the IRS form is not as detailed as the budget provided by the trial court, a few similar line items are worth noting. The trial court adopted Alane's proposed monthly total vehicle expenses of \$281.00, but Alane listed her total vehicle expenses at only \$125.00 with the IRS. (Appellee 22). This is a difference of \$156.00. The trial court reduced Alane's proposed monthly food and grocery expenses from her proposed value of \$700.00 to \$500.00, but on the IRS form Alane listed her monthly food expense at \$400.00, a difference of \$100.00. (Appellee 22). The trial court reduced Alane's monthly clothing expense from her proposed value of \$650.00 to \$325.00, but Alane listed her monthly clothing expense with the IRS at \$125.00.

(Appellee 22). This is a difference of \$200.00. On the IRS form Alane listed the total monthly expense for the children at \$50.00. (Appellee 22).

[¶93]In addition to the inconsistencies found when examining the IRS form, Alane was not awarded any of the parties' joint Federal tax liability, and Alane testified that she anticipates a tax refund. (Tr. 42:1-5). This further reduces her total monthly expenses by \$148.00. (App. 33). Alane testified that her attorney's fees will not be a permanent expense, which will reduce her total monthly expenses by \$700.00. (Tr. 138:7-10). The loan from Alane's mother was for \$800.00 (App. 33), and at \$67.00 per month it will be paid off in one year. Adding up these adjustments (\$156.00+\$100.00+\$200.00+\$148.00+\$700.00+\$67.00) results in a reduction of Alane's monthly expenses of \$1,371.00, reducing her total current monthly expenses to \$2,927.60.

[¶94]Alane's gross annual income from all sources for the next three years is approximately \$54,891.00. (App. 31). This includes \$18,214.00 from Alane's employment with Grafton Public Schools; \$4,097.00 from her part-time employment with Demester Cleaning; \$6,000.00 from summer employment; \$7,332.00 representing one-half of Richard's military retirement; and child support of \$19,248.00. Using the trial court's budget for Alane, Alane's yearly expenses total \$51,583.20, leaving her with a surplus of \$3,307.80. Using the adjusted monthly expense amount of \$2,927.60, Alane's yearly expenses will total \$35,131.20, resulting in a surplus of \$19,759.80. When Alane is only receiving child support for one child, her total annual income from all sources will be approximately \$47,859.00. (App. 31). Without taking into account reduced expenses for only one child, Alane's annual surplus will be \$12,727.80.

[¶95]After both of the children graduate, Alane's expenses will further reduce. Alane will no longer have the monthly expense for the children's clothing, laundry, and dry cleaning, reducing the adjusted monthly clothing expense to \$75.00, or a \$50.00 monthly reduction. Alane will not need to pay \$165.00 per month for the children's miscellaneous expenses. Alane's food and grocery bill will reduce by at least \$100.00 when she only is buying food for one person. On cross-examination Alane testified that the unreimbursed vision, dental, and medical expenses were for her and the children. (Tr. 127:16-25;128:1-12). Thus, the total monthly expenses for unreimbursed vision, dental, and medical can be reduced. Alane testified that the unreimbursed prescription costs were for the children only. (Tr. 128:13-14). This reduces Alane's monthly expenses by \$75.00. The total adjustment, after both children graduate, without specific reduction for unreimbursed medical, dental, and vision expenses, is at least \$390.00 ($\$50.00 + \$165.00 + \$100.00 + \75.00). This reduces Alane's monthly expenses to \$2,537.60 ($\$2,927.60 - \390.00). Alane's total annual expenses after both children have graduated will be approximately \$30,451.20. Alane's annual gross income when she is no longer receiving child support will be approximately \$35,643.00. (App. 31). Thus, Alane will have an annual surplus of \$5,191.80.

[¶96]Alane testified that she was current with all of her bills, and that was without the addition of the approximately \$500.00 per month she will receive from one-half of Richard's military retirement. (Tr. 142:16-19). Alane was awarded virtually none of the parties' debt, and a greater percentage of the net equity in the marital estate. The parties stipulated that Richard is responsible for one-half of the children's extraordinary expenses including off-season sports fees, sports equipment, class rings, senior pictures,

sports/summer camps, extracurricular expenses and testing, graduation announcements, costs incurred for college credits taken during high school, college testing and application fees, and class trips, which further reduces Alane's financial burden. (App. 51). Richard is also responsible for one-half of all unreimbursed medical, dental, and vision expenses for the children (App. 51); all maintenance on and insurance for the children's vehicles (App. 54-55); and for the monthly costs of the children's mobile phones. (App. 55).

[¶97] Without any spousal support, and without the addition of one-half of Richard's military retirement, Alane is able to meet all of her expenses. The total amount of Alane's annual surplus will naturally be dependent on her willingness to work, as even when the parties were in "dire financial straits" Alane chose not to work full-time. However, it is clear from the evidence that even if Alane were to continue working both of her current part-time jobs, she will still be able to meet both her needs, and the needs of the children.

[¶98] B. Richard Does Not Have the Ability to Pay Spousal Support

[¶99] The trial court established Richard's approximate annual gross income at \$79,535.00. (App. 26). Richard's approximate monthly expenses, without the monthly amount for the property division payment, totals \$7,646.00. This results in annual expenses of \$91,752.0, creating an annual deficit of \$12,217.00. The trial court noted the annual deficit facing Richard, and the fact that Richard will have to make adjustments in his spending in order to make everything work. Even if Richard were to completely eliminate all non-essential monthly expenses including: DirecTV (\$110.00), Netflix (\$17.00), entertainment for himself and the children (\$100.00), and gifts (\$50.00) that

would only reduce Richard's total annual expenses by \$3,324.00. This would still leave an annual deficit of \$8,893.00.

[¶100]The only monthly expenses that Richard has that are not relatively static are the monthly payments on the credit cards. Richard's budget calls for monthly payments on the credit cards totaling \$1,225.00, or total annual payments of \$14,700.00. In order to just break even, Richard will have to reduce his total monthly payments on the credit cards to \$483.92. If the payments on all of the cards were proportionately reduced, and it was assumed that: no interest were to accumulate on the credit card balances, that the children were to have no expenses, that the children's vehicles will need no repairs or maintenance, and that no other unbudgeted expenses were to occur, it would take approximately two years to pay off all of the credit cards. In reality, it will likely take much longer to pay off the credit card debt.

[¶101]As the children graduate, Richard's child support obligation will decrease, as will Alane's expenses. Richard's monthly expenses will also reduce after the credit cards are paid off, and after the tax liability is satisfied. However, given the state of Richard's health, as a result of his combat-related injuries, it is unclear how much longer Richard will be able to maintain his level of employment. Eventually, Richard will only have his disability benefits (\$18,827.28) and one-half of his military retirement (\$7,332.00) which totals an approximate annual income of \$26,159.28. If we eliminate all expenses related to the credit cards, the children, and the tax liability, Richard's monthly expenses are still \$3,930.00, or \$47,160.00 annually. This would leave Richard with an annual deficit of \$21,000.72.

[¶102]The evidence is clear that Richard simply does not have the ability to pay spousal support to Alane, and furthermore, Alane does not have the need for spousal support. This court affirmed the trial court in Klein when it only awarded Mary Ann Klein two years of rehabilitative spousal support. Klein at ¶15. The present matter can be distinguished from Klein in several ways: 1) Mary Ann Klein had previously worked in her chosen career field, nursing, but was not currently working in that field, 2) Mary Ann Klein, despite being four (4) years older than Alane, was interested in pursuing further education to increase her earning potential, and 3) Wesley Klein had the ability to provide support. In the present matter, as the trial court noted, there is no evidence that Alane ever sacrificed her own career to enhance Richard's, and there is no evidence Alane ever expressed a desire to pursue a new career path, "especially any path requiring further education." (App 42-43). Alane has been working in her chosen career for the past eleven (11) years, and she has no desire to leave her current position with Grafton Public Schools. Finally, unlike Wesley Klein, Richard does not have the ability to provide support to Alane. As in Klein, it is easy, given the trial court's detailed analysis, to understand the decision not to award spousal support now, nor in the future.

[¶103]IV. The Trial Court's Determination That Neither Rehabilitative nor Permanent Spousal Support Is Appropriate in This Matter Was Not Clearly Erroneous

[¶104]When discussing Rehabilitative and Permanent Spousal Support this court has stated:

Rehabilitative spousal support is awarded to equalize the burden of divorce or to restore an economically disadvantaged spouse to independent status by providing that spouse an opportunity to acquire an education, training, work skills, or experience to become self-supporting.

Klein at ¶8.

Permanent spousal support and rehabilitative spousal support are two distinct remedies.

Rehabilitative spousal support is appropriate when it is possible to restore a spouse to independent economic status or to equalize the burden of the divorce by increasing that spouse's earning capacity.

Permanent spousal support is generally appropriate when a spouse cannot be equitably rehabilitated to make up for the opportunities lost in the course of the marriage. Id. Even when a spouse is capable of rehabilitation, permanent spousal support may be an appropriate remedy to ensure the parties equitably share the overall reduction in their separate standards of living.

Wold v. Wold, 2008 ND 14, ¶14, 744 N.W.2d 541

[¶105]It is clear that Alane has no desire to obtain further education, training, or otherwise become self-supporting. Alane has no desire to go back to school. (Tr. 24:3-4). Alane has no desire to get a full-time job that would allow her to earn more. (Tr. 119:19-23). Alane testified that she wants “indefinite” spousal support even if she were to remarry. (Tr. 111:12-16).

[¶106]In Klein, Mary Ann Klein was older (52) than Alane (48), the Kleins had been married longer (31 years) than the current parties (28 years), and this court affirmed an award of rehabilitative spousal support of relatively short duration. However, unlike in Klein, Alane has no desire to make any effort to increase her earning ability, and Alane does not have the need for spousal support. Additionally, unlike in Klein, Richard does not have the ability to provide spousal support.

[¶107]Richard has sacrificed throughout the marriage, including being severely wounded in combat, all in an effort to provide for the family. In contrast, for the last eleven (11) years, even when the parties were in Alane’s words “such financial despair,”

while Richard was working 12-hour days, every day, for 120 days in a row, Alane could not be bothered to get a full-time job, or until last year, even work during the summer.

[¶108]Alane wants Richard to continue to subsidize her lifestyle, and that is not right or equitable. Alane argues that permanent spousal support is appropriate to compensate for the opportunities she lost during the marriage. However, Alane presented no evidence of any opportunity she was forced to forego as a result of her marriage to Richard. Alane further argues that permanent spousal support is appropriate as to allow both parties to equitably share the reduction in their standards of living. As discussed above, Alane presented no evidence outside of conjecture as to how Richard's standard of living is somehow better than her own. Alane has far less debt, drives a newer car, has more disposable income, is in far better health, and works far less hours than Richard. By an objective measure, Alane's standard of living is higher than Richard's.

[¶109]Alane argues that permanent spousal support is appropriate when there is a significant disparity in the parties' incomes. If we look at the parties' disposable incomes it is clear that Alane has far greater income than Richard. Even when the children graduate and she is no longer receiving child support, her expenses will decrease, and she will still have an annual surplus. Alane has no need for spousal support.

[¶110]Alane testified, and requested in her prayer for relief on appeal, that she wants her spousal support to increase as the amount of child support decreases. (Tr. 111:5-7). This court has said that “[c]hild support under the guidelines is modeled upon the assumption that the presumptive amount will be paid to the custodial parent, as obligee, to use for the child's current expenses.” Schleicher v. Schleicher, 551 N.W.2d 766,768 (N.D. 1996). Child support is for the support and benefit of the child, not the

parents. With her testimony Alane is in essence admitting that she intends to use the child support for her own needs, otherwise there would be no need for an increase after the children graduate.

[¶111]Alane argues that the trial court erred in not retaining jurisdiction with respect to spousal support. In Harvey v. Harvey, 2014 ND 208, 855 N.W.2d 657, this court stated:

if [a trial court] find[s] no immediate need for awarding permanent spousal support, they should retain jurisdiction to do so beyond a temporary award, when facing uncertainty about the need for permanent support.

Harvey at ¶17.

In the present matter, it is clear that neither rehabilitative, nor permanent spousal support is appropriate. Even if Alane had a need for further education and training, she has demonstrated no desire to take advantage of such an opportunity. The trial court's division of the marital estate ensures that the parties are equally sharing the burdens of the divorce, and that their separate standards of living are equitable. Even if the trial court had determined that Alane demonstrated need for spousal support, Richard would still not have the ability to pay said support.

[¶112]In Norberg v. Norberg, 2014 ND 90, 845 N.W.2d 348, this court found that:

Where there is a demonstrated limitation on the ability to be self-supporting such as disability, a district court should retain jurisdiction to potentially award spousal support in the future when there is uncertainty about the parties' future incomes and need for support.

Norberg at ¶35.

In this matter, Richard is disabled, and his future income is uncertain given the limitations placed on him by his injuries. No evidence nor testimony was offered that Alane will not be able to continue working until she is 65, or even after. However, it is unlikely Richard will be able to work until 65. While Alane will enjoy fiscal surpluses going forward, Richard will be forced to struggle with debt and deficit. Alane has no demonstrated need for spousal support, and Richard does not have the ability to pay support.

[¶113]V. The Trial Court's Determination Not to Award Attorney's Fees to Alane Was not Clearly Erroneous.

[¶114]The trial court did not address the issue of attorney's fees in its findings. This is not unusual since in his Answer and Counterclaim, Richard asked that each party pay their own attorney's fees, and at trial Alane testified that each party should be responsible for their own attorney's fees. (Tr. 116:14-15). It is somewhat disingenuous for Alane to testify at trial that she wants both parties to be responsible for their own attorney's fees, but then seek an award of attorney's fees on appeal. The trial court's silence on this topic was appropriate given the expressed wishes of the parties.

[¶115]CONCLUSION

[¶116]Alane has failed to meet her burden in showing that the findings of the trial court are clearly erroneous. It is clear from the record that all of the trial court's findings were based on the evidence and testimony received throughout the pendency of this matter. The trial court's findings denying an award of spousal support, not retaining jurisdiction over the issue of spousal support, and not awarding attorney's fees, should be affirmed in all respects.

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