20210083

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 24, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael R. Pomarleau, Plaintiff, Appellant and Cross-Appellee, v. Tanya M. Pomarleau, Defendant, Appellee and Cross-Appellant, and State of North Dakota, Statutory Real Party in Interest.	**SUPREME COURT NO. 20210083** District Court Case No. 08-2018-DM-00826

BRIEF OF DEFENDANT, APPELLEE, AND CROSS-APPELLANT TANYA M. POMARLEAU

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE BURLEIGH COUNTY DISTRICT COURT MEMORANDUM AND ORDER DATED DECEMBER 28, 2020, JUDGMENT DATED JANUARY 20, 2021, ORDER ON POST-TRIAL MOTIONS DATED MAY 13, 2021 AND AMENDED JUDGMENT DATED JULY 9, 2021 BY THE HONORABLE DAVID REICH OF THE SOUTH CENTRAL JUDICIAL DISTRICT

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JURISDICTIONAL STATEMENT

[1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI, § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6 and N.D.C.C. § 28-27-01.

STATEMENT OF THE ISSUES

[2] Whether the trial court properly calculated the parties' child support obligations in light of Tanya's involuntary reduction in income.

[3] Whether the trial court appropriately allocated each party's right to receive child tax credits for their minor children pursuant to Michael's proposal regarding the same.

[4] Whether the trial court abused its discretion in valuing marital assets pursuant to the evidence available in the record.

[5] Whether the trial court clearly erred in calculating the parties' oil royalties received following their separation.

[6] Whether the trial court should have made adjustments to its division of the marital estate to account for the expenses incurred by each party during separation.

[7] Whether Michael's appeal is frivolous and Tanya is entitled to costs and attorney's fees pursuant to Rule 38 of the North Dakota Rules of Appellate Procedure.

STATEMENT OF THE CASE

[8] This appeal arises out of a divorce action which Michael R. Pomarleau (hereinafter "Michael") commenced against his wife, Tanya M. Pomarleau (hereinafter "Tanya") by admission of service on August 10, 2018 [Doc. ID #2-3]. The Court held trial on June 4-5, 2020 and issued its *Memorandum and Order* [Appendix, hereinafter "App." 70] on December 28, 2020. The Order directed that, pursuant to Rule 7.1 N.D.R.Ct., the parties shall have 14 days to "make any objections, request any changes or corrections, or submit their own proposed findings of fact and conclusions of law." *Id.*

[9] Michael filed a "request" at Docket Index No. 187 entitled "Plaintiff's Rule 7.1 Objections / Request for Changes." Similarly, Tanya filed a Rule 52 Motion to Amend or Make Additional Findings at Docket Index Nos. 189-194. Both parties raised complaints with the trial court's order, and requested the Court correct its findings regarding child support.

[10] Before the District Court addressed the pending requests/motions, the Clerk executed Judgment on January 20, 2021. [App. 99]. Michael filed Notice of Appeal on March 25, 2021 and Tanya cross-appealed on March 30, 2021. On April 21, 2021, the District court issued an *Order on Post-Trial Motions to Amend the Court's Memorandum and Order*. [Doc. ID #221]. Said order directed a modification of the Judgment regarding parenting time and indicated the Court (if it had jurisdiction to do so) intended to modify the parties' child support obligations. Therefore, the order directed

Michael to file proposed child support calculations. Michael filed proposed calculations and Tanya responded to the same.

[11] Pursuant to Rule 27, Tanya moved this Court for an order instructing the District Court to re-issue the *Order on Post-Trial Motions to Amend the Court's Memorandum and Order* (to clarify the trial court's jurisdiction to issue said order and temporarily remand this case to the District Court for the limited purpose of disposing of the pending "request" and Rule 52 motion. The Court re-issued a new order, curing any jurisdictional concerns on May 13, 2021. [App. 120]. Most notably, this order recalculated the parties' child support obligations.

[12] The Clerk subsequently entered Amended Judgment on July 9, 2021. [App. 125].

[13] Oral argument is requested and likely to be of assistance to provide more detailed explanation regarding the factual complexities of this appeal.

STATEMENT OF FACTS

[14] Michael and Tanya married on September 4, 1999 in Belfield, North Dakota. [App. 71 ¶ 2]. The parties lived together until their separation on June 27, 2018. *Id.* Michael and Tanya are the parents of three children, namely: J.M.P. (born in 2002); B.M.P. (born in 2008); and A.R.P. (born in 2014). *Id.* During the course of their marriage, the parties acquired various assets and debts which required equitable distribution from the Court.

[15] Michael was 43 years old and testified that he is in good health. [App. 71 ¶ 6]. He works as a self-employed landman and operates American Land Services, LLC and Sparrow Investments, LLC. *Id.* Michael's earnings are documented in the tax returns provided to the Court as Exhibits 1-10, and Exhibit 51. [Doc. ID #50-55, 40-41, 100 and 157]. In the last six years, Michael's highest earning year was in 2014 where he earned $370,912 (as referenced on lines 12 and 17 of his 2014 tax return marked as Exhibit 51). *Id.* From 2014 through 2019, Michael's average earnings are $182,907 per year. *Id.*

[16] Tanya was 42 years old and also testified that she is in good health. [App. 72 ¶ 9]. For most of the marriage, she did unskilled or low earning work. *Id.* For example, in 2015, Tanya earned $17,454. [Doc. Id #50]. In 2016, Tanya accepted a position as a mortgage banker with Plains Commerce Bank and her earnings increased. [App. 72 ¶ 9]. In April 2020, Tanya changed positions and at the time of trial was working as a mortgage banker with Anytime Mortgage. *Id.*

[17] Further facts regarding the parties' income (for child support purposes) and division of the marital estate are described more fully throughout the remaining argument.

LAW AND ARGUMENT

I. The trial court, in its Order on Post-Trial Motions and subsequent Amended Judgment, recognizing Tanya's reduction in income was involuntary and making detailed findings regarding the same, correctly calculated the child support obligations of the parties.

[18] Because the trial court ordered Michael and Tanya to share equal residential responsibility of their children, the trial court must calculate a child support obligation for each parent. Those obligations then offset one another. The parties stipulated Michael's gross income, for purposes of a child support calculation, was $145,000. [App. 122 ¶ 5].

[19] Tanya argues her income should be based on her employment contract with Anytime Mortgage (yielding $126,000 per year). Michael argues Tanya voluntarily reduced her income, and therefore, proposes two methods of calculating Tanya's income differently: using Tanya's 2019 income or averaging Tanya's historical income.

[20] The trial court addressed Michael's proposed calculation methods and whether Tanya's reduction in income was voluntary in its *Order on Post-Trial Motions to Amend the Court's Memorandum and Order*, finding:

> Michael argues Tanya voluntarily and knowingly reduced her income and, therefore, should not be allowed to pay child support based on her lowered income. The court disagrees. Tanya's higher earning years required her to work long hours for commission earnings in an uncertain market. During that time, she had a spouse with a good income to pay expenses if her commissions were lacking and to assist with child care and other family matters. As a single parent, Tanya testified that she wanted employment which provided her with a guaranteed salary so that she was no longer entirely dependent upon commissions and which also gave her more time to be with the children. She continues to earn a good income and an income comparable to the

> income earned by Michael. The court finds these to be legitimate reasons for Tanya to change employment and not an intentional reduction of income to minimize her child support obligation.

[App. 122 ¶ 5].

[21] "Child support determinations involve questions of law which are subject to a de novo standard of review, findings of fact which are subject to a clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to an abuse-of-discretion standard of review." *Buchholz v. Buchholz*, 1999 ND 36, ¶ 11, 590 N.W.2d 215. Under the de novo standard, a court errs as a matter of law when it fails to comply with the requirements of the child support guidelines, fails to make required findings, or required findings are not intelligible. *Id.* ¶ 11; *see also* Laura W. Morgan, Child Support Guidelines: Interpretation and Application (1998) § 403 (b). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or, if there is some evidence to support the finding but, on the entire record, appellate courts are left with a definite and firm conviction a mistake has been made." *Dvorak v. Dvorak*, 2006 ND 171, ¶ 11, 719 N.W.2d 362. The abuse of discretion standard applies when a court has discretion or "may do something." *See Schwalk v. Schwalk*, 2014 ND 13, ¶ 8, 841 N.W.2d 767 (emphasis added). Discretion is abused if a court acts arbitrarily, capriciously, or unreasonably. *Austin v. Towne*, 1997 ND 59, ¶ 8, 560 N.W.2d 895.

[22] The task of the trial court in setting an amount for child support is to balance the needs of the children and the ability of the parent to pay. *Montgomery v. Montgomery*, 481 N.W.2d 234, 236 (N.D. 1992). Courts rely on past income to calculate child support as past income is often the best predictor of future income. *Shaver v. Kopp*, 545 N.W.2d 170, 175 (N.D. 1996). While the child support calculated pursuant to the North Dakota Child Support Guidelines is presumed to be the correct child support amount unless rebutted, the trial court has discretion to consider the obligor's financial circumstances and fashion an appopriate level of support. *State ex Rel. K.B. v. Bauer*, 2009 ND 45, ¶ 16, 763 N.W.2d 462. The Court is given this discretion because the guidelines do not and cannot envision every conceivable factual scenario that will arise. *Id.* (emphasis added).

A. The trial court properly recognized Tanya's reduction in income was involuntary and made detailed findings regarding the same.

[23] First, Michael proposes calculating Tanya's child support obligation using her 2019 income. Michael argues this is appropriate, rather than using her wages at Anytime Mortgage, because she voluntarily reduced her income. N.D.A.C. 75-02-04.1-07(7) permits the Court to impute historical wages to a party if a party voluntarily reduces their income. However, this is *permissive* authority for the court and is not *mandatory*. Specifically, the guidelines state, "if an obligor makes a voluntary change in employment resulting in reduction of income . . . earnings *may* be imputed." N.D.A.C. 75-

02-04.1-07(7). However, the guidelines also direct the Court to consider whether the change in employment was made for the purpose of reducing the obligor's child support obligation and lists factors such as standard of living, work history, education, barriers to employment, stated reason for change in employment, and likely employment status if the family before the Court were intact. *Id.*

[24] In Paragraph 9 of the Court's *Memorandum and Order* the Court found Tanya, for most of the marriage, was employed in relatively low paying, unskilled labor types of employment until she accepted a position as a mortgage broker. [App. 72 ¶ 9]. The first page of Michael's *Exhibit 12* provides a demonstrative summary of Tanya's income from 2015 to 2020. [Doc. ID #43]. In 2019, Tanya worked in a commission-based program at Plains Commerce Bank and earned $259,853. [Doc. ID #42 – Exhibit 11]. Tanya worried she was about to be terminated from her position at Plains Commerce Bank and offered, by way of exhibit, proof of a disciplinary notice from her employer. [Doc. ID #130 – Exhibit 84]. She accepted a position with Anytime Mortgage, receiving a monthly salary of $10,500, yielding a yearly income of $126,000. [Doc. ID #129 – Exhibit 83].

[25] In Paragraph 20 of the Courts *Memorandum and Order*, the Court found the reason for Tanya's decrease in earnings was a change in employment which provides her with a guaranteed salary so that she was no longer entirely dependent upon commissions and which also gave her more

time to be with the children. [App. 77 ¶ 20]. This observation from the Court, based on Tanya's testimony, is particularly relevant as Tanya is now solely responsible for the mortgage for the marital home and no longer has the stability of a second income while needing to provide for her children.

[26] These findings, combined with the trial court's *Order on Post-Trial Motions to Amend the Court's Memorandum and Order* demonstrate the trial court properly analyzed the law with regard to voluntary reduction in income, made factual findings consistent with the record, and did not abuse the its discretion.

B. Because Tanya's income did not fluctuate, the Court did not err by refusing to average Tanya's income.

[27] Second, in the alternative, Michael proposes using a five-year historical average of Tanya's earnings. Michael argues the child support guidelines permit this historical averaging because of alleged fluctuations in income and cites N.D.A.C. 75-02-04.1-02. Michael's reliance on this authority is misplaced because Michael misinterprets the guidelines and because Tanya's income does not fluctuate.

[28] The guidelines advise, if income fluctuates, evidence should be presented to the Court to show the range of fluctuation. Specifically, the guidelines state: "[w]here gross income is subject to fluctuation, regardless of whether the obligor is employed or self-employed, information reflecting and covering a period of time sufficient to reveal the likely extent of fluctuations must be provided." N.D.A.C. 75-02-04.1-02. The above-cited authority does not

authorize, and certainly does not require, the trial court to conduct any sort of "averaging" of an obligor's income for child support calculations. Simply, the parties are to advise the trial court of the nature of the fluctuations. The child support guidelines do not specify a five-year average is appropriate for an employed (W-2 receiving) individual. The child support guidelines only utilize a five-year average for self-employed parties.

[29] Despite Michael's misinterpretation of the guidelines, Tanya's income does not fluctuate. Tanya's employment with Anytime Mortgage was a consistent salary of $10,500 per month. The trial court found Tanya accepted this position to avoid commission-based employment – which is subject to fluctuation.

C. Michael failed to raise his argument regarding post-separation division of rents and oil royalties impacting the parties' child support calculations to the trial court.

[30] Michael and Tanya received rents and oil royalties post separation. The trial court ordered the parties to split these post-separation assets received by the parties. In his closing statement filed post trial, Michael requested the trial court split these assets. [Doc. ID #159 ¶ 43]. The trial court did so. On appeal, Michael argues (for the first time) this division should reduce his income and increase Tanya's income.

[31] After the Court issued its *Memorandum and Order*, Michael submitted proposed child support calculations and briefing regarding the same. [Doc. Id #222-223]. In his briefing and calculations, Michael argued his

average self-employment income was $145,036 annually. *Id.* Michael did not argue the trial court's distribution of the post-separation assets should impact either parties income calculation for child support purposes. *Id.* In the appellant's brief, Michael notes the parties stipulated that Michael's average self-employment income was $145,036. "Where a party invites, and in effect consents to, a ruling, he is ordinarily estopped from asserting that the ruling was prejudicial." *Chaffee Broe Co. v. Powers Elevator Co.*, 41 N.D. 94, 170 N.W. 314 (1918).

[32] This Court has repeatedly held that issues not raised or considered in the district court cannot be raised for the first time on appeal, and this Court will not address issues raised for the first time. *Risovi v. Job Service North Dakota,* 2014 ND 60, ¶ 12, 845 N.W.2d 15. The purpose of an appeal is not to give the appellant an opportunity to develop new strategies or theories; rather, the purpose is to review the actions of the district court. *In re Johnson,* 2013 ND 146, ¶ 10, 835 N.W.2d 806. 'The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision." *Id.* (quoting *Spratt v. MDU Res. Group, Inc.,* 2011 ND 94, ¶ 14, 797 N.W.2d 328).

II. Considering the proposal presented by Michael at trial and the evidence presented to the trial court regarding the same, the trial court did not abuse its discretion by honoring Michael's

specific proposal to alternate which parent would receive child tax credits on a yearly basis.

[33] Michael argues the Court erred in allowing Tanya to claim two (of three) children in even years and Michael to claim two (of three) children in odd years – because he would have preferred to claim the extra child in even years.

[34] When determining divorce transactions, a trial court should consider the tax consequences. *Kostelecky v. Kostelecky*, 537 N.W.2d 551, 554 (N.D.1995). A court may allocate income tax dependency exemptions. *Fleck v. Fleck*, 427 N.W.2d 355, 357–59 (N.D.1988). "Although it may be prudent to place the exemptions in the hands of the party who will most benefit, perhaps with a reciprocal reduction in the other party's support obligation, we have not previously required the trial courts to do so." *State ex rel. Younger v. Bryant*, 465 N.W.2d 155, 160 (N.D.1991), quoting *Illies v. Illies*, 462 N.W.2d 878, 882 (N.D.1990).

[35] In the present case, Michael submitted a proposed parenting plan to the court requesting language identical to that which the trial court ordered. [Doc. ID #27]. It is illogical to use the benefit of hindsight to now, on appeal, argue the trial court should not have granted the relief that a party requested at trial. Where a party consents to a certain procedure he will be estopped from asserting on appeal that the procedure was erroneous. *Walton v.* Olson, 40 N.D. 571, 170 N.W. 107 (1918); *Vannett v. Reilly-Herz Auto Co.*, 42 N.D. 607, 173 N.W. 466 (1919). Further, in his brief, Michael alleges facts not in the

record regarding alleged motivations for who claimed which children during the interim to this case. Finally, Michael suggests claiming the "extra" child for the 2020 and 2021 for tax years for the first time on appeal.

[36] Despite the above, the Court's award for Tanya to claim two children in even years is equitable. It is undisputed that Tanya provided health insurance for the family during the interim to the divorce. Tanya also submitted a spreadsheet detailing the expenses she incurred to support the children during the interim. [Doc. ID #125 – *Exhibit 78*].

[37] This Court should not reverse unless it is left with a definite and firm conviction the trial court made a mistake. *Mahoney v. Mahoney*, 1997 ND 149 ¶ 21, 567 N.W.2d 206. For the reasons described above, the trial court did not make a mistake.

III. The trial court was not clearly erroneous in valuing and distributing the marital estate using the range of the evidence presented.

[38] The law regarding allocation of property and debts in a divorce, is well established. Specifically, the *Ruff-Fisher* guidelines require the Court to consider the following factors when determining an equitable division of the marital estate:

> 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.

Shultz v. Schultz, 2018 ND 259, ¶ 27, 920 N.W.2d 483, 490 (citing *Ruff v. Ruff*, 52 N.W.2d 107 (N.D. 1952) and *Fischer v. Fischer*, 139 N.W.2d 845 (N.D. 1966)). A district court must make an equitable distribution of the divorcing parties' marital property and debts. N.D.C.C. § 14-05-24(1); *Feist v. Feist*, 2015 ND 98, ¶ 6, 862 N.W.2d 817, 820. However, martial property valuations "within the range of evidence presented to the trial court" are not clearly erroneous valuations. *Evenson v. Evenson*, 2007 ND 194, ¶ 6, 742 N.W.2d 829, 833.

A. Selecting the appraisal which most closely reflected the state of the home at the time of separation, the trial court did not err in valuing the marital home.

[39] The legislature recently revised North Dakota law regarding the date of valuation. However, at all times during the pendency of this case through service of the summons and complaint and through trial, the parties were subject to N.D.C.C. § 14-05-24(1) regarding date of valuation. The plain language of said statute states the valuation date "is the date mutually agreed upon between the parties." *Willprecht v. Willprecht*, 2020 ND 77, ¶ 14, 941 N.W.2d 556. If the parties do not agree upon a valuation date, the valuation date "is the date of service of a summons ... or the date on which the parties last separated, whichever occurs first." *Id.*

[40] The trial court accepted Tanya's valuation of the marital home because it "more accurately reflected the value at the time of separation." [App. 91]. The trial court applied the applicable version of North Dakota law

regarding the date of valuation. Michael asks this Court to reject the statute on the basis of his ideas about equity.

[41] Further, Michael asserts the trial court should have accepted his appraised value because a half bathroom on the main floor was being remodeled at the time of separation and was being remodeled at the time Tanya obtained her appraisal in late July 2018. Thus, he asserts the house is worth approximately $22,000 more due to the completion of this bathroom project. However, Michael's argument fails to consider the Court's statutory obligations outlined in N.D.C.C. § 14-05-24(1) regarding date of valuation. The Court should consider the assets in the condition they were in at the time of separation. In this case, both parties testified the main floor half bathroom was not remodeled when the parties separated. [Transcript Day 1, hereinafter "T1" 171:17-25; 172:1-8; 221:10-19]; [Transcript Day 2, hereinafter "T2" 122:13-22]. Thus, pursuant to the statute, it would be inappropriate for the Court to value the home based on renovations which occurred after the separation.

B. Recognizing mandatory authority regarding valuation of business assets, the trial court properly determined the accounts receivable and fixed assets associated with the businesses.

[42] First, Michael contests the trial court's valuation of American Land Services (hereinafter "ALS") fixed assets at $13,619.35 and Sparrow Investment's (hereinafter "Sparrow") fixed assets at $37,766.18.

[43] Exhibit 24A shows, under the "fixed assets" column, that ALS had $13,619.35 in furniture and equipment. [Doc. ID #64]. Exhibit 23A shows,

under the "fixed assets" column, that Sparrow had $37,766.18 in furniture and equipment. [Doc. ID #60]. The two values listed on the balance sheets are the value's the trial court adopted.

[44] Michael disputes that the business equipment held by American Land Services has any value, because it is nearly fully depreciated on the balance sheet. This Court has addressed this issue in *Kluck*, wherein the Court recognized evidence that showed depreciated values in a financial statement for a business did not reflect the fair market value of those assets. *Kluck v. Kluck*, 1997 ND 41, ¶ 35, 561 N.W.2d 263. The Court noted in valuing a professional corporation, the trial court must include *at a minimum* the interest in the office equipment, furniture, fixtures, and the accounts receivable. *Id*. (citing *Bard v. Bard*, 380 N.W.2d. 342, 344 (N.D. 1986); *see also Fraase v. Fraase*, 315 N.W.2d 271, 275 (N.D. 1982)). This Court held that depreciating a business' assets is "strictly an accounting valuation" and had "very little relationship to the true value of the physical assets." *Id.* In the case at hand, the Court should use $13,619.35 for the value of these assets because the depreciated value on the balance sheet does not reflect the actual fair market value of those current assets. The fair market value is the proper method of valuing marital property in a divorce under ordinary circumstances. *Hoverson v. Hoverson*, 2001 ND 124, ¶ 12, 629 N.W.2d 573, 579.

[45] Michael disputes that the business equipment held by Sparrow had any value which is not already noted elsewhere in the property and debt

listing, because the "furniture and equipment" listed in the balance sheet reflects the Belfield home found on line 2 of the property and debt listing. This position by Michael is erroneous and nonsensical. Michael testified and asserts that one half of the Belfield home is worth $70,000. [T1 172:15-20]. For his balance sheet to only reflect $37,766.18 for an asset which Michael claims is worth $140,000 combined is not credible. Further, real property owned by the parties is unlikely to be listed as "furniture" on the balance sheet for the business. There is already a separate line item for "Belfield Resid. Property" on the balance sheet on Exhibit 23A. [Doc. ID #60]. Tanya argues that, clearly, Sparrow owns $37,766.18 in furniture and equipment. The trial court did not err in assigning that value to those assets as it is within the range of evidence. The value given to marital property by the courts depends on the evidence presented by the parties. *Fox v. Fox,* 2001 ND 88, ¶ 22, 626 N.W.2d 660. "Marital property valuations within the range of the evidence are not clearly erroneous." *Id.* ¶19 (quoting *Wald v. Wald,* 556 N.W.2d 291, 295 (N.D.1996)). A district court's choice between two permissible views of the weight of the evidence is not clearly erroneous. *Lizakowski v. Lizakowski*, 2017 ND 91, ¶ 15, 893 N.W.2d 508.

[46] Michael argues the trial court erred in awarding Michael accounts receivable without also awarding him the liability for accounts payable. Tanya's closing brief specifically cited the aforementioned *Kluck* opinion and requested the trial court include the accounts receivable in its

valuation of the business. [Doc. ID #159 ¶ 37] citing *Kluck*, 1997 ND 41, ¶ 35. Michael never listed this alleged liability anywhere on the property and debt listing. [App. 66-69]. Michael cannot reasonably expect the trial court to sift through hundreds of exhibits and numerous financial documents to award him this liability when he never requested the same. "Judges, whether trial or appellate, are not ferrets, obligated to engage in unassisted searches of the record for evidence to support a litigant's position." *Earnest v. Garcia*, 1999 ND 196, ¶ 10, 601 N.W.2d 260 (citing *Anderson v. A.P.I. Co. of Minnesota, 1997 ND 6,* ¶ 25, 559 N.W.2d 204).

[47] Similarly, both parties listed $2,500 as the valuation for line item 10 on the property and debt listing. Michael cannot expect the trial court to ignore a stipulated value without a compelling reason. The trial court's award of $2,500 was within the range of available evidence.

C. In light of the limited evidence available, the trial court's valuation regarding personal property was appropriate and the trial court did not error.

[48] The parties dispute the value of their personal property. The disputes can be generalized into three matters: (1) the value of the home furnishings kept by each party, (2) the silver and gold bullion, and (3) the ownership of the Gents ring.

[49] Tanya testified that Michael waited until she was out of town, and without Tanya's knowledge, went through the marital home and removed whatever personal property he desired, and in doing so, selected the more

valuable personal property. [T2 128:7-130:6; 132:6-134:13]. Tanya is the only party that provided the Court with any frame of reference regarding what personal property is actually being discussed by providing comparable pictures to show the items Michael removed from the property, found in the record at Exhibit 67. [Doc. ID #116].

[50] Tanya testified that in order to determine the values she used for the home furnishings, she reviewed websites like Bismanonline.com to determine the sale price of used home furnishings similar to her home furnishings. [T2 128:7-130:6; 132:6-134:13]. It is clear that Tanya attempted to fairly and consistently value the home furnishings. For example, Tanya valued the grill that Mike took to his residence (P&DL No. 16) at almost half the price Mike valued the grill at (when the parties agree Mike should keep the grill). *Id.* She was also consistent in her valuations, assigning a $200 value to the queen bed Mike took (P&DL No. 17) and $400 for the two queen beds she took (P&DL No. 37). *Id.* Tanya did assess the living room furniture that Mike removed from the home at a slightly higher value than her own, because consistent with her testimony, Mike took more pieces of furniture than were left upstairs, and the furniture downstairs was newer and had more features (such as electronic features built into the furniture). *Id.*

[51] In favor of the above, the trial court concluded the parties' personal property is worth roughly $20,000 and awarded half to each party. [App. 93 ¶70]. A district court's findings of fact are presumed correct, and this

Court views the evidence in the light most favorable to its findings. *Lorenz v. Lorenz,* 2007 ND 49, ¶ 5, 729 N.W.2d 692. In the present case, both parties provided limited evidence regarding the values of personal property. The trial court notes "[t]he limited information provided to the court regarding the inventory, condition and value of the parties personal property makes it extremely difficult for the court to accurately determine values for the home furnishings." [App. 93 ¶69]. Existence of evidence necessary to permit the court to make correct findings as to the personal property of the parties is the responsibility of counsel. *Hoge v. Hoge*, 218 N.W.2d 557, 561 (N.D. 1979).

[52] The trial court did not err by valuing all personal property at $10,000 per party and "lumping together" a value for all personal property. In *Nastrom v. Nastrom,* 284 N.W.2d 576 (N.D.1979), this Court placed a limitation on the requirement that the trial court must make a determination of the net worth of the parties' real and personal property by indicating that the findings of fact need not set forth the value of <u>each</u> particular item making up the whole of the marital property. The Court reiterated that position in *Tuff v. Tuff*, 333 N.W.2d 421, 424 (N.D. 1983). However, this Court observed that the *Nastrom* limitation does not eliminate the need for a determination by the trial court of the couple's net worth prior to the application of the other *Ruff-Fischer* guidelines."

[53] The trial court discusses its valuation of the parties' silver and gold bullion at Appendix paragraph 73, explaining "Michael was not

forthcoming about the gold and silver removed from the home in discovery and at trial." Thereafter, the trial court found that each party maintained possession of approximately one-half of the silver and gold bullion collection. Michael argues this generalized factual finding by the court is an error. For the reasons described above in *Nastrom* and *Tuff*, the Court's findings are appropriate.

[54] Tanya offered, and the court received, a video of Michael leaving the marital home with the type of clear tote that was used to store the excess gold and silver. [Doc. ID #121 - *Exhibit 72*]. Michael sent Tanya an email after the divorce was commenced admitting he removed at least some gold and silver from the home which Michael did not account for in the property and debt listing. [Doc. ID #120 – *Exhibit 71*]. After Michael moved out but before Michael removed a substantial amount of gold and silver from the home, Tanya took photos of receipts for gold and silver that were in the safe and she also took photos of various gold and silver pieces themselves. These photos and receipts are found at Exhibit 74 – Doc. ID #123. After Michael went through the home and removed a substantial amount of gold and silver, Tanya had the gold and silver in her home appraised. [Doc. ID #82 - *Exhibit 37*]. The receipts and photos demonstrate gold and silver which was not included in Tanya's appraisal. The trial court agreed.

[55] The trial court also assessed Michael's truthfulness and credibility regarding the gent's ring and determined Michael exercised

ownership of the ring and it should be considered part of the marital estate. [App. 93-94 ¶ 71]. A district court may consider property to be part of the marital estate, if supported by evidence, even if a party claims it is owned by a nonparty. *Kovarik v. Kovarik*, 2009 ND 82, ¶ 13, 765 N.W.2d 511 (citing *Barth v. Barth,* 1999 ND 91, ¶ 8, 593 N.W.2d 359).

[56] Tanya showed the Court a photograph of Mike wearing the ring during a special occasion. [Doc. ID #115 – *Exhibit 66*]. Michael was cross-examined regarding the photo and admitted he was wearing the ring. [T1 240:5-11]. On August 29, 2014, Michael and Tanya brought the ring to Riddle's Jewelry and had the ring appraised for $25,813. The appraisal indicates the ring is the property of Tanya and Mike and can be found in the record at Exhibit 65 [Doc. ID #114]. Also significant to the ownership of the ring is the quote for a personal articles policy which was obtained by Tanya on September 9, 2014 to insure the ring for $25,813. The quote is part of the record as Exhibit 64 [Doc. ID #113].

[57] With regard to the silver and gold bullion as well as the Gent's ring, the Court made reasonable findings based on the evidence presented and the credibility of the witnesses. This Court does not reweigh conflicts in the evidence, and this Court gives due regard to the trial court's opportunity to judge the credibility of the witnesses." *Crandall v. Crandall,* 2011 ND 136, ¶19, 799 N.W.2d 388.

D. Using the bank statements admitted into evidence and considering the date of separation of the parties, the trial court correctly valued the parties' financial assets.

[58] Michael contends the Court erred in valuing Tanya's Plains Commerce Bank account at $65,110.76 rather than $76,701.86. In support of his argument, Michael points to withdrawals from the account and argues Tanya "cleaned out the account."

[59] In reality, Tanya's removal of approximately $11,500 is a relatively small portion of the marital estate and a modest amount of spending money considering the parties' incomes. Although Michael supposes that Tanya had unclean hands in removing these funds, nothing in the record supports the same. The trial court is in the best position to weigh the evidence and the credibility of the parties. Michael's suspicions of alleged financial misconduct from Tanya are not otherwise supported by evidence in the record. Notably, neither party included any "cash in hand" on the property and debt listing or asked the trial court to consider the same.

[60] The trial court valued the account based on the value on the bank statement closest to the date of valuation in corrected Exhibit 68. The trial court's findings conform with North Dakota law. The Court is statutorily required to value assets as of the date of separation, or, June 27, 2018. With regard to bank accounts, this is a simple process and leaves little room for dispute amongst the parties. Tanya offered Exhibit 68 (corrected) which is found on the docket at Index No. 150. Exhibit 68 (corrected) shows Tanya's

two bank accounts with Plains Commerce Bank. The first account ending in #0505 has a balance of $40,126.21 on June 29, 2018 which is the closest date available to the date of separation (see page 3). Page 7 of Exhibit 68 (corrected) shows Tanya's second bank account (ending in #8045) with a balance of $24,984.55 on June 29, 2018 which is the closest date available to the date of separation. The total value is $65,110.76.

[61] Post separation, the parties received rents from property and oil royalties. Michael held these funds from the time of separation in June 2018 through entry of amended Judgment in July 2021. In other words, Michael had exclusive use and possession of the funds for three years and was entitled to all interest earned from the funds during that time. Michael listed these funds on the property and debt listing – thereby alleging they were property subject to an equitable division. In its opinion, the trial court assigned a value to them and equitably divided them (similar to how the Court would divide funds in a bank account or an investment account).

[62] Without acknowledging the benefit he received from withholding the funds from Tanya for three years, Michael now uses the benefit of hindsight to complain that he has to share those funds without sharing the tax obligation. A reality divorcing parties must face is the division of a marital estate is rarely truly equal in all facets. Further, nearly every aspect of the marital estate is subject to taxes in some way. For example, the parties have paid income tax of some kind on (likely) all of the money in their various checking and savings

accounts. Investments accounts have either been taxed or are subject to future taxes. The parties paid real estate tax on the marital home – and Tanya paid real estate tax on the marital home for three years during the interim to the divorce.

[63] Finally, the trial court considered Michael's estimated tax liability as a liability in item 64 on the property and debt listing and explained that same in its *Memorandum and Order*. [App. 95 ¶76].

E. The trial court correctly calculated and assigned the parties' marital debt.

[64] Michael argues the trial court should not have awarded the debt to Tanya for two credit cards because Tanya had already satisfied the debts with her personal checking account prior to the date of separation. In its *Memorandum and Order*, the trial court noted the credit card purchases were for insurance for family vehicles, supplies for the children, and a family vacation. [App. 95 ¶76]. Because these expenses were family related, the trial court reasoned that the parties should be equally responsible for them (even though they the debt was technically satisfied from Tanya's personal account prior to separation). The trial court was aware the debts were satisfied as Michael raised the issue during trial and again in post-trial briefings.

[65] This does not mean the trial court's order was erroneous. The trial court is not obligated to order an entirely equal distribution of the marital estate. Rather, the Court may order an equitable division of the marital estate if it sufficiently explains its reasoning for the same. *Kosobud v. Kosobud*, 2012

ND 122, ¶ 6, 817 N.W.2d 384 ("A property division need not be equal to be equitable, but a substantial disparity must be explained.").

F. In order to equitably divide the marital estate, the trial court properly considered interim health insurance premiums paid by one party when evaluating the disposition of the marital estate.

[66] North Dakota Rules of Court Rule 8.4(a)(3) binds both parties in a divorce to the following restraining provision: "[a]ll currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation." At the commencement of this action, Michael was self-employed and Tanya carried health insurance coverage for the entire family, including Michael. Due to the restraining provisions of Rule 8.4(a)(3), Tanya's obligation to continue to provide health insurance continued from June 2018 to July 2021. Rightfully, Tanya requested the trial court order Michael to reimburse her for her expense in supporting Michael and the children.

[67] Intended to aid in the interpretation of the laws of this state, the maxims of North Dakota's jurisprudence require "for every wrong there is a remedy" and "one who takes the benefit must bear the burden." N.D.C.C. § 31-11-05(12) and (14). Furthermore, "A person legally responsible for the support of a child under the age of eighteen years who is not subject to any subsisting court order for the support of the child and who fails to provide support, subsistence, education, or other necessary care for the child." N.D.C.C. § 14-08.1-01. Health insurance coverage

[68] Our courts favor equity. It is not uncommon for parties to be ordered to share out of pocket medical expenses incurred for children while a divorce is pending. The general principal of reimbursement is common in many aspects of domestic relations cases. For example, in *Lohstreter*, this Court ordered a party to provide rehabilitative support for their spouse by reimbursing schooling expenses. *Lohstreter v. Lohstreter*, 2001 ND 45, ¶ 12, 623 N.W.2d 350.

[69] Tanya could not voluntarily terminate the health insurance coverage for Michael or the children. Therefore, Tanya's request for reimbursement from Michael is reasonable and justified, especially in consideration of her obligation to provide the insurance coverage pursuant to Rule 8.4(a)(3). The trial court did not abuse its discretion in ordering Michael to reimburse.

IV. The trial court erred in failing to make an adjustment to the net marital estate (or otherwise order reimbursement from one party to the other) based on the expenses incurred by the parties during their separation.

[70] Both Tanya and Michael incurred expenses for the children during interim period of the divorce. Tanya (individually and through counsel) approached Michael and requested they equalize their bills on a regular basis in order to make sure they were each equally responsible for financially supporting the children. Michael refused. *See* [Doc. ID #145 - Exhibit 79] and [Doc. ID #126 - Exhibit 80]. Tanya's spreadsheet of her expenses is found at Exhibit 78 [Doc. ID #125]. Michael's spreadsheet of his expenses is found at

Exhibit 44 [Doc. ID #87]. At trial, Michael was critical of Tanya's spreadsheet and Tanya was critical of Michael's spreadsheet. For example, Michael included bills that Tanya disputed or his entire cell phone bill rather than just the minor children's portion of the cell phone bill (while also noting that Michael also claims the cell phone as business deduction which was not considered in his spreadsheet in anyway). Michael was critical of Tanya's spreadsheet, because it included a few other extraneous items she believes she should be reimbursed for. For example, Tanya included the price of her appraisal of the gold and silver, the price of the security system she purchased for the home after Michael entered without her permission while she was out of town and removed a significant amount of personal property, and the price of paying for each of their life insurance policies (which are required to be maintained pursuant to the summons in this case). Although some of these expenses are not strictly "for the children" they are all reasonable reimbursement requests.

[71] Michael spent $13,244 on what he claims are reasonable expenses to be reimbursed. Tanya spent $19,333 on expenses she believes are reasonable to be reimbursed. Because Tanya spent $6,089 more than Michael, Tanya requested the Court reduce her overall equity payment by one half of this amount (and order the parties to regularly reimburse each other for the expenses outlined in their proposed parenting plans moving forward).

[72] The trial court noted the parties' conflicting testimony regarding their respective spreadsheets and determined "the court is unable to determine whether either party is entitled to any adjustment to the net marital estate based on claimed expenses for the children." [App. 96 ¶78].

[73] As noted in the aforementioned caselaw regarding equity and fairness, this Court should favor reimbursement for the parties in order to ensure wrongs are remedied and those receiving a benefit also bear a reasonable burden. N.D.C.C. § 31-11-05(12) and (14). Although both parties had complaints about the other's respective spreadsheets, both parties meticulously tracked their expenses and provided a summary of the same to the Court. The Court erred by dismissing the testimony of both parties. Tanya's equity payment to Michael should be reduced by $3,044.50 (one half of $6,089) to reflect the additional expenses Tanya incurred.

V. The trial court's calculation of the parties oil royalites received during separation was clearly erroneous.

[74] The trial court valued of the oil royalties received since the time of separation as $18,782 (line 60 of the Third Amended Joint Property and Debt Listing). [App. 69]. The trial court simply said it accepts this value but does not explain or provide a rationale for the same. [App. 95 ¶74]. Tanya's value, $39,304, is based upon Mr. Corey Schick's review of the accounting documents related to American Land Services and Sparrow Investments. Tanya had Mr. Schick review the general ledgers which are part of the record in this case and the balance sheets for the businesses and calculate the oil royalties received

from June 27, 2018 until May 1, 2020. Mr. Schick testified he calculated the oil royalties to be $26,759 for American Land Services and $9,865 for Sparrow Investments, totaling $36,624.00. [T2 66:6-68:15]. Mr. Schick calculated this value, pursuant to his testimony, by adding the royalty income, and then deducting taxes, AFE costs (tangible and intangible), taxes, and other standard deductions. *Id.*

[75] The trial court was clearly erroneous by rejecting this calculation compared to Michael's calculation which is not as nearly well described throughout the record.

CONCLUSION

[75] THEREFORE, this Court should remand for recalculation of the parties' oil royalties and an adjustment to the martial estate for familial expenses incurred, but otherwise uphold the lower court's judgment.

CERTIFICATE OF COMPLIANCE

[76] The undersigned, as attorney for the Defendant, Appellee, and Cross-Appellant in the above matter, hereby certifies, in compliance with N.D.R.App.P. 32, that the above brief complies with the page limitations and the brief contains 36 pages.

[77] Respectfully submitted September 24, 2021.

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CERTIFICATE OF SERVICE

[78] I hereby certify that on September 24, 2021, I filed and e-served the foregoing document on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25 and 31:

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 1, 2021
STATE OF NORTH DAKOTA

Michael R. Pomarleau,

Plaintiff,
Appellant, and
Cross-Appellee

v.

Tanya M. Pomarleau,

Defendant,
Appellee, and
Cross-Appellant

and

State of North Dakota,

Statutory Real
Party in Interest.

CERTIFICATE OF SERVICE

Supreme Co. No. 2021-0083
Burleigh Co. No. 08-2018-DM-00826

[1.] The undersigned certifies, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that on October 1, 2021, a true and correct copy of the following documents:

a. Appelle's brief with non-substantive correction; and
b. Certificate of Service

were filed via email and served, via electronic mail service, upon the following:

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