

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Jean Kaspari,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 Thomas Kaspari,)
)
 Defendant/Appellant.)

Supreme Ct. Case No. 20210192
District Ct. Case No. 29-2019-DM-00050

APPELLANT’S REPLY BRIEF

APPEAL FROM THE AMENDED JUDGMENT DATED JULY 2, 2021, JUDGMENT DATED SEPTEMBER 25, 2020, AND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT DATED SEPTEMBER 10, 2020 OF THE MERCER COUNTY DISTRICT COURT, THE HONORABLE PAMELA A. NESVIG

ORAL ARGUMENT REQUESTED

JENNIFER M. GOOSS (ID# 07971)
Attorney for Appellant
Solem Law Office
PO Box 249
109 Central Ave. S.
Beulah, ND 58523
701-873-5555
Beulaw3@westriv.com

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

STATEMENT OF FACTS.....¶ 1

ARGUMENT.....¶ 30

 A. Introduction.....¶ 30

 B. The District Court erred in the Amount of Spousal Support Awarded.....¶ 31

 1. The Court failed to properly consider the distribution of assets and debts in
 its award of spousal support.....¶ 32

 2. The evidence presented does not support a finding of a need for
 spousal support.....¶ 36

CERTIFICATE OF COMPLIANCE.....¶ 40

TABLE OF AUTHORITIES

CASES

Fox v. Fox, 1999 ND 68, ¶ 22, 592 N.W.2d 541.....¶ 33

Knudson v. Knudson, 2018 ND 199, ¶ 21, 916 N.W.2d 793.....¶ 36

Overland v. Overland, 2008 ND 6, ¶ 6, 744 N.W.2d 67.....¶ 36

Woodward v. Woodward, 2013 ND 58, ¶ 5, 830 N.W.2d 82.....¶ 38

STATUTES

N.D.C.C. § 14-05-24.....¶ 33

OTHER AUTHORITIES

North Dakota Rules of Appellate Procedure, Rule 32(a)(8)(A).....¶ 40

STATEMENT OF FACTS

¶ 1. Although Jean testified that it was agreed upon that she would cease working when the parties moved to Minot in 1996 (8/7/2020 Transcript 17:4-12), Tom testified that Jean told him that she wasn't going to work anymore and that he didn't agree with it from the financial standpoint (8/7/2020 Transcript 124:7-125:1). The children were approximately 8 and 12 at that time. 8/7/2020 Transcript 18:21-23.

¶ 2. Jean testified that after the move to Hazen, they "discussed [her working outside the home] a lot." 8/7/2020 Transcript 28:20-23.

¶ 3. Although Jean testified that she didn't go back to work until the parties started having problems in 2013 (8/7/2020 Transcript 34:20-35:7), she later admitted that she went back to work at Med Center One or Coal Country at the time she renewed her license prior to that time (8/7/2020 Transcript 68:17-69:3). In fact, in her Affidavit in Support of Motion for Interim Order, Jean swore under oath that she started this position in 2010, which was three years prior to their separation. App. 13 at ¶ 9.

¶ 4. Jean renewed her nursing license prior to working at Med Center One or Coal County in 2010, prior to the deterioration of the marriage. 8/7/2020 Transcript 68:3-13.

¶ 5. Jean currently makes about 30 dollars an hour working approximately 40 hours a week. 8/7/2020 Transcript 38:16 and 44:6-8. In 2019 her total income was \$57,329. App. 222.

¶ 6. She currently lives in a twin home with her son, and sometimes her daughter, living with her no contributing to rent. 8/7/2020 Transcript 45:19-46-9. Jean wishes to purchase the twin home for \$209,000, and testified that she does not have the

resources to make any type of down-payment. 8/7/2020 Transcript 46:13-23. She further provided a mortgage estimate showing a total down payment and closing costs of \$17,738. App. 221. Purchasing the home would decrease her current rent of \$1,550 per month to a mortgage payment of \$1,227 per month. Id.

¶ 7. Tom received a nursing degree from Concordia, with a significant amount of the schooling being paid by grants and scholarships. 8/7/2020 Transcript 81:21-82:3.

¶ 8. Tom worked throughout attending school for his RN, medical degree, and residency. 8/7/2020 Transcript 14:23-15:14, 17:15-18. Contrary to Jean's assertion that the parties incurred significant loans for Tom's medical schooling, the loans were to cover the parties' financial obligations outside of schooling itself, as Tom had scholarships that covered his tuition and provided a thousand dollars a month stipend. 8/7/2020 Transcript 84:20-85:8.

¶ 9. During the parties' marriage, Tom worked an average of 45-50 hours per week; however after Jean left, he increased his hours to 70-80 hours per week. 8/7/2020 Transcript 121:3-14. Tom testified that he does not intend on continuing to work those hours because it is extremely stressful. 8/7/2020 Transcript 121:17-20.

¶ 10. The income that Tom is currently making is not what he was making when the parties were married. Further, the annual income Jean references for Tom for 2018 and 2019 of \$430,000 is not net income. 8/7/2020 Transcript 98:7-99:25. In 2012, the total income for Tom and the business was approximately \$230,000. 8/7/2020 Transcript 122:10-12. In 2013, the total income for Tom and the business was approximately \$300,000, which included an increase due to increase in hours the later part of the year. 8/7/2020 Transcript 123:11-16.

¶ 11. The credit card charges Tom incurred include most purchases, aside from electricity, water, waste management, and the mortgage payment, including food, gas, and other living expenses. 8/7/2020 Transcript 100:1-102:3.

¶ 12. Both parties cared for the children throughout the marriage. 8/7/2020 Transcript 9:7-8, 10:16-23.

¶ 13. During the marriage, the parties incurred student loans for their children Nicholas and Danielle (8/7/2020 Transcript 25:16-19) and credit card debt (8/7/2020 Transcript 25:24-25).

¶ 14. Jean testified that the parties had purchased necessary machinery for the snow removal and cattle, including a skid steer, tractors, backhoe, stock trailer, and a flatbed trailer. 8/7/2020 Transcript 26:22-27:10. She further testified that it was a team effort taking care of their cows. 8/7/2020 Transcript 27:17-22.

¶ 15. Thomas replaced some of the farm equipment throughout the years following the parties' separation with loans, including a tractor (8/7/2020 Transcript 108:6-15), skid steer (8/7/2020 Transcript 109:11), and John Deere Tractor (8/7/2020 Transcript 109:14) which is used for his farm and cattle.

¶ 16. The parties had money problems throughout their marriage. 8/7/2020 Transcript 89:11-13. Even when Tom's income was increasing, they were not catching up on expenses or debt. 8/7/2020 Transcript 89:25-90:10. While they occasionally used credit cards for purchases, they did not use them excessively because the balances were high and the interest rates were high. 8/7/2020 Transcript 92:2-12. Jean confirmed that they had significant debts during the marriage and didn't have extra money to go out and make expensive purchases. 8/7/2020 Transcript 140:16-25.

¶ 17. Tom testified that Jean's lack of working caused financial stress throughout the marriage beginning when he was in medical school, explaining that there were times when they were a month away from bankruptcy and the financial struggles continues until the time of separation. 8/7/2020 Transcript 125:2-126:1.

¶ 18. Tom testified that whenever he would bring up the financial problems, Jean would get very defensive and didn't want him questioning her about how she was paying the bills. 8/7/2020 Transcript 90:16-91:18.

¶ 19. In 2013, Tom refinanced the mortgage on the marital home and paid off the credit cards. 8/7/2020 Transcript 92:25-93:4. Jean provided no contribution to any of this.

¶ 20. After their separation Jean received spousal support from Tom through their joint bank account. 8/7/2020 Transcript 39:21-25. Approximately two years later, the parties agreed that Tom would pay spousal support of \$2,000 per month. 8/7/2020 Transcript 40:21-25. Tom testified that he made similar payments to Jean in 2013, but doesn't recall what the amounts were, and that he made payments of \$2,000 per month to her for the months of April through August, 2019, and then again starting March 2020 for a total of just over \$114,000 in spousal support since January 2014. 8/7/2020 Transcript 128:1-25. Of that, at least \$25,210 was given to her children. App. 425-427. In 2014 alone, of the \$14,000 in spousal support that Jean received from Tom, she gave \$9,950 of that to their adult son. App. 425.

¶ 21. Jean testified that without the \$2,000 spousal support she would not be able to travel, and she may need to find a cheaper home, but provided no evidence to support the need for a cheaper home. 8/7/2020 Transcript 55:20-24.

¶ 22. Jean asked for \$10,000 per month in spousal support, but admitted that she doesn't need that amount. 8/7/2020 Transcript 75:25-76:3. She further testified that she felt that she should have the lifestyle that Tom has now (8/7/2020 Transcript 62:4-7), although she admitted that is not the way the parties lived at any time during their marriage (8/7/2020 Transcript 139:23-25).

¶ 23. The only change in lifestyle that she testified to is that she is living paycheck to paycheck and that she has no security, with very little retirement of approximately \$45,000. 8/7/2020 Transcript 56:5-9. However, Jean received additional retirement benefits of \$110,000 in the property distribution. App. 20.

¶ 24. In examining Jean's spending, it is clear that Jean's spending includes a large amount of unnecessary spending. Jean testified that she took a 10 day trip to Ireland in 2018, and a 4-day trip to Las Vegas and a 5-day trip to Florida in 2019. 8/7/2020 Transcript 57:4-11. Although she testified that she did not pay for her daughters to go on the Ireland trip (8/7/2020 Transcript 57:12-16), her American Express Credit Card shows airline ticket purchases for herself, both of her daughters, and two other individuals at a price of \$744.11 each. App. 42. There was no evidence provided to show that she was ever reimbursed for any of those charges. She further testified that she paid for the trip to Las Vegas outright without putting it on a credit card. 8/7/2020 Transcript 57:21-24.

¶ 25. Jean testified that most of her credit card debt is travel expenses, entertainment and eating out, and that she does not typically pay for her monthly expenses on credit cards. 8/7/2020 Transcript 70:8-13.

¶ 26. Jean admits that she helps her children financially, allowing her son to live with her rent free, along with paying all utilities, food and household items, and telephone, and sending her adult children money. 8/7/2020 Transcript 60:12-25.

¶ 27. The only debt that Jean has are her three credit cards, which have a combined balance of \$34,126.14, all of which was accumulated after the parties' separation. App. 25, 103, and 155.

¶ 28. The parties stipulated to the valuation and distribution of the marital estate. App. 20. The total value of the marital estate is \$168,606.89. App. 22. Of this, Jean is receiving \$110,095.80, which is 65.3% of the marital estate, and Tom is receiving \$58,511.09, or 34.7%. Id.

¶ 29. Jean received the full balance of Tom's 401k, at the time of separation, of over \$110,000, along with the retirement she personally has of approximately \$45,000. App. 20. Additionally, Thomas must continue to maintain his North Western Mutual Life Insurance with Jean and sole beneficiary of the \$600,000 death benefit. App. 21. Conversely, the only retirement Tom will have is his 401k, valued at \$24,298.75. App. 20.

ARGUMENT

A. Introduction

¶ 30. This case is being back to this Court on the issue of whether the district court's award of spousal support was clearly erroneous. Specifically, the Appellant respectfully requests that the spousal support award be vacated and remanded back to the district court for an appropriate spousal support award. The district court's award of spousal support was clearly erroneous, as the court failed to properly consider the property

and debt distribution, there was no evidence of need presented, and it improperly attempted to equalize the parties incomes.

B. The District Court Erred in the Amount of Spousal Support Awarded

¶ 31. The court erred in the amount of spousal support awarded. In awarding spousal support, the district court failed to properly consider the property and debt division. Further, the court erred as there was a lack of showing a need for such support. Finally, the court improperly attempted to equalize the incomes, considering the lifestyle Tom has now, rather than the lifestyle the parties had during the marriage. As such, the district court's ruling on spousal support is clearly erroneous and should be remanded.

1. The district court failed to properly consider the distribution of assets and debts in its award of spousal support.

¶ 32. The district court's initial findings and judgment regarding spousal support are clearly erroneous as they contain no consideration regarding the division of the assets and debts in determining the spousal support award. Those findings were incorporated into the Order Following Remand. App. 727, ¶ 4. Although the district court also included some analysis of the property and debt distribution in its Order, it improperly considered assets after the date of separation.

¶ 33. The "questions of property division and spousal support cannot be considered separately or in a vacuum, but must be examined and dealt with together." Fox v. Fox, 1999 ND 68, ¶ 22, 592 N.W.2d 541. The valuation date for marital property and debt in this case is the date of separation, which was the summer of 2013, as agreed to by the parties. The district court erred in considering the property that Tom accumulated after the date of separation in its analysis of the property division. App. 728 at ¶ 10. This

includes the cattle, vehicles, airplane, tractor, and stocks. This in contrary to N.D.C.C. § 14-05-24, and the agreement of parties, that the valuation be at the time of separation.

¶ 34. The district court further erred in finding that the student loans are Tom's outstanding student loan (App. 728 at ¶ 8), as this also included student loans for their children, Nicholas and Danielle. 8/7/2020 Transcript 25:16-19.

¶ 35. Based on the above, the complete lack of any analysis or explanation regarding how spousal support was considered in light of the property distribution in the initial findings, and the improper analysis and explanation of the property distribution in the Order Following Remand, the district court's findings are clearly erroneous. As such, Appellant respectfully requests that the decision be reversed and remanded.

2. The evidence presented does not support a finding of a need for spousal support.

¶ 36. In this case, Jean failed to show her need for spousal support. This Court has held that spousal support is not warranted, even where many Ruff-Fischer factors support an award of spousal support, when the "requesting spouse had the ability to adequately address her current needs." Knudson v. Knudson, 2018 ND 199, ¶ 21, 916 N.W.2d 793. Further, this Court has held that when there is no evidence regarding need for spousal support "we are left with a firm conviction a mistake has been made" in awarding spousal support. Overland v. Overland, 2008 ND 6, ¶ 21, 744 N.W.2d 67.

¶ 37. In Appellee's Brief, she relies on her arguments that Jean has been unable to purchase a home and has accumulated debt to explain Jean's "need" for spousal support, and then focuses the remainder of her argument on Tom's ability to pay. Tom does not dispute that he has the ability to pay the spousal support, although he contends that the amount is excessive and makes it impossible to put away money for his impending

retirement. The issue is whether the evidence supported the finding of Jean’s “need” for spousal support, and in the excessive amount awarded. In this case, Jean herself admitted that she doesn’t need the spousal support she was seeking. 8/7/2020 Transcript 75:25-76:3. Jean has a professional career, including full benefits, wherein she makes approximately \$60,000 per year working 35-40 hours per week, and she has become re-established in her career for nearly a decade. Further, Jean’s testimony established that she is able to pay her monthly expenses, but that she desires spousal support so that she can go on vacations without having to put it on a credit card. In examining Jean’s spending, it is clear that Jean’s spending includes a large amount of unnecessary spending, which is the reason for the debt she has accumulated since the parties’ separation.

¶ 38. Appellee has now acknowledged that the standard is to look at the lifestyle the parties had during the marriage, not at the time of trial. Woodward v. Woodward, 2013 ND 58, ¶ 8, 830 N.W.2d 82, 85. However, she then makes the bizarre argument that the time of trial is the appropriate timeframe for application of the Ruff-Fischer guidelines as they relate to the spousal support determination. Although it is true that the court takes into consideration the circumstances of the parties at the time of trial to determine the need of one spouse for spousal support and the ability to pay spousal support, it must do so in consideration of the lifestyle the parties had during the marriage. Id.

¶ 39. Based on the above, the district court’s award of spousal support is clearly erroneous given the lack of evidence to support the requirement of Jean’s “need” for such support. As such, the Appellant respectfully requests that the issue of spousal support be reversed and remanded.

//

CERTIFICATE OF COMPLIANCE

¶ 40. The undersigned, as the attorney representing Appellant, Jeffrey Gooss and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 12 pages.

DATED this 3rd day of December, 2021.

/s/ Jennifer M. Gooss
JENNIFER M. GOOSS (ID# 07971)
Attorney for Appellant
SOLEM LAW OFFICE
PO Box 249
109 Central Ave. S.
Beulah, ND 58523
701-873-5555
Beulaw3@westriv.com

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vs.)	
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Defendant/Appellant.)	

[¶ 1] I hereby certify that on December 3, 2021, a true and correct copy of the following documents were served the North Dakota Supreme Court E-Filing Portal:

- 1. Appellant’s Reply Brief**
- 2. Certificate of Service**

[¶ 2] A copy of the foregoing was sent to the following email address:

Ann Mahoney	Clerk of the Supreme Court
Mahoney & Mahoney	supclerkofcourt@ndcourts.gov
service@mahoney-legal.com	

[¶ 3] To the best of this affiant’s knowledge, the email addressed above given are the actual email address of the parties intended to be so served. That the above documents were duly served in accordance with the provisions of the North Dakota Rules of Civil and Appellate Procedure.

Dated this 3rd day of December, 2021.

By: Jennifer M. Gooss
JENNIFER M. GOOSS (ID# 07971)
Attorney for Defendant/Appellant
Solem Law Office
109 Central Ave. N., PO Box 249
Beulah, ND 58523
701-873-5555
Beulaw3@westriv.com