IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29558
NOTICE OF REVIEW NO. 29582

CHRISTOPHER ALAN DUNHAM,

Plaintiff and Appellant,

v.

SUSAN MICHELLE SABERS,

Defendant and Appellee.

Appeal from the First Judicial Circuit
Union County, South Dakota
The Honorable Rodney J. Steele, Retired Circuit Court Judge

APPELLANT'S BRIEF

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Respectfully submitted this 13th day of July, 2021.

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PRELIMINARY STATEMENT

Citations to the record of the Court proceedings have been referenced as follows: Record as set forth in Clerk's Register of Action (R. p. [page #]). Pages of the trial transcripts are also cited as part of the entire record.

Pages of the Appendix to this brief have been referenced as follows: (App. [page #]). Plaintiff, Appellant, Christopher Alan Dunham, shall be referenced as "Chris." Defendant, Appellee, Susan Michelle Sabers, shall be referenced as "Susan". The Estate of Donald A. Dunham, Jr. will be referenced as "Estate". The Living Trust of Donald A. Dunham, Jr. will be referenced as "Trust". The Court's Memorandum Decision, filed on November 23, 2020 will be referenced as "Decision". The Court's Amended Memorandum Decision, filed on January 12, 2021 will be referenced as "Amended Decision". The Court's Second Amended Decision, filed on January 22, 2021 will be referenced as "Second Amended Decision".

JURISDICTIONAL STATEMENT

Chris respectfully appeals from the Judgment and Decree of Divorce entered by the Court on February 5, 2021. (R. p. 538). Notice of Entry of the Judgment and Decree of Divorce was served and filed on February 8, 2021. (R. p. 552). Chris' Notice of Appeal was served upon counsel for Defendant/Appellee and filed on February 22, 2021. (R. p. 604). The filing of the entry of the Notice of Appeal was within the thirty (30) days allowed for an appeal from a civil judgment in accordance with SDCL § 15-26A-6. This is an appeal from a final judgment, and the Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

REQUEST FOR ORAL ARGUMENT

Chris respectfully requests the privilege of appearing before this Court for oral argument.

LEGAL ISSUES

i. THE COURT ABUSED ITS DISCRETION BY FAILING TO IMPLEMENT THE PLAN OUTLINED BY THE CHILD CUSTODY EVALUATOR AND FAILING TO ORDER SCHEDULED PARENTING TIME

The Court failed to implement the recommendations of the professional custody evaluator in this case. Ms. Zimbelman's recommendations stated that Chris was to begin private counseling and that the boys should attend counseling after Chris has attended counseling. Despite multiple motions filed by Chris to implement Ms. Zimbelman's recommendations, the Court refused to enter an order for the boys to attend counseling. The Court failed to implement the recommendations of the custody evaluator, and it ignored the South Dakota Parenting Guidelines by denying Chris scheduled parenting time with his sons. The failure of the Court to order counseling for the boys prejudiced Chris' claims at trial regarding implementation of the South Dakota Child Support Guidelines and request for scheduled parenting time.

Most relevant cases and statutes:

SDCL § 25-4A-10;

SDCL § 25-4A-A.

ii. THE COURT ABUSED ITS DISCRETION BY INCLUDING CHRIS' K-1 INCOME TO CALCULATE RETROACTIVE AND CURRENT CHILD SUPPORT

The Court included Chris' K-1 gains and losses when calculating Chris' income from the years 2013-2018. The Court then used those calculations to determine Chris' amount owed for both retroactive and current child support. Case law in South Dakota supports exclusion of K-1 income from child support calculations when the income is not actually received by the party and the party does not have control over distributions. The Court's decision to include all of Chris' K-1 income from entities in which he does not have 100% control, and include K-1 income that Chris does not actually receive, was an abuse of discretion by the Court, and attributed more income to Chris than he actually received.

Most relevant cases and statutes:

SDCL § 25-7-6.3;

SDCL § 25-7-6.6;

Roberts v. Roberts, 2003 S.D. 75, 666 N.W.2d 477;

Ochs v. Nelson, 538 N.W.2d 527 (S.D. 1995);

Laird v. Laird, 2002 S.D. 99, 605 N.W.2d 296.

iii. THE COURT ABUSED ITS DISCRETION BY DENYING CHRIS' CLAIMED IN-KIND CHILD SUPPORT CONTRIBUTIONS

The Court denied Chris' claimed in-kind child support contributions due to Chris' inability to "show any verification of any claimed expenditure." Court's Memorandum Decision, p. 7. The Court denied Chris' claim despite its prior guidance and exhibits entered into evidence by Chris supporting the vast majority of his claimed contributions.

Most relevant cases and statutes:

SDCL § 25-7-6.3, *et seq.*;

State, ex rel. Tegegne v. Andalo, 2015 S.D. 57, 866 N.W.2d 550.

iv. THE COURT ABUSED ITS DISCRETION BY ORDERING CHRIS TO REIMBURSE SUSAN FOR PAST PAROCHICAL SCHOOL TUITION AND PAY ½ OF FUTURE PAROCHIAL SCHOOL TUITION EXPENSES

The Court ordered Chris to reimburse Susan for $26,905 in parochial school tuition, assessed interest, and ordered Chris to pay ½ of all future parochial school tuition for the boys. The Court found that the parties did not have a previous contractual agreement that Chris would pay for the boys' parochial school tuition.

Most relevant cases and statutes:

SDCL § 25-7-6.10;

Hollinsworth v. Hollinsworth, 2008 S.D. 102, 757 N.W.2d 422;

Roseth v. Roseth, 2013 S.D. 27, 829 N.W.2d 136;

Warne v. Warne, 360 N.W.2d 510 (S.D. 1984);

v. THE COURT ABUSED ITS DISCRETION BY INCLUDING ITEMS OF PROPERTY PURCHASED BY CHRIS' PARENTS IN THE MARITAL ESTATE

The Court valued the 2001 Ford F-150 and 1969 Firebird convertible in the valuation of marital property. The items were valued at $2,025 and $18,000, respectively. These items were purchased by Chris' father and should not have been valued for purposes of marital property division.

Most relevant cases and statutes:

Novak v. Novak, 2006 S.D. 34, 712 N.W.2d 551;

Billion v. Billion, 1996 S.D. 101, 553 N.W.2d 226;

Taylor v. Taylor, 2019 S.D. 27, 928 N.W.2d 458;

SDCL § 25-4-44.

vi. THE COURT ABUSED ITS DISCRETION BY APPLYING DIFFERENT STANDARDS TO THE PREMARITAL PROPERTY OF THE PARTIES

The Court ordered that Susan was entitled to a $68,174 offset towards the marital home because Susan invested her sale profits from her "premarital" home into the marital home. Susan purchased her "premarital" home in 1997, and Chris moved into that home in 1998. The parties were married in 2002, and lived in the home until 2004, when they moved to Devitt Drive. The Court valued Chris' 20% interest Dunham Partnership, held in QAZ, LLC at $260,000. Dunham Partnership was gifted to Chris by his father in 1989. Chris did not contribute any personal funds to Dunham Partnership, nor did he make business decisions which affected Dunham Partnership's holdings. Dunham Partnership holds the same assets it did when Chris was gifted his 20% interest in 1989. The Court included Chris' interest in Dunham Partnership in the martial estate despite Susan's nonexistent contributions to Dunham Partnership.

Most relevant cases and statutes:

Billion v. Billion, 1996 S.D. 101, 553 N.W.2d 226;

Taylor v. Taylor, 2019 S.D. 27, 928 N.W.2d 458.

Halbersma v. Halbersma, 2009 S.D. 98, 775 N.W.2d 210;

SDCL § 25-4-44.

vii. THE COURT ABUSED ITS DISCRETION BY FAILING TO VALUE ITEMS OF PERSONAL PROPERTY IN SUSAN'S POSSESSION

The Court assigned a value of $0 to Susan's Wells Fargo checking account. There was evidence submitted at trial that Susan's Wells Fargo checking account held a balance of $5,152.25 in August 2020. The Court additionally did not place a value on the 2008 GMC Yukon in the marital estate. The 2008 GMC Yukon was purchased during the marriage and is now driven by Q.S.D. Chris provided evidence at trial the vehicle is worth $8,025. This item of property was purchased with marital funds and should have been valued for purposes of marital property division.

Most relevant cases and statutes:

Ahrendt v. Chamberlain, 2018 S.D. 31, 910 N.W.2d 913;

Giesen v. Giesen, 2018 S.D. 36, 911 N.W.2d 750;

Johnson v. Johnson, 300 N.W.2d 865 (S.D. 1980);

Billion v. Billion, 1996 S.D. 101, 553 N.W.2d 226;

Taylor v. Taylor, 2019 S.D. 27, 928 N.W.2d 458;

SDCL § 25-4-44.

viii. THE COURT ABUSED ITS DISCRETION BY APPLYING DIFFERENT STANDARDS TO THE VALUE OF CERTAIN PERSONAL PROPERTY

The Court granted Susan a post-separation offset for her State of South Dakota Retirement account and State of South Dakota Supplemental Retirement account of $149,308 and $3,966, respectively, finding that Chris made "no or de minimis" contributions to Susan's mandatory retirement. The Court denied Chris' request for offsets of $141,000 from the value of American Land Development Company and $82,000 from Milestone Consulting & Construction Services proven to be funded by his father's life insurance proceeds. Chris additionally testified that he used the remainder of the life insurance proceeds to pay for attorney advice during purchase negotiations of The Dunham Company. Chris' requested offsets were based upon monies he contributed from his father's life insurance policy after the parties' separation. The Court stated Chris should not receive his requested offsets because Susan's contributions to the life insurance proceeds were not "de minimis."

Most relevant cases and statutes:

Johnson v. Johnson, 2007 S.D. 56, 734 N.W.2d 801;

Novak v. Novak, 2006 S.D. 34, 712 N.W.2d 551;
Billion v. Billion, 1996 S.D. 101, 553 N.W.2d 226;

Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989);

Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988);

Taylor v. Taylor, 2019 S.D. 27, 928 N.W.2d 458;

SDCL § 25-4-44.

ix. THE COURT ABUSED ITS DISCRETION BY VALUING CHRIS' INTEREST IN MILESTONE CONSULTING & CONSTRUCTION SERVICES AT 100% AND NOT SUBTRACTING LEGITIMATE DEBT

The Court ruled that Chris holds a 100% ownership interest in Milestone Consulting & Construction Services. There was evidence submitted at trial which proved that Chris and his mother, Karen Dunham, are each 50% owners of Milestone Consulting & Construction Services. The Court additionally failed to subtract a legitimate debt, in the form of rent-payable, from Chris to Milestone.

Most relevant cases and statutes:

Novak v. Novak, 2006 S.D. 34, 712 N.W.2d 551;

Billion v. Billion, 1996 S.D. 101, 553 N.W.2d 226;

Johnson v. Johnson, 300 N.W.2d 865 (S.D. 1980);

SDCL § 25-4-44.

x. THE COURT ABUSED ITS DISCRETION BY EXCLUDING BUYOUT MONIES RECEIVED FROM FULLER & SABERS, LLC AND THE DAKOTA LAW BUILDING FROM THE MARITAL PROPERTY DIVISION

The Court excluded the buyout monies received from Fuller & Sabers, LLC and Dakota Law in the amounts of $91,980 and $216,410, respectively, as dissipated funds. The buyout monies were marital funds spent on the education, maintenance, and care of the boys.

Most relevant cases and statutes:

Billion v. Billion, 1996 S.D. 101, 553 N.W.2d 226;

Johnson v. Johnson, 300 N.W.2d 865 (S.D. 1980);

SDCL § 25-4-44.

xi. THE COURT ABUSED ITS DISCRETION BY CONSIDERING CHRIS' DISCRETIONARY INTEREST IN THE LIVING TRUST OF DONALD A. DUNHAM, JR. WHEN DETERMINING CHRIS' FINANCIAL CONDITION

The Court speculated regarding Chris' interest in the Living Trust of Donald A. Dunham, Jr. ("Trust") when determining Chris' financial condition when ruling on child support, parochial school tuition, property equalization, and attorney fees. Chris is a discretionary beneficiary of the Trust and is not guaranteed to receive a single distribution from the Trust. Distributions from the Trust are up to the discretion of the corporate trustee, Trident Trust.

Most relevant cases and statutes:

SDCL § 55-1-43;

Evens v. Evens, 2020 S.D. 62, 951 N.W.2d 268.

xii. THE COURT ABUSED ITS DISCRETION BY AWARDING SUSAN $50,000 IN ATTORNEY/EXPERT WITNESS FEES & COSTS

The Court awarded Susan $50,000 in attorney fees because "Chris unreasonably prolonged the divorce by his actions." Court's Memorandum Decision, p. 18. The Court further cited Chris' alleged withholding of documents from his father's Estate. Throughout this litigation, Chris listened to the advice of Estate counsel when determining whether to disclose information or documents related to the Estate. As the representative of the Estate, Chris owed the Estate fiduciary duties, which he could not violate. Susan filed many Motions/Resistances herself.

Most relevant cases and statutes:

Evens v. Evens, 2020 S.D. 62, 951 N.W.2d 268

SDCL § 29A-3-703

xiii. WHETHER THE COURT ABUSED ITS DISCRETION BY ORDERING A MANDATORY EXCHANGE OF TAX RETURNS EVERY CALENDAR YEAR UNTIL CHILD SUPPORT EXPIRES

The Court ordered that the parties be forced to exchange their tax returns every year until there is no longer a need for child support. Neither party asked for the court to order this at trial. The requirement amounts to an invasion of privacy and, arguably, subjects Chris to a mandatory child support review every year.

Most relevant sources:

SDCL § 25-7-6.11;

SDCL § 25-7-6.13;

26 U.S.C. § 6103.

II. STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE:

This was an action for divorce from Union County, South Dakota. Retired Circuit Court Judge Rodney J. Steele presided. Attorneys Loftus, Grande and Staum, represented Chris until December 20, 2017. (R. pp. 4, 12-17). Attorney Elizabeth Rosenbaum of Sioux City, Iowa filed her Notice of Appearance on December 20, 2017 and represented Chris throughout the remainder of the proceedings. Attorney William Fuller represented Susan throughout the Court proceedings. (R. p. 266).

The divorce was commenced by Chris on June 30, 2016. The issues involved included property and debt division, child custody and support, alimony, and attorney fees. After many litigious years, the case was tried August 17-21, 2020. The Court requested post-trial briefs from the parties.

The Court entered its Decision on November 20, 2020. (App. 1). The Decision awarded the parties joint legal custody of Q.S.D. and Z.S.D., awarded Susan sole physical care, awarded retroactive child support of $84,329 plus interest, current child support of $1,240/month, past tuition expenses of $26,905, future tuition expenses (1/2), past medical expenses of $11,894.56 and ½ of future medical expenses, past extracurricular expenses of $7,163 and ½ of all future extracurricular expenses, a $262,905 property settlement from Chris, and $50,000 in attorney/expert fees and costs. (App. 001-019). The Decision considered Chris' interest in the Trust when evaluating Chris' financial condition. (App. 017). The Decision forces the parties to exchange tax returns every year until Z.S.D. is no longer eligible for support. (App. 019). The Decision

did not include a payment structure for the amounts owed by Chris, but instead required all amounts to be paid immediately. (App. 102-106).

Chris filed his Objections and Motion for Clarification and Reconsideration of the Court's Memorandum Decision on December 4, 2020. Chris objected to and asked the Court to reconsider many of its findings and conclusions. (R. p. 56).

Susan also filed a Motion for Reconsideration of the Court's Memorandum Decision on December 14, 2020. Susan objected to several findings and conclusions of the Court. (R. p. 93).

The Court issued its Amended Decision on January 12, 2021 after giving the parties time to respond and reply to each other's briefs. Upon Chris' inquiry, the Amended Decision corrected the initial calculations of Susan's income for purposes of child support, using Box 5 W-2 income instead of Line 7 Form 1040 income on Susan's tax returns. The Amended Decision determined the 2014 child support obligation should be $2,643/month instead of the originally ordered $3,773/month. The Court reversed its decision to require Chris to pay retroactive extracurricular expenses to Susan and ½ of future extracurricular expenses. The Court made additional findings regarding SDCL §§ 25-7-6.1 and 25-8-5 and determined that Susan was entitled to retroactive child support dating back 3 years from the filing of the Complaint in 2016. (App. 035-052).

Upon review of the Amended Decision, it was noted that the Court used Susan's Box 1 W-2 wages to calculate Susan's income for child support purposes, instead of her Box 5 W-2 wages. Chris' counsel sent the Court an e-mail pointing out the calculation error on January 20, 2021. (App. 157). The Court responded on January 20, 2021 stating

that Chris' counsel was correct and attached amended child support calculations for years 2017 and 2019. (App. 054-058).

The parties submitted proposed Findings of Fact and Conclusions of Law. (R. pp. 249, 348). The parties objected to each other's Proposed Findings of Fact and Conclusions of Law. (R. pp. 396, 416). The Court used Susan's Proposed Findings of Fact and Conclusions of Law. (App. 059).

Chris filed his Notice of Appeal, Docketing Statement, and all other required items on February 22, 2021. (R. p. 604).

STATEMENT OF THE FACTS:

Chris was born in 1971 and grew up in Sioux Falls, South Dakota. (R. pp. 4613, 4614). Susan was born in 1970, and also grew up in Sioux Falls, South Dakota. (R. pp. 4990-3). The couple met in the spring of 1997, after Chris' mother, Karen Dunham ("Karen"), sold Susan her first home on Belmont Street in Sioux Falls. (R. pp. 4993-94). At the time, Susan was a junior Associate Attorney at Woods, Fuller Schultz & Smith in Sioux Falls. (R. pp. 4619). Chris was working for his mother as a licensed real estate broker at her residential real estate business. (R. p. 4617). Chris and Susan started dating in August 1997, and soon became serious. (R. p. 4617-18). In early 1998, Chris moved in to Susan's home with her. (R. p. 4994). Chris became a licensed contractor in 1998. The parties married in Carnoustie, Scotland in May 2002. (R. p. 4994). Q.S.D was born in May 2003. (R. p. 4619). After Q.S.D. was born, the couple started on plans to build a family home on Devitt Drive in Sioux Falls. (R. p. 4622) The home was built in 2004, with Chris performing as general contractor and managing the home building project for no pay. (R. p. 4622-23). The parties sold their Belmont Street home, and contributed the

proceeds to the building of the new home on Devitt Drive. (R. p. 4622-25). Z.S.D was born in April 2005. (R. p. 4619).

In January 2006, Susan left Woods, Fuller, Schultz & Smith to start her own law firm with her longtime friend, William Fuller. (R. p. 4996). They named their firm "Fuller & Sabers, LLC." (*Id*.) Susan received a buyout from Woods, Fuller, Schultz & Smith. (R. p. 5007). The parties, William Fuller, and his wife became each quarter owner/partners in the office building housing Fuller & Sabers. (R. p. 1411). Dakota Law, LLC, an entity, was created to hold the ownership of the building. (R. p. 4776). The building was built by Don Dunham, and Chris helped design the building. (R. p. 4625-27). While Susan was busy starting her new law practice, Chris was the primary caretaker for the boys. (R. p. 4621). Chris fully supported Susan's job and wanted to see her succeed. (*Id*.) When Susan began applying for judgeships, Chris put in a good word to his influential friends. (R. p. 4855). Susan was appointed to the bench in 2013. (R. p. 4260). Susan left Fuller & Sabers, LLC and received a $86,670 buyout of her partnership, plus interest. (R. p. 5010). Per the South Dakota Judicial Canons, Susan and Chris were required to dispose of their interest in Dakota Law, LLC. (R. p. 4776-77). The parties each signed redemption agreements for their separate 25% interests in Dakota Law, LLC. (R. p. 1411). The redemption agreements stated that each party was to receive $108,205 for their interest in Dakota Law, LLC. (*Id*.) The Dakota Law, LLC redemption funds of $216,410 were deposited into the couple's joint account at First Premier Bank. (R. p. 5012).

Don Dunham, Jr., ("Don"), Chris' father, died in 2013. (R. p. 4614). Don's death was very hard on Chris, as Chris and his father were close and had a strong father/son

bond. (R. p. 4615). Not long after Don's death, Susan was sworn in as a Circuit Court Judge in Minnehaha County. (R. p. 4627). Don's death sent Don's business entities and their ownership into limbo. (R. p. 4630). Chris and his two paternal half-brothers did not get along. All of the brothers worked for The Dunham Company at the time of Don's death. The original plan was for one of Chris' half-brothers and some employees to purchase The Dunham Company from Don's Estate. It soon became apparent that plan could not come to fruition. (R. p. 4630).

Chris received $322,600 in life insurance monies after the death of his father. Chris used some of the life insurance proceeds to retain private counsel to represent him in the negotiations to buy The Dunham Company. Chris purchased 100% of The Dunham Company in Fall 2013. Chris did not spend any personal or marital funds to purchase The Dunham Company. (R. pp. 4746, 4815-17).

Problems in the marriage began in late 2011. Chris and Susan's marriage fell completely apart in September 2013 after Chris told Susan about his plans to purchase The Dunham Company. (R. p. 4630-32). Susan's risk-averse nature made her vehemently opposed to Chris' plan, even after family friend, Attorney Dean Nasser, explained that Chris would be purchasing the company using no personal funds. (R. p. 4631-32). Chris supported Susan's legal rise and career, but Susan refused to do the same for her husband. (*Id.*). In anger, Susan demanded that Chris sign over items of personal property and take his name off of their joint accounts, including the account which held the Dakota Law, LLC joint buyout monies. (R. p. 4778). Susan made Chris sign a quit claim deed to their marital home. (R. p. 4633). Susan forced Chris to move from the marital home in late September 2013, and told Chris they would work on their marriage and go to

counseling. (R. p. 4638). Chris moved in with his mother, Karen, down the street from the marital home. Susan remained in the martial home with the boys. Chris started going to counseling, but Susan never attended even after Chris asked about attending joint counseling. Chris retained his key to the marital home and stopped over often to see the boys. Chris frequently came over to see the boys early in the separation, but eventually the visits became less frequent due to Susan's tendency to argue with Chris in front of the boys and her purposeful scheduling of play dates during times that Chris would come over.

The family continued living apart. Chris was incredibly busy trying to build The Dunham Company. He invested the remainder of the life insurance proceeds he received from his father's death into business interests. Chris invested $141,000 in ALDC in May 2014. (R. p. 4759). Karen also invested the same amount into ALDC. Chris and Karen each remain half owners of ALDC. Chris invested $82,000 in Milestone, in March 2014, as did Karen, making them constructive partners. (R. pp. 4761-62, 13). Chris moved out of Karen's home and eventually into a townhouse. The deed to the townhome and the mortgage are held by Milestone. Chris' business interests were complex. A chart was created by Chris' expert, Mike Snyder, to explain Chris' business ventures and ownership. (R. p. 4366) (App. 142).

A few years after the separation, it became clear to Chris that it was never Susan's intention to work on the parties' marriage. This realization led Chris to file a Summons and Complaint for Divorce on June 30, 2016. Chris filed the Petition in Union County to shield Susan from embarrassment.

III. ARGUMENT

I. THE COURT ABUSED ITS DISCRETION BY FAILING TO IMPLEMENT THE PLAN OUTLINED BY THE CHILD CUSTODY EVALUATOR AND FAILING TO ORDER SCHEDULED PARENTING TIME

The Court strictly limited Chris' parenting time per Order filed on January 10, 2018. (R. p. 374). Chris filed several Motions throughout the case requesting more parenting time with the boys. One of the few Motions granted by the Court was Chris' Renewed Motion for Custody Evaluation, filed on February 28, 2018. (R. p. 555). The parties hired custody evaluator Judy Zimbelman to conduct the custody evaluation. Ms. Zimbelman's report ("Report") was issued on November 11, 2018, and it confirmed Chris' suspicion that Susan was turning the boys against him. The report confirmed that Susan had a tendency to "dismiss Chris and collude with the boys on identifying their father as both amusing and an irritant." (R. p. 2023). The Report recommended that Chris attend personal counseling, and "That a therapist get involved in this case to determine the mode of treatment." (R. p. 2028). Chris filed a Motion for Order Requiring Family Counseling, citing the report on May 20, 2019. (R. p. 2182). The Court denied Chris' Motion during the June 25, 2019 motions hearing, and stated that it needed more evidence of Chris' counseling sessions and the information given to Chris' personal counselor. (R. p. 2640).

Chris filed a Renewed Motion for Order Requiring Family Counseling on October 15, 2019 citing his attendance of personal counseling sessions with Mike Wheaton and requesting that the boys start attending counseling, per the Report. (R. p. 3011). Chris called his counselor as a witness on November 11, 2019. (R. p. 3372). Mr. Wheaton provided extensive testimony regarding his counseling sessions with Chris. (R. p. 3376-

3409). Susan was allowed to dramatically testify as to the boys' feelings, over vehement hearsay objections. (R. p. 3424). The Court again denied Chris' request for family counseling, citing the lack of "proof" that Chris' counseling sessions had been beneficial and reliance on the hearsay testimony provided by Susan on the boys' behalf. (R. p. 3440). Despite Chris' adherence to the Court's June 25, 2019 recommendations, his Motion was still denied.

Chris filed a Motion to Reconsider his Renewed Motion for Order Requiring Family Counseling on January 10, 2020. (R. p. 3618). This Motion was Chris' plea that the Court implement Ms. Zimbelman's recommendations and order that the boys start counseling. Chris' Motion was once again denied. (R. p. 3745).

The Decision stated that, "Chris should have visitation privileges, but the children may chose when, where, and for how long visitations should take place." (App. 002-003).

The Court heavily relied on the in-camera testimony of Q.S.D. and Z.S.D., when deciding that visitation time should be controlled by the boys, and that all visitation should be voluntary. The in-camera testimony lasted no longer than 20 minutes, the arrangements were questionable, and the depth of interview was alarmingly shallow. (R. p. 5140). Not to be overlooked is the fact that Q.S.D. and Z.S.D. live with Susan full-time and had ample time to be coached by Susan prior to their testimony. The in-camera testimony of the boys reflected the exact plan that Susan proposed at trial. It is evident that Susan will neither nurture nor encourage the father/son relationships between Chris and the boys.

While the Court had ultimate authority to make a decision regarding counseling, the Court erred by ruling one thing at the June 25, 2019 hearing and then issuing its

patently contradictory ruling at the November 11, 2019 motions hearing. The Court's refusal to implement expert recommendations, and denials of Chris' Motions was a clear abuse of discretion that prejudiced Chris at trial.

Pursuant to SDCL Section 25-4A-10, the South Dakota Supreme Court has developed court rules establishing statewide standard guidelines for minimum noncustodial parenting time. These guidelines provide a framework for noncustodial parenting time including frequency; hours or days of noncustodial parenting time; weekends, holidays, birthdays, and other special occasions; and time periods for summer noncustodial parenting time. The Guidelines were ignored in this case.

The Court relied on the Report to apply the *Fuerstenberg v. Fuerstenberg* factors, but repeatedly denied Motions filed by Chris to implement the suggestions contained in the report. *Fuerstenberg v. Fuerstenberg*, 1999 S.D. 35, 591 N.W.2d 798. (App. 003). Chis asked the Court multiple times to allow him more time with his boys and was denied additional parenting time and counseling each time. Chris proved that he was attending counseling, as recommended by the custody evaluator, and followed the recommendations made by the Court in the June 25, 2019 motions hearing. (R. pp. 2023, 2640).

Chris has had very little time with the boys since 2016 due to the Court's various orders and Susan's rigidity. Chris was not able to take the boys to his home since the 2018 supervised visitation Order, nor has he had them for a single overnight or a typical holiday. The Report further found that Susan discounts Chris as a father and demonstrates disdain for him. (R. p. 2026). Without scheduled parenting time, it is feared that Chris will never see the boys.

The court abused its discretion by awarding Susan sole physical care of the boys and by allowing the boys complete control as to when they spend time with their father.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY INCLUDING CHRIS' K-1 INCOME TO CALCULATE RETROACTIVE AND CURRENT CHILD SUPPORT

The Court ordered that Chris pay $84,329 retroactive child support plus $35,400 interest, totaling $119,729. (App. 039-040). The Court's calculations covered amounts allegedly owed by Chris from September 2013-November 2018. (*Id*.). The retroactive and current child support calculations included Schedule E ("K-1") income from Chris' tax returns. (App. 041-053).

In order to determine a parent's monthly gross income for purposes of calculating child support, the South Dakota Supreme Court held that the calculation must first begin with monies actually received by the parent. In *Roberts v. Roberts*, husband appealed the decision of the lower court to include his pass-through income from subchapter S corporations as income for purposes of calculating child support. *Roberts v. Roberts*, 2003 S.D. 75, 666 N.W.2d 477. Husband received many distributions from subchapter S corporations for the purpose of meeting the federal income tax liability for the pass-through corporate income. *Id*. The South Dakota Supreme Court identified three issues to determine in that case, one of which is relevant to the instant case:

> "Should pass-through corporate income from a Subchapter S corporation included on a parent's federal income tax return be included in calculating gross income for child support purposes when the parent does not actually receive the income and has no control over its distribution?" *Id*. at 480.

The Court focused on the word "received" in SDCL 25-7-6.3 and interpreted the statute to mean income actually "received" by the parent. *Id*. at 481. The Court defined

"received" income as being part of the parents means as income to support either the parent or the children. *Id*.

After it is determined whether the money is actually "received" by the parent under the interpretation set out in *Roberts*, the Court must decide whether the parent has "control" over the distributions in question in order to correctly analyze SDCL 25-7-6.6. *Id*. at 483. The *Roberts* court also cited and discussed previous decisions of the South Dakota Supreme Court in *Ochs v. Nelson* and *Laird v. Laird* when determining the control element. *Ochs v. Nelson*, 538 N.W.2d 517 (S.D. 1995) and *Laird v. Laird*, 2002 S.D. 99 at ¶ 25, 650 N.W.2d 296, 301. The *Ochs* Court decided that some or all of a parent's retained earnings may be counted in a parent's gross income when the parent can control whether or not the corporation distributes income. *Ochs*, 538 N.W.2d 527 (S.D. 1995). The *Laird* Court held that retained income should not be included in a parent's gross income when the parent could not control the distribution of the income. *Laird*, 2002 S.D. 99 at ¶ 25, 650 N.W.2d at 301. The *Roberts* Court, after evaluating the Court's previous holdings in *Ochs* and *Laird*, stated: "If a parent can control whether business income is retained by the business or distributed to the parent, that requirement that the parent receive the income is satisfied for purposes of SDCL 25-7-6.3. If the provisions of SDCL 25-7-6.6 are then met, some or all of that retained business income may be considered in calculating the parent's gross income." *Roberts*, 2003 S.D. 75, 666 N.W.2d at 483.

Susan did not mention the concept of retroactive support until 2018. The Court concluded that all of Chris' Schedule E income was to be included in Chris' income for purposes of child support and calculated the amount owed by year according to this

finding. The Court came to this conclusion due to Chris' perceived "control" of the entities on his Schedule E. (App. 004-006).

Chris' financial expert, Mike Snyder testified that K-1 income shown on either party's tax return should not be included as income. (R. p. 4548-4551). From 2013-2018 Chris received K-1 distributions from the following entities on his tax returns: The Dunham Company (100% interest); Sioux Falls Sports; QAZ, LLC (50% interest); Pollyanna's, Inc. (49% interest); Milestone. (50% interest); and ALDC (50% interest). (R. p. 1123). The only entity Chris retains full control over from that list is The Dunham Company. Chris and Mr. Snyder (Chris' financial expert) conceded at trial that distributions from The Dunham Company should be included as income for purposes of calculating child support. (R. pp. 1123, 4548-4551).

The inclusion of all of Chris' K-1 income to calculate retroactive and current child support was erroneous, attributing more income to Chris than he actually earned. The best year to illustrate this is 2015. In 2015, Chris' tax return reported K-1 income of $100,952, however Chris only received $4,329 in cash from the underlying investments. Chris did not receive $96,623 of his reported K-1 income in the year 2015. Furthermore, many of the underlying investments which caused K-1 income to be reported on Chris' tax returns are now inactive. For example, the Court correctly stated in its Decision that the only asset remaining in Milestone is Chris' townhome. (App. 014). This logically means that Milestone is no longer an income-generating entity and has not been since 2016. Despite this fact, the Court included K-1 "income" reported on Chris' tax returns from Milestone from 2015 & 2016, and used these calculations to determine Chris' current child support obligation. (App. 045-048) (R. pp. 238-246).

Additionally, the Court erroneously used Chris' 2014 income to calculate retroactive child support for 2014. By the testimony of Chris' financial expert, Mike Snyder, and the Court's own admission, Chris' 2014 income was skewed due to corporate restructuring of The Dunham Company. (R. pp. 4560). (App. 007). Mr. Snyder testified that, in 2014, The Dunham Company switched from a C corporation to an S corporation, and paid out wages to shareholders as a tax mechanism. (R. p. 4553). The Court adjusted Chris' 2014 income in its Amended Decision from $3,773 per month to $2,643 per month pursuant to SDCL 25-7-6.9 and the children's standard of living. (R. p. 229).

The Court abused its discretion by including Chris' K-1 income to calculate retroactive and current child support obligations. The Court's calculations attributed more income to Chris than he actually received in those years, making the calculation inaccurate according to SDCL §§ 25-7-6.3 and 25-7-6.6 and the South Dakota Supreme Court's interpretation of the statutes under *Ochs, Laird*, and *Roberts*.

III. THE COURT ABUSED ITS DISCRETION BY DENYING CHRIS' CLAIMED IN-KIND CHILD SUPPORT CONTRIBUTIONS

The Court denied Chris' request that A). joint buyout funds depleted by Susan should be counted against Chris' retroactive child support; and B). food and other items Chris purchased for the boys during his parenting time should be considered in-kind child support. (App. 007-008). It is important to note that there was no child support order in place during the period in question. (September 2013 to November 2018).

A.

Susan admitted to depleting 100% of the buyout funds from her law partnership and the law building. Susan admitted that the buyout monies were used to "pay the boys'

education and monthly living expenses." (R. p. 4292). The Court reasoned that the buyout monies depleted by Susan should not be included because, according to SDCL 25-7-6.3 et seq., "child support contributions are to be from the current income of the obligor, not from accounts which are assets." (App. 007). The Court's interpretation was erroneous. SDCL 25-7-6.3 simply explains how child support is to be calculated. Susan used the monies from the Dakota Law Building buyout ($216,410.00) and the Fuller & Sabers, LLC buyout ($91,980.00) to maintain the marital household by making mortgage payments and paying for other household expenses such as groceries and expenses for the boys. The Court states that the proceeds from these buyouts were "spent in good faith on Susan and the boys." (App. 015). Chris is not arguing that Susan did not spend these funds in good faith, he is arguing that ½ of the funds should be attributed to him, and that he should receive credit for these living expenses according to *State ex rel. Tegegne v. Andalo*, 2015 S.D. 57, 866 N.W.2d 550.

B.

Due to the Court's previous rulings, Chris has not been allowed to take the boys to his home unsupervised since 2018. (R. p. 374). Chris was required to spend time with his boys in public places and spend extra money on entertainment and restaurant food for them during his parenting time. These expenditures were accounted for on Chris' trial exhibit 100. (R. p. 1167).

The Court denied Chris' claim of in-kind child support due to Chris' inability "to show any verification for any claimed expenditure." (App. 007). This ruling is contrary to the Court's prior statements regarding Chris' in-kind child support expenses. During the

November 12, 2019 Motions Hearing, the Court stated the following regarding Chris' in-kind child support:

> "Now I understand the plaintiff may not be able to come up with receipts, etc., for all of these contributions he may claim, but for me it comes down to a matter of proof. And I'll tell you up front, any claims made for credits towards contributions – first of all, I think there's case law on that. But any claimed contributions, he's going to have to support. And the less documentation has had to support the claim, the less credibility I'm going to give the claim. I will, in the end, make my own judgments as to whether a particular claim is justified or not based on the evidence. So to me it's a shot across the bow to the plaintiff here. Any claims he makes have to be properly documented or referred to at the time of trial. Other than that, I'm not going to order that he be required to produce a receipt for any specific thing, or if he doesn't produce that receipt his claim is going to be denied. I'm not going to do that. I'm just going to say that he should produce documents for everything that he can, and I'll make my own decisions at the time of trial as to what's justified and what's not. (R. p. 3513).

Chris relied on the Court's statements from the November 12, 2019 hearing and provided bank statements supporting the majority of the line items on Chris' Exhibit 100. (R. p. 1173). Chris was unable to find itemized receipts for all of his claims, which date back to September 2013. This is another example of Chris' perceptions of bias of the Court towards Susan. For example, Exhibit 212 (Extracurricular expense summary for Q.S.D. & Z.S.D.) was a chart created by Susan and produced two days before trial. (R. p. 1571). Susan did not provide any supporting documentation or receipts for these expenses, yet they were taken at face value by the Court.

The Court applied different standards to Chris and Susan regarding verification of expenditures and supporting documentation at trial. Several states recognize in-kind child support payments, including South Dakota, Utah, Florida, and Alaska. (i.e., *Knudson v. Utah State Dept. of Social Serv.*, 660 P.2d 258 (Utah 1983) see also Fla. Stat. § 61.30)). The Court should have given Chris credit for his in-kind child support contributions.

IV. THE COURT ABUSED ITS DISCRETION BY ORDERING CHRIS TO REIMBURSE SUSAN FOR PAST PAROCHICAL SCHOOL TUITION AND PAY ½ of FUTURE PAROCHIAL SCHOOL TUITION EXPENSES

The Court cited Chris' acknowledgement that the boys are receiving a good education as justification for ordering that Chris reimburse Susan for ½ of all parochial school tuition paid for the boys since 2013 and ½ of all future tuition payments under SDCL 25-7-6.10. (App. 008). There may not be deviation from the child support guidelines unless there is an entry of specific findings concerning factors for deviation. (See *Hollinsworth v. Hollinsworth*, 2008 S.D. 102, 757 N.W.2d 422). SDCL 25-7-6.10 allows for upward deviations to child support for "necessary education expenses", but there is not case law in South Dakota classifying parochial school tuition as "necessary education expenses", making the Court's ruling contrary to South Dakota law. Additionally, the Court did not find that there was an enforceable contract and/or signed agreement between the parties regarding parochial school tuition. South Dakota cases requiring parents to pay parochial school tuition involve a previous agreement by the parties to do so. (See *Roseth v. Roseth*, 2013 S.D. 27, 829 N.W.2d 136 see also *Warne v. Warne*, 360 N.W.2d 510 (S.D. 1984). Parochial school is a luxury item that should not constitute an upward deviation to child support. Parochial school tuition should be paid out of the guideline amount of support.

The Court abused its discretion by ordering Chris to reimburse Susan for past parochial school tuition, interest, and future payment of ½ of the boys' parochial school tuition. Contrary to the *Hollinsworth* case, there was not a prior signed agreement binding Chris to payment of parochial school tuition. The Court erred when citing SDCL 25-7-6.10 to support its ruling.

V. THE COURT ABUSED ITS DISCRETION BY INCLUDING ITEMS OF PROPERTY PURCHASED BY CHRIS' PARENTS IN THE MARITAL ESTATE

South Dakota courts may consider the intention of the donor when determining whether to exclude gifts from the marital estate in a divorce case. (*Novak v. Novak*, 2006 S.D. 34, 712 N.W.2d 551, 552. Also considered are the seven factors outlined in *Novak* to determine whether an item of property should be considered in the martial estate for purposes of property division. *Id*. Contributions of the parties to the property must also be analyzed when evaluating marital property. (see *Billion v. Billion*, 1996 S.D. 101, 553 N.W.2d 226, 232).

The statutory authority for property division in an action for divorce is provided by SDCL § 25-4-44, which provides as follows:

> When a divorce is granted, the courts may make an equitable division of the property belonging to either or both, whether the title to such property is in the name of the husband or the wife. In making such division of the property, the court shall have regard for equity and the circumstances of the parties.

The Court assigned a value of $2,025.00 to Chris' 2001 Ford F-150, which was left to Chris by his father through instrument of title. (App. 012). Chris was not aware that his father titled the vehicle in both his and Chris' name until after his father's death. (R. p. 4697). Prior to his father's death, Chris was driving the vehicle for work. (R. p. *Id*.). Susan did not contribute to acquisition/maintenance of the 2001 Ford F-150. The Court's inclusion of the 2001 Ford F-150 was erroneous and contrary to case law. (See *Taylor v. Taylor*, 2019 S.D. 27, 928 N.W.2d 458, 465 see also *Billion*, 553 N.W.2d at 232). The court did not explain the inclusion of the 2001 Ford F-150 in the marital property division, instead stating: "Nevertheless it constitutes marital property." (App. 012). The decision to include Chris' 2001 Ford F-150, to which Susan made no

contribution, clearly violates the properties and factors listed in *Taylor*. The *Taylor* factors were also ignored when excluding the 2008 Yukon, purchased by the parties during the marriage and valued at $8,025, from the marital property division. (App. 012). (R. p. 1390).

The Court assigned a value of $18,000 to the 1969 Firebird convertible. Chris testified that his father purchased the 1969 Firebird for him when he was a boy. (R. p. 4699). Troy Stanga testified that he and Chris would drive the Firebird around in high school. (R. pp. 5378-5379). While the title, issued on October 6, 2011 lists both Chris and Susan, this was merely an act of transfer from Don Dunham. The car was titled in Don's name until 2011, but the understanding by Chris and everyone involved was that the car was always to belong to Chris. The Court gave Susan credit for maintenance costs, but she did not provide any evidence of her claims.

The Court contradicted itself multiple times in the Decision and Amended Decision when it applied the seven factors to inherited, gifted, and other property owned by the parties.

VI. THE COURT ABUSED ITS DISCRETION BY APPLYING DIFFERENT STANDARDS TO THE PREMARITAL PROPERTY OF THE PARTIES

In addition to the seven (7) factors outlined in *Novak*, South Dakota courts consider the contributions of the parties to items of property when determining whether to include items of personal property in the marital estate. *Billion*, 1996 S.D. 101, 553 N.W.2d at 232. Even indirect contributions to items of property, can be considered by courts when deciding whether to value an item of property in the marital estate. (See *Halbersma v. Halbersma*, 2009 S.D. 98, 775 N.W.2d 210, 215. All property must be divided, regardless of its title or origin, under SDCL § 25-4-44.

The Court allowed Susan a $78,804.00 premarital offset from the marital home, citing proceeds from the sale of Susan's "premarital home" on Belmont Street in Sioux Falls. (App. 010). Susan purchased the home in 1997, prior to meeting Chris, but Chris moved into the home in 1998. The couple married in 2002. The Belmont Street home was the marital home for the couple until 2004. Chris lived in the home on Belmont Street for six years prior to the sale of the home. The Court heard testimony during trial from Chris and Troy Stanga that Chris made repairs on the Belmont Street home. (R. pp. 4624, 5380-5381). The offset allowed for the sale proceeds of the Belmont Street home is contrary to South Dakota case law. In *Halbersma,* the South Dakota Supreme Court upheld the decision of the lower court to include the wife's inherited home as marital property due to the husband's indirect contributions to the property, even though his direct contributions were limited. *Halbersma,* 2009 S.D. 98, 775 N.W.2d 210, 215. While Chris may not have made the mortgage payments directly from an account with his name on it, he contributed to the home and family in other ways, such as making repairs, earning an income, financially contributing to the relationship/marriage, and taking care of the boys while Susan focused on her legal career. Susan's offsets should not have been adopted by the Court.

The Court applied a completely different standard to Chris' 20% interest in Dunham Partnership. Chris' gifted interest in Dunham Partnership, held in QAZ, LLC, was valued at $260,000. (App. 013-014). Chris testified that his 20% interest in Dunham Partnership was gifted to him by his father in 1989, pre-marriage. (R. pp. 4752-4755). Chris further testified that the last investment in Dunham Partnership was Vista Towers, made by his father in 2003. (*Id.*). Chris did not invest any personal capital into any of the

holdings in Dunham Partnership. All investments into Dunham Partnership and its holdings were made by Don Dunham. Further, Dunham Partnership always paid any pro-rata tax consequences attributed to its members, so Chris did not pay the taxes for Dunham Partnership out of marital funds. (R. p. 56). Chris testified that he and Susan were advised to create QAZ, LLC in the mid-2000s as an estate planning mechanism. (R. pp. 4752-4755). Chris' 20% interest in Dunham Partnership was transferred into QAZ, LLC in 2012. (*Id.*). Chris testified that he was gifted the 20% interest in Dunham Partnership in 1989, and had not invested any capital or indirectly contributed to Dunham Partnership through any sort of work to grow the investment after his marriage to Susan. Susan did not contribute to Dunham Partnership directly or indirectly during the marriage. (See *Billion*, 1996 S.D. 101, 553 N.W.2d at 232; see also *Halbersma*, 775 N.W.2d at 215).

The Court abused its discretion by applying two separate standards to pre-marital property held by Susan and Chris.

VII. THE COURT ABUSED ITS DISCRETION BY FAILING TO VALUE ITEMS OF PERSONAL PROPERTY IN SUSAN'S POSSESSION

South Dakota courts look at the seven factors outlined in *Novak* when determining whether to include items of property in the marital estate. 2006 S.D. 34, 712 N.W.2d at 552. "Failure to place a value upon the property of parties for purposes of equitable distribution is reversible error." *Johnson v. Johnson*, 300 N.W.2d 865, 868 (S.D. 1980). See also, SDCL § 25-4-44.

When one party claims that an account balance is zero at the time of trial but does not provide documented evidence showing the same, South Dakota courts have treated this as a credibility issue. (See *Ahrendt v. Chamberlain*, 2018 S.D. 31, 910 N.W.2d 913,

920. The Court in *Ahrendt* held that because wife did not provide a statement to support her testimony that the balance of the parties' bank account was at zero dollars at the time of trial, the Court properly found the account to be worth the amount of the last provided bank statement. (*Id*.).

South Dakota courts have additionally held that the last complete bank statement should be used as evidence. (See *Giesen v. Giesen*, 2018 S.D. 36, 911 N.W.2d 750).

The Court valued Susan's Wells Fargo checking account at $0. (App. 011). The Court's ruling was contrary to the documented evidence presented at trial. (R. p. 4295). Chris' Trial Exhibit 145 showed a $5,152.25 balance in Susan's Wells Fargo checking account as of July 8, 2020. (R. p. 4295). This document was dismissed by the Court in favor of Susan's dramatic testimony that her checking account was currently sitting at a "negative balance." (R. p. 5214-5216). Susan was waiving her checkbook in the air, and did not admit any evidence other than her own testimony that her current checking account balance was at $0. Susan argued in her Motion to Reconsider that Chris' First Premier Checking account x2607 should be valued at a higher amount due to a payment made to his attorneys for legal fees "artificially lowering" his checking account balance. (R. p. 93). Chris provided an August 2020 statement for his checking account, and Susan insisted that the statement be disregarded in favor of a checking account statement from a previous month. (*Id*.). This followed the trend of Susan applying one standard to Chris, but another, less stringent standard towards herself. Throughout the case, Susan and the Court held Chris to a higher standard of proof than Susan. The Court required Chris to provide itemized receipts for every purchase he made on behalf of the boys since 2013,

but did not require Susan to provide simple proof in the form of a bank statement showing her claimed $0.00 balance.

The Court valued the 2008 GMC Yukon at $0, despite evidence provided at trial that the vehicle was purchased during the marriage and worth $8,025 according to Kelley Blue Book. (R. p. 1390). Susan did not provide any evidence of the Yukon's value. The Decision stated the following with regard to the 2008 Yukon: "Susan testified that this [2008 Yukon] is [Q.S.D.'s] vehicle and should not be valued. Chris does not argue otherwise. It is removed from the spreadsheet." (App. 012). This was a misstatement of the record. The 2008 Yukon is now driven by Q.S.D., but was purchased during the marriage and used as a family vehicle. The 2008 Yukon is marital property subject to equitable division at a value of $8,025.

The Court abused its discretion by valuing Susan's Wells Fargo checking account and the 2008 GMC Yukon at $0.

VIII. THE COURT ABUSED ITS DISCRETION BY APPLYING DIFFERENT STANDARDS TO THE VALUE OF CERTAIN PERSONAL PROPERTY

Under South Dakota law, assets and liabilities are valued at the time of trial, rather than the time of separation, absent special circumstances. (See *Johnson*, 2007 S.D. 56, 734 N.W.2d 801, 810 (S.D. 2007). South Dakota courts look at the following factors when determining whether to include property as part of the marital estate for purposes of property division:

> "(1) the duration of the marriage; (2) the value of the property owned by the parties; (3) the ages of the parties; (4) the health of the parties; (5) the competency of the parties to earn a living; (6) the contribution of each party to the accumulation of the property; and (7) the income-producing capacity of the parties' assets." (*Novak*, 713 N.W.2d at 552).

Only in cases where a party has made "no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support, should a court set it aside as 'non-marital' property." *Billion*, 1996 S.D. 101, 553 N.W.2d 226, 232. Additionally, the failure of a Court to value property in the marital estate in the equitable distribution of property in a divorce is reversible error. (see *Johnson*, 300 N.W.2d 8865, 868 (S.D. 1980)). See also, SDCL § 25-4-44.

The South Dakota Supreme Court has "consistently held that vested retirement accounts and pensions should be included as marital assets and divided between the parties." (Gibson v. Gibson, 437 N.W.2d 170, 171 (S.D. 1989) (Citing *Caughron v. Caughron*, 418 N.W.2d 791 (S.D. 1988); *Hautala*; *supra*; *Arens v. Arens*, 400 N.W.2d 900 (S.D. 1987); *Stubbe v. Stubbe*, 376 N.W.2d 807 (S.D. 1985)). Retirement plans are considered divisible marital assets by South Dakota courts because contributions to retirement plans reduce a party's salary. (See *Caughron*, 418 N.W.2d 791 (S.D. 1988) citing *Stemper v. Stemper*, 403 N.W.2d 405, 408 (S.D. 1987)). While the spending habits of the parties during the marriage can be considered by the court when determining marital property division, the court must also consider the seven core factors and the contributions by the parties to the property at issue. (See *Ahrendt*, 2018 S.D. 31, 910 N.W.2d at 921).

The Decision stated that the mandatory nature of the plan contributions, and Chris' "de minimis" contributions and "lack of need for support" justified Susan's claimed separate property offsets of $149,308 and $4,181, including growth, for her South Dakota Retirement System and supplemental South Dakota Retirement System accounts, respectively. (App. 011). The Court did not explain its reasoning for calling

Chris' contributions of supporting his spouse, caring for the parties' children, working and contributing income to the marital estate and other things Chris did to support Susan's legal career "de minimis."

The Court also did not consider the fact that Susan's employer contributed to Susan's SDRS contributions. Susan was given credit for all of the contributions. On the other hand, the Court had no qualms with valuing items of Chris' in the marital estate that did not generate value until after the separation of the parties, and to which Susan made absolutely no contributions, let alone de minimis contributions. Susan has only tried to hinder Chris' businesses and income stream since the parties separated. The decision to give Susan an offset for contributions made to her retirement account post-separation, yet failure to value Chris' assets (such as his business entities and interests) on the date of separation is unfair. The Court showed bias and preference for Susan, while failing to apply the same standard to Chris. Chris is being financially penalized because Susan is employed by the State and her retirement contributions are mandatory. Those retirement funds are clearly marital funds.

Applying a totally different standard, the Court denied Chris' requests for offsets for life insurance proceeds contributed by Chris to his business interests. (App. 014). The South Dakota Supreme Court upheld the exclusion of life insurance proceeds from the division of marital property in *Taylor*. (See *Taylor*, 928 N.W.2d 458 (S.D. 2019). In *Taylor*, the South Dakota Supreme Court upheld the decision of the Circuit Court to exclude life insurance proceeds received by husband, from his mother's estate, from the division of marital property. (*Id*.).

The Decision stated that Chris should not receive offsets in the amounts of $82,000 for his investment in Milestone and $141,000 for his investment in ALDC. (App. 014). The majority of the remainder of the proceeds were used to pay for Chris' legal representation to "purchase" The Dunham Company. The Decision further stated that Susan contributed to this property and her contributions were not "de minimis", but did not expand on Susan's "contributions". (App. 014).

Chris would have received the life insurance proceeds whether he was married to Susan or not. Susan did not contribute to the "acquisition" of the life insurance proceeds in any way. Chris received the life insurance proceeds because his father passed away. The Court included the life insurance proceeds received by Chris for the following reasons: "From the beginning of the marriage Susan contributed substantially to the accumulation of marital property, and the contributions were more than de minimis." (App. 014). The Decision correctly cited the factors for determination of separate property outlined in *Taylor*, 2019 S.D. 27, 928 N.W.2d at 465, but incorrectly applied the decision in *Billion*. 1996 S.D. 101, 553 N.W.2d at 232.

In *Billion*, the South Dakota Supreme Court held that in cases where a party has made "no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support, a court should set it aside as 'non-marital' property." *Id*.

The Decision stated that neither party in this case shall receive alimony, therefore neither party has a need for support. (App. 017-018). According to the Court's Amended Decision, Susan makes 54% percent of the parties' shared income, and as argued above, the Court incorrectly inflated Chris' income when calculating Chris' income for purposes

of child support. (App. 040). As stated above, Susan did not contribute to the acquisition of the life insurance proceeds. The life insurance proceeds required no maintenance or upkeep. Susan did not attribute to the "acquisition and maintenance" of the life insurance proceeds per the South Dakota Supreme Court's decision in *Billion*.

The Court's exclusion of Susan's "post-separation" retirement contributions from the marital estate due to Chris' "de minimis" contributions to the accounts, yet inclusion of the life insurance proceeds received by Chris after the death of his father due to Susan's "contributions to the marriage" was an abuse of discretion and an inconsistent analysis.

IX. THE COURT ABUSED ITS DISCRETION BY VALUING CHRIS' INTEREST IN MILESTONE CONSULTING & CONSTRUCTION SERVICES AT 100% AND NOT SUBTRACTING LEGITIMATE DEBT

Milestone was formed in 1998 by Chris, but was dormant at time of the separation, with pennies in the operating account. Chris and Karen invested $82,000 each in Milestone in 2014 (R. p. 13). Chris and Karen built approximately 10 twin homes from 2014-2016 under the umbrella of Milestone. Susan did not contribute. (See *Billion*, 1996 S.D. 101, 553 N.W.2d at 232). Both Chris and Karen testified that Chris was in charge of building the twin homes, and Karen decorating and selling the twin homes. (R. pp. 4760-4762, 4911-4912). Karen gave testimony at trial about their twin home projects. (*Id*.). The ownership statement for Milestone states that Chris and Karen are each 50% owners of Milestone. (R. p. 13). Chris' financial expert, Mike Snyder testified that the Milestone Ownership Statement was evidence that Chris and Karen were each 50% owners of Milestone. (R. p. 4575). Mr. Snyder referred to Plaintiff's Exhibit 44, and stated that there was evidence of a constructive partnership found in the notes payable listed, as both

Chris and Karen held notes payable from Milestone in the amount of $69,923.61. (*Id*.) (R. p. 13). Despite this evidence, and the clear evidence of the existence of a constructive partnership between Chris and Karen, the Court ruled that Chris was the sole, 100% owner of Milestone and valued Milestone at $105,000.

The Decision also stated that since Chris was 100% owner of Milestone, the $40,907 payable Chris owed to Milestone for back rent on his townhome was not a legitimate debt and "will very likely never be paid." (App. 016-017). (R. p. 1456). The failure to value certain property of the parties which should be included in the marital estate is reversible error. See *Johnson*, 300 N.W.2d at 868. Chris and Karen are constructive partners in Milestone, and the debt is very much a legitimate debt that will have to be paid. The debt is an outstanding mortgage. Even if Chris was the 100% owner of Milestone, the rent payable owed by Chris to Milestone is still a legitimate debt and legitimate funds have been expended by Milestone to pay the mortgage on the townhome. Whether the Court found Chris' ownership interest in Milestone to be 100% or 50%, the Court should have subtracted the $40,907 payable from the value assigned to Milestone. See SDCL § 25-4-44.

The Court's determination that Chris is 100% owner of Milestone and failure to subtract Chris' rent payable to Milestone is an abuse of discretion and reversible error, per *Johnson*.

X. THE COURT ABUSED ITS DISCRETION BY EXCLUDING BUYOUT MONIES RECEIVED FROM FULLER & SABERS, LLC AND THE DAKOTA LAW BUILDING FROM THE MARITAL PROPERTY DIVISION

A Court's failure to value items of property in the marital estate is reversible error. *Johnson*, 300 N.W.2d at 868. South Dakota is an "all property" state meaning that

"all property of both of the divorcing parties [is] subject to equitable division by the [circuit] court regardless of title or origin. (see *Billion*, 1996 S.D. 101, 553 N.W.2d at 237).

In cases where a party has made "no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support, a court should set it aside as 'non-marital' property." (*Id*. at 232).

The Decision states that because Susan's complete spend down of funds received from the Dakota Law Building and Fuller & Sabers, LLC buyout monies were made in "good faith" and were "not fraudulent", they should be excluded from the equitable division of marital property. (App. 015). Susan depleted $308,390 of marital funds. Chris is simply asking that the funds be accounted for somewhere in the case, whether in the marital property division, or as credit towards Chris' retroactive/future child support amount, per SDCL § 25-4-44. Susan depleted the money without consulting Chris. Chris was a 25% owner of the building as well as Susan's spouse. (R. p. 1411). Susan forced Chris to remove his name from the First Premier checking account containing the buyout monies. (R. p. 4778).

The inconsistent findings as to the values of marital assets and the classification of assets are a clear abuse of the Court's discretion and require reconsideration and amendment of the division of marital assets.

XI. THE COURT ABUSED ITS DISCRETION BY CONSIDERING CHRIS' DISCRETIONARY INTEREST IN THE LIVING TRUST OF DONALD A. DUNHAM, JR. WHEN DETERMINING CHRIS' FINANCIAL CONDITION

The Decision stated the following: "Chris can afford the [cash equalizing property] payment because the assets awarded to him are income producing and he has

probable access to trust distributions . . . " (App. 017). This is complete speculation on behalf of the Court.

Chris is a discretionary beneficiary of the Trust. (R. pp. 4456, 4484). Under SDCL § 55-1-43, discretionary interests are not property interests. It is not guaranteed that Chris will ever receive a distribution from the Trust due to the pending claims which were transferred from the Estate to the Trust. The Estate was finally closed due to an agreement reached between the Estate and its existing creditors that outstanding obligations would be assigned to the Trust meaning there are still significant liabilities that have not been resolved. The Trust's value is unknown due to the nature of those liabilities and the inability to estimate when or what those liabilities may be settled for. Whether Chris will ever receive a distribution from the Trust depends on whether there will be funds remaining after the creditor claims are settled. Even if there are funds remaining after settlement of the claims, it will be up to the corporate Trustee, Trident Trust, whether Chris will receive a distribution.

Chris offered to notify Susan if a distribution was received from the Trust during the years she is owed support, as a solution to the "future Trust income" question. The Court instead imputed an ability on Chris to draw funds from the Trust as if it was his piggybank. The Decision imposed a property interest in Chris' discretionary interest which is directly contradictory to SDCL § 55-1-43. There is no evidence to support the Court's conclusion that Chris has unfettered access to Trust distributions and those distributions may be considered for purposes of determining Chris' financial condition. "A discretionary interest is neither a property interest nor an enforceable right. It is a mere expectancy." SDCL § 55-1-43(1).

The Court's consideration of Chris' discretionary beneficiary interest in the Trust to determine Chris' financial condition was an abuse of discretion and contrary to expert testimony and South Dakota law.

XII. THE COURT ABUSED ITS DISCRETION BY AWARDING SUSAN $50,000 IN ATTORNEY/EXPERT WITNESS FEES & COSTS

Courts in South Dakota use a two-step analysis when deciding whether to awarded attorney fees in a divorce action:

> "First, the court must determine what constitutes a reasonable attorney's fee. This requires consideration of: (1) the amount and value of the property; (2) the intricacy and importance of the litigation; (3) the labor and time involved; (4) the skill required to draw the pleadings and try the case; (5) the discovery utilized; (6) whether there were complicated legal problems; (7) the time required for the trial; and (8) whether briefs were required. Second, it must determine the necessity for such fee. That is, what portion of that fee, if any, should be allowed as costs to be paid by the opposing party. This requires consideration of the parties' relative worth, income, liquidity, and whether either party unreasonably increased the time spent on the case." *Evens v. Evens*, 2020 S.D. 62, 951 N.W.2d 268, 282 (citing *Green v. Green*, 2019 S.D. 5, 922 N.W.2d 283, 288).

The Decision accused Chris of prolonging the divorce. Specifically referred to was Chris' resistance to discovery requests regarding the Estate/Trust. (App. 018). What the Decision failed to mention or consider, is that Chris was not able to act in his personal capacity regarding the Estate. Chris was the personal representative of the Estate and owed the Estate fiduciary duties. SDCL § 29A-3-703. SDCL § 29A-3-703 specifically states the following:

> "A personal representative is a fiduciary who, except as otherwise provided in the will, shall observe the standards of care in dealing with the estate assets that would be observed by a prudent person dealing with the property of another . . . A personal representative shall use the authority conferred by this code, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of the estate."

Chris was not able to turn over information regarding the Estate in his personal capacity due to these fiduciary duties. Chris worked with Estate attorneys at every turn during this process to ensure he complied with his fiduciary duties. The Estate incurred significant attorney fees and charges due to Susan's incessant discovery requests.

Chris was forced to hire an expert rebuttal witness due to Susan's eleventh hour claim that the Estate/Trust should be included in the equitable division of marital property and her meritless assertion that the Estate/Trust was worth $3,091,794.00. The award of attorney fees to Susan punishes Chris for fulfilling his fiduciary duties to the Estate and following the advice of Estate counsel.

The Decision failed to mention Susan's objections to every motion filed by Chris, as well as her poor behavior during the proceedings (i.e., taking photos of the interior of Chris' home through a glass door, use of her UJS e-mail account to organize baseball events and other personal matters, swearing at Chris and the children, making demeaning statements about Chris to the children, secretly changing her will and insurance beneficiaries during the proceedings, forcing Chris to communicate with the "Honorable Susan Sabers" via her UJS e-mail address, her flippant and disrespectful testimony at trial, etc.). Chris expended a great deal of time and money due to Susan's stubbornness, inappropriate actions, and unwillingness to discuss settlement. Chris had to seek relief from the Court several times for Susan's behaviors.

Although Chris and his attorneys requested Susan's attorney billing statements in discovery, these statements were never produced. On the eve of trial, Susan produced only abbreviated statements for attorney fees in response to Motions filed. Susan claimed that her fees were protected by "attorney client privilege" and refused to disclose them.

Chris was shocked by Defendant's Exhibit 240, claiming Susan incurred $205,224.24 in attorney fees. (R. p. 4410). Susan testified that, despite the fact that this litigation had been pending since 2016, she had never made a payment to her current counsel, friend and former law partner, William Fuller for his representation of her in the divorce. (R. pp. 5367-5368).

Susan is receiving many items of property which are "liquid assets". Susan is a circuit court judge with stable employment and a salary and benefits greater than $130,000 per year. Chris received non-liquid assets and his income is volatile. Both parties filed many Motions throughout the case, most of which were vehemently contested. Susan admitted that she has never made a payment to Attorney Fuller's law firm, despite her apparent debt of over $200,000 to the firm. (R. p. 4410). Chris should not owe attorney fees to Susan, because Susan's attorney fees are clearly not legitimate. (See *Evens*, 2020 S.D. 62, 951 N.W.2d at 282).

The Court's award of costs and fees to Susan was an abuse of discretion and the reasoning given for awarding costs and fees to Susan appears very one-sided and biased.

XIII. THE COURT ABUSED ITS DISCRETION BY ORDERING A MANDATORY EXCHANGE OF TAX RETURNS EVERY CALENDAR YEAR UNTIL CHILD SUPPORT EXPIRES

The Court ordered the parties to exchange tax returns every year until Chris' support obligation terminates, starting with tax year 2019. (App. 019). The Court cited Chris' ongoing support obligation as authority for its ruling. (*Id.*). Neither party requested this relief at trial. Chris offered at trial to report all future distributions from the Trust, if any. (R. pp. 4687). Further, the Court denied two frivolous and duplicative post-trial

Motions filed by Susan attempting to gain access to Chris' 2019 tax return and to improperly re-open the record. (R. pp. 22, 5504).

Per the guidelines provided by the Child Support Office of the South Dakota Department of Social Services, there are two ways an order for a child support modification may be instituted in South Dakota, (1) the order was entered more than three years from the petition to modify; or (2) the requesting party must show there has been a substantial change in circumstances per SDCL § 25-7-6.13. During a modification, the parties are required to provide financial information, to their assigned child support referee. The referee then calculates child support and determines whether an adjustment is necessary. While SDCL § 25-7-6.11 provides that South Dakota Courts have the authority to "require periodic adjustments in the support," surely requiring ex-spouses to personally exchange tax returns each year was not what the South Dakota Legislature had in mind while drafting SDCL § 25-7-6.11.

The U.S. Tax Code indicates that by law, information about your tax return "shall be confidential." (App. p. 109). 26 U.S.C. § 6103 (2021). The Decision ordered the parties to annually exchange private tax information with their ex-spouse – a great invasion of privacy and confidentiality.

Chris is perplexed by the Court's order regarding the tax returns, considering the denial of both of Susan's post-trial Motions and the fact that neither party requested this relief at trial. The Court's order essentially dooms Chris to frequent child support reviews by a litigious ex-wife and is an invasion of privacy. Susan should be required to wait three years or prove a substantial change in circumstances to obtain a child support modification, just like every other South Dakotan.

The Court abused its discretion and violated Chris' right to confidentiality by ordering the parties to exchange tax returns until Chris is no longer obligated to pay child support.

V. CONCLUSION

The Appellant respectfully requests that the trial court be reversed on each of the issues as outlined above and that the case be remanded to the trial court for reconsideration of each of the issues as set out above.

Respectfully submitted this 13th day of July, 2021.

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CERTIFICATE OF SERVICE

I, Elizabeth A. Rosenbaum, hereby certify that I am a duly licensed and practicing attorney at law, having been so licensed by the Supreme Court of the State of South Dakota, and that I served the Appellant's Brief upon the Appellee by mailing one (1) true and correct copy to her attorney, by electronic mail, on July 13, 2021, as follows:

William P. Fuller
7521 S. Louise Ave.
Sioux Falls, SD 57108

Dated this 13th day of July, 2021.

_____
Elizabeth A. Rosenbaum

CERTIFICATE OF COMPLIANCE

I, Elizabeth A. Rosenbaum, hereby certify this brief is submitted in Times New Roman typeface, 12 pt., and that the word processing system used to prepare the brief indicates that the number of words used was 9,975 and the character count was 50, 976 without counting spaces.

Dated this 13th day of July, 2021.

_____
Elizabeth A. Rosenbaum

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29558
NOTICE OF REVIEW NO. 29582

CHRISTOPHER ALAN DUNHAM,

Plaintiff and Appellant,

v.

SUSAN MICHELLE SABERS

Defendant and Appellee.

Appeal from the First Judicial Circuit
Union County, South Dakota
The Honorable Rodney J. Steele, Pro Tem Circuit Court Judge

APPELLEE'S BRIEF AND APPENDIX

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Notice of Appeal Filed: February 22, 2021
Notice of Review Filed: March 11, 2021

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PRELIMINARY STATEMENT

This appeal arises from a divorce action captioned, *Christopher Alan Dunham v. Susan Michelle Sabers*, 63DIV.16-000032, venued in Union County, First Judicial Circuit, South Dakota, presided over by the Honorable Rodney J. Steele, Circuit Court Judge Pro Tem ("the Divorce Action"). Appellant Christopher Alan Dunham will be referred to as "Chris." Appellee Susan Michelle Sabers will be referred to as "Susan." *The Estate of Donald A. Dunham, Jr.*, 41PRO.13-000005, venued in Lincoln County, Second Judicial Circuit, South Dakota, will be referred to as "the Estate." The Living Trust of Donald A. Dunham, Jr. will be referred to as "the Trust." The Court Record was provided in three pdfs by the Clerk: 29558.quick.R01.pdf; 29558.quick.R02.pdf; and 29558.quick.R03.pdf. References to the Clerk's Register of Actions for filings from the Summons filed on 7/7/16 through Plaintiff's Trial Exhibit 37 filed on 8/21/20 (29558.quick.R01.pdf) will be referred to as "RA(1)." References to the Clerk's Register of Actions filings from Plaintiff's Trial Exhibit 38 filed on 8/21/20 through Defendant's Motion for Leave to Issue Subpoena Duces Tecum filed on 11/2/20 (29558.quick.R02.pdf) will be referred to as "RA(2)." References to the Clerk's Register of Actions from the Brief in Support of Defendant's Motion for Leave to Issue Subpoena Duces Tecum filed on 11/2/20 through the Notice of Hearing and Certificate of Service filed on 11/1/21 (29558.quick.R03.pdf) will be referred to as "RA(3)." References to the August 17-21, 2020 Trial Transcript found at RA(2)4490-5390 will be referred to as "TT" with the applicable page and line numbers. References to the August 12, 2016 hearing transcript (RA(1)56-207) will be referred to as "8-12-16-HT." References to the January 2, 2018 hearing transcript (RA(1)381-503) will be referred to as "1-2-18-HT."

References to the November 12, 2019 hearing transcript (RA(1)3369-3576) will be referred to as "11-12-19-HT." Document references will include the applicable page numbers.

STATEMENT OF JURISDICTION

The parties appeal from the Judgment and Decree of Divorce filed on February 5, 2021 (RA(3)538-42;App.9-13), and Susan also appeals the monetary Judgment filed on February 5, 2021 (RA(3)543-44;App.16-17.) Notices of Entry were filed on February 8, 2021. (RA(3)545-46;App.7-8;RA(3)552-53;App.14-15.) Notice of Appeal was timely filed by Chris on February 22, 2021. (RA(3)604-06.) Notice of Review was timely filed by Susan on March 11, 2021. (App.1-2.) This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

APPEAL STATEMENT OF THE ISSUES

I. Whether the parenting plan ordered by the court was in the best interests of the children and within its discretion.

The court's denial of Chris's requests for forced visitation and counseling with the children was in the children's best interests given Chris's emotional and physical abuse toward them, and sporadic involvement in their lives since separation.

- *Pieper v. Pieper*, 2013 S.D. 98, 841 N.W.2d 781.

II. Whether the court correctly included K-1 income in its calculation of Chris's past and current child support obligations.

The evidence and law supported the court's determination that Chris's K-1 income be included in the calculation of past and current child support obligations because Chris has control over the companies' distributions of business income.

- SDCL § 25-7-6.

- *Nace v. Nace*, 2008 S.D. 74, 754 N.W.2d 820.
- *Roberts v. Roberts*, 2003 S.D. 75, 666 N.W.2d 477.

III. Whether the court correctly denied Chris's claimed in-kind child support contributions as unsupported by the evidence.

Chris wholly failed to satisfy his burden of proving an offset for in-kind child support and the court properly denied the claim as a result.

- *State ex rel. Tegene v. Andalo*, 2015 S.D. 57, 866 N.W.2d 550.

IV. Whether the court appropriately exercised its discretion in ordering that Chris pay for half of the children's school tuition.

The court did not abuse its discretion in ordering an upward deviation in child support to include half of the children's school tuition.

- SDCL § 25-7-6.

V. Whether it was within the court's discretion to include items gifted to the parties by Chris's parents in the marital estate.

The court's inclusion of the 2001 Ford F-150 and 1969 Firebird convertible as marital property was supported by the evidence.

- *Godfrey v. Godfrey*, 2005 S.D. 101, 705 N.W.2d 77.

VI. Whether it was within the court's discretion to grant Susan an offset for her premarital assets.

The court's determination that Susan was entitled to a premarital offset in the Devitt Drive property was supported by the evidence.

- *Legrand v. Weber*, 2014 S.D. 71, 855 N.W.2d 121.

VII. Whether the court correctly treated QAZ as marital property.

The court did not abuse its discretion in determining that QAZ, LLC was marital property because QAZ was a holding company formed and owned by Chris and Susan.

- *Scherer v. Scherer*, 2015 S.D. 32, 864 N.W.2d 490.

VIII. Whether the court was within its discretion in placing a $0 value on Susan's checking account.

The court's holding that Susan's checking account had a $0 value was supported by the evidence.

IX. Whether the court correctly found that Q.S.D.'s vehicle, the 2008 Yukon, was non-marital property.

The court correctly determined that the 2008 GMC Yukon was not marital property both because the vehicle is Q.S.D's and was purchased with proceeds from Susan's personal injury settlement.

- *Green v. Green*, 2019 S.D. 5, 922 N.W.2d 283.

X. Whether it was within the court's discretion to grant Susan an offset for post-separation values of her retirement accounts.

The court did not err in granting Susan an offset for post-separation growth for her South Dakota State Retirement accounts after finding that Chris had no contribution to their growth and had no need for support.

- *Muenster v. Muenster*, 2009 S.D. 23, 764 N.W.2d 712.

XI. Whether the court properly considered as marital property the full value of Milestone Consulting and Construction and American Land Development Company.

The court properly considered as marital property the full value of Milestone and ALDC, including the contractual life insurance proceeds received while the parties were living together as man and wife that Chris later injected into these companies.

- *In re: Cline's Estate*, 132 Mont. 328 (1957).
- *In re: Succession of Halligan*¸887 So. 2d 109 (La. App. 1 Cir. 2004).
- *Muenster v. Muenster*, 2009 S.D. 23, 764 N.W.2d 712.

XII. Whether the court correctly found Chris to be a 100% owner of Milestone.

The court correctly determined from the evidence that Chris is a 100% owner of Milestone.

XIII. Whether the court correctly determined that the buyout funds from Dakota Law and Fuller Sabers were spent in good faith long before trial and, therefore, appropriately excluded them from the marital estate.

The court did not err in determining that the funds from Susan's Dakota Law and Fuller Sabers buyouts were excluded from the marital estate because the funds were used before and after separation for the benefit of the family, and no longer existed at the time of trial.

- *Anderson v. Anderson*, 2015 S.D. 28, 864 N.W.2d 10.

XIV. Whether the court committed reversible error in mentioning Chris's interest in the Trust when discussing his post-trial financial condition and ability to pay the property equalization payment.

The court was within its discretion referencing Chris's interest in the Trust when discussing Chris's post-trial financial condition and, specifically, his ability to pay the property equalization payment.

- SDCL § 25-7-6.

XV. Whether the court's award of attorneys' fees to Susan was within its discretion and supported by the evidence.

The court was within its discretion in awarding Susan attorneys' fees and costs due to Chris's delay tactics, withholding relevant information and documents, and gamesmanship throughout the Divorce Action.

- *Palmer v. Palmer*, 316 N.W.2d 631 (S.D. 1982).

XVI. Whether the court was within its discretion in ordering that the parties exchange tax returns every year until Z.S.D. is no longer eligible for child support.

The court was within its discretion in ordering that Chris and Susan annually exchange federal income tax returns until Z.S.D. is no longer eligible for child support given Chris's litigation tactics and that his income varies from year-to-year.

- SDCL § 25-7-6.

NOTICE OF REVIEW STATEMENT OF THE ISSUES

I. Whether the court erred in failing to value the parties' property, and abused its discretion in failing to treat marital assets injected into the Estate as marital property.

The court erred when it failed to value and consider as marital property Chris's 92% interest in Tatar Quincey, 20% interest in Dunham Equity Management, and 40% interest in Dunham Partnership that he transferred into the Estate while the Divorce Action was pending in violation of the Temporary Restraining Order.

- *Endres v. Endres*, 532 N.W.2d 65, 68 (S.D. 1995).
- *Grode v. Grode*, 1996 S.D. 15, 543 N.W.2d 795.

II. Whether the court abused its discretion in dividing the marital property 50/50.

The court erred in determining that the marital property be split 50/50 between Chris and Susan after finding Susan's contributions to the accumulation of assets greatly outpaced Chris's.

- *Halbersma v. Halbersma*, 2009 S.D. 98, 775 N.W.2d 210.
- *Taylor v. Taylor*, 2019 S.D. 27, 928 N.W.2d 458.

III. Whether the court abused its discretion in failing to grant Susan a divorce on the grounds of extreme cruelty.

The court erred in denying Susan a divorce on the grounds of extreme cruelty under the facts.

- SDCL § 25-4-4.
- *Osman v. Keating-Osman*, 521 N.W.2d 655 (S.D. 1994).

IV. Whether the court erred in not awarding Susan more in attorneys' fees.

The court's award of attorneys' fees and costs to Susan should have been higher than $50,000 given Chris's behavior and tactics during the Divorce Action.

- SDCL § 55-1-30.

STATEMENT OF THE CASE

Trial was held August 17-21, 2020. (RA(2)4490-5390.) The issues presented were: (1) grounds for divorce; (2) child custody and parenting time; (3) child support (past and current); (4) school tuition (past and future); (5) children's healthcare expenses (past and future); (6) children's extracurricular expenses; (7) property division; (8) alimony; and (9) attorneys' fees, expert witness fees, and costs. (*See id.*) At the end of trial, the court requested the parties' closing arguments through post-trial briefing. (RA(2)5391-5457(Chris);RA(2)5504-5699(Susan).)

The court granted the parties a divorce on the grounds of irreconcilable differences. (RA(3)23-54.) The court ruled: Susan receive sole physical custody of Q.S.D. and Z.S.D., with joint legal custody; Chris pay Susan $129,116 in past child support and current child support of $1,240 per month; Chris pay Susan $26,905 for past school tuition expenses; parties share equally in the cost of future school tuition; and Chris pay Susan $11,895 for the children's past medical expenses and his proportionate

share of the children's future medical expenses. (*See id*.) After dividing the marital estate 50/50, Chris was to pay Susan a property equalization payment of $262,905. (RA(3)39.) Because the court found that Chris had "unreasonably prolonged the divorce by his actions[,]" Chris was to pay Susan $50,000 in attorneys' fees and expenses. (RA(3)40.) Due to Chris's discovery tactics and his variable income, the parties were to exchange tax returns annually until Z.S.D. is no longer eligible for support. (RA(3)41.)

Chris asked the court to reconsider its Memorandum Decision or grant him a new trial claiming, in part, the court was biased against him. (RA(3)56-92.) In response, Susan asked the court to: reconsider its 50/50 division of marital property; value the Estate/Trust as a marital asset or, alternatively, pull back and value the marital assets Chris transferred into the Estate; and increase its award of attorneys' fees. (RA(3)93-114.)

The court filed its Amended Memorandum Decision on January 12, 2021, decreasing Chris's past child support to $119,729, and reversing a prior decision that required Chris to share in the children's extracurricular expenses, past and future. (RA(3)229-46.) On January 22, 2021, the court issued its second amended calculations for Chris's 2017 and 2019 child support. (RA(3)247-48.)

The parties each proposed their findings, conclusions, and judgments. (RA(3)249-336(Chris);RA(3)337-95(Susan).) Susan filed detailed objections to Chris's proposals. (RA(3)416-94.) Chris submitted a general objection to Susan's proposals. (RA(3)396-98.) The court considered the parties' proposals and issued its own Findings of Fact and Conclusions of Law, Judgment and Decree of Divorce, and monetary

Judgment on February 5, 2021. (RA(3)495-544.) Notices of Entry were filed on February 8, 2021. (RA(3)543-601.)

Chris filed his Notice of Appeal on February 22, 2021. (RA(3)604-06). Susan filed her Notice of Review on March 11, 2021. (App.1-2.)

STATEMENT OF THE FACTS

The parties began dating in the fall of 1997. (TT504:8-20.) At the time, Susan owned her own home on Belmont Street and was employed as an associate attorney at Woods, Fuller, Shultz & Smith ("Woods Fuller"). (TT503:23-505:4.) Chris later moved into Susan's home and, for the rest of their dating relationship, lived there rent-free. (TT508:12-17.) He did not contribute to the costs of the mortgage or utilities. (*Id*.) Susan also paid for trips that the couple took, including two golf trips to Europe. (TT506:1-15.)

On May 15, 2002, Chris and Susan were married during a golf trip in Carnoustie, Scotland. (TT505:16-23.) At the time of the marriage, Susan was a partner at Woods Fuller and had built up 5.5 years of contributions to her retirement account, which was then valued at $52,528.09. (TT504:2-3,728:21-730:17.) Chris was a real estate broker at Dunham Company Residential. (TT127:14-128:1.) Susan continued to singlehandedly pay for the parties' living expenses after marriage. (TT508:18-511:6.) Additionally, she paid Chris's monthly credit card bills, car payments, Minnehaha Country Club ("MCC") expenses, and gave Chris monthly spending money. (*Id*.;TT680:24-684:8)

The parties' first child, Q.S.D., was born on May 31, 2003. (RA(1)4.) Susan sold her home on Belmont Street later that year and received $68,173.97 from the sale. (TT516:2-8.) Susan applied those funds to the parties' new home and lot located on

Devitt Drive. (TT516:2-18,721:17-723:1;RA(2)1514.) The parties took out a loan to build the Devitt Drive home, and Susan used pre-marital funds to finish the project when the construction loan reached its maximum. (TT721:17-723:1;RA(2)1514.) The parties moved into the Devitt Drive home in 2004. (TT133:7-10.) The parties' second son, Z.S.D., was born on April 11, 2005. (RA(1)4.)

From their birth forward, Susan was the primary caregiver for the children. (App.23-33.) Her role was all-encompassing, including: nursing them; changing them; bathing them; putting them to bed; cooking; staying home with them when they were sick; purchasing clothes; arranging and scheduling activities and appointments; transporting to/from activities, school, and appointments; doing the shopping, laundry, and cleaning; assisting with homework every night; and planning all birthday parties. (*Id*.) The parties had full-time nannies from 2003 to 2009, helping Susan care for the children. (TT512:13-16.) After the children began school, the parties had part-time nannies, save for 2010 and 2011, when Q.S.D. was in school full-time and Z.S.D. went to school half-days. (TT512:17-513:12.) During this time, Chris or Susan would pick Z.S.D. up from school. (*Id*.) Susan continued to do the lion's share of the children's caretaking and all of the housework. (*Id*.;TT513:24-514:11.)

Susan supported Chris professionally throughout their marriage. (TT679:7-21.) Golf consumed Chris's time and he claimed that his membership at MCC was crucial to his business endeavors, so Susan paid the monthly MCC bills. (TT680:24-684:8.) She also paid Chris's car expenses, some of his credit card expenses, and the majority of the household expenses so Chris could focus on his businesses. (*Id*.) Susan cleaned and decorated the houses that Milestone built and made gift baskets for the buyers.

(TT679:22-680:3.) Susan negotiated the purchase of house plans from a Minneapolis developer and provided free legal representation to Milestone, including representing Milestone in a trial. (TT680:4-23.) For years, Chris assured Susan that he was building a real estate career that would support them all. (TT534:23-535:1.)

Susan left Woods Fuller and started Fuller & Sabers, LLP ("Fuller Sabers") with Bill Fuller in January 2006. (TT507:6-10,15-20.) At the time she left Woods Fuller, Susan received a buyout and funds from an employment dispute – the terms of which are confidential. (TT517:22-24.) She used $73,000 of the funds received from Woods Fuller as the buy-in to Dakota Law, LLC ("Dakota Law"), a company that owned the building where Fuller Sabers was located. (TT517:22-518:11.) The remainder of the Woods Fuller funds were used to provide for the family while Fuller Sabers was establishing itself. (*Id*.)

Compensation for the legal work that Fuller Sabers performed each month went, in part, toward the mortgage payment to Dakota Law, and Dakota Law paid the mortgage to the bank. (TT520:5-12.) Chris never contributed to the work at Fuller Sabers, and never made mortgage payments for the Dakota Law building. (TT520:13-15,521:1-3.)

Susan remained at Fuller Sabers until she was appointed to the circuit bench in January 2013. (TT507:19-508:8.) At the time she left Fuller Sabers, Susan received buyouts from the law firm and Dakota Law of $86,670 and $216,410.22, respectively. (TT521:9-25,522:15-523:8;RA(2)1411-23,1424-31.) This money was used to provide for the family, including paying a $73,000 tax liability and purchasing a jet-ski and 4-wheelers for the children. (TT752:19-753:14.) All of the buyout-related funds had been gone for several years before the divorce trial began. (*Id*.)

Chris's dad, Don Dunham, Jr., died on January 12, 2013. (TT125:21-23.) Shortly after his death, and while the parties were still living together as husband and wife, Chris received $322,603 in life insurance proceeds. (TT349:3-350:7,746:15-747:2.) Chris opened a separate, secret bank account and hid the money from Susan. (*Id*.) Susan did not learn of the value of those funds until the Divorce Action. (*Id*.) The first time Chris had any substantial income to help the family, he hid it from Susan. (*Id*.)

In spring 2013, Chris began discussions to purchase The Dunham Company ("the Company") – another fact kept from Susan. (TT327:1-328:10,528:12-529:9,532:2-23.) Before then, the plan had always been for Chris's half-brother Jim to purchase the Company. (TT528:13-24.) Jim and Chris did not get along, and the couple knew Chris would be fired as soon as Jim took over. (*Id*.) Susan often asked Chris when Jim was going to buy the Company, to plan for Chris's unemployment. (*Id*.) Instead of telling Susan about his plans to purchase the Company, Chris kept putting Susan on hold – stating he did not know when Jim would act. (*Id*.) Months later, Chris finally told Susan he was purchasing the Company for $1.5 million dollars. (TT528:24-9,530:6-9.) Chris also told Susan that the purchase was none of her business and refused to answer any questions about it. (*Id*.)

The parties did not have $1.5 million dollars to purchase the Company. (TT529:10-532:1.) And Chris had a history of significant financial setbacks and failed business ventures. (*Id*.) Susan worried that the family would lose everything if the Company failed after Chris's purchase. (*Id*.) To protect the family and the assets she had spent many years accumulating, Susan asked Chris to transfer title to the house, various

vehicles, and a joint savings account to her. (TT533:22-534:16.) Chris had an attorney draft a quitclaim deed and signed the paperwork to effectuate those transfers. (*Id.*)

As September 2013 approached, Susan grew increasingly worried about Chris's temper and mental health. (TT532:24-533:21.) Chris always had a short fuse, something Susan had lived with for many years and which caused an earlier separation in 2012. (*Id.*;TT526:19-527:17.) At the time of the 2012 separation, Susan asked Chris to get help for his anger issues. (*Id.*) Chris took a class from Boys Town that was supposed to help him with his parenting and anger issues, but in 2013, the problems worsened. (*Id.*) Chris grew increasingly angry and physical with the children. (*Id.*) After Susan went to bed, Chris frequently went downstairs and drank beer until he passed out. (*Id.*) Susan was concerned for Chris, their relationship, and the children. (*Id.*) Although Susan repeatedly encouraged Chris to get help, he refused and things continued to worsen. (*Id.*)

The parties separated on September 22, 2013. (TT525:1-7.) Despite living with his mom only a few houses away, Chris effectively disappeared after separation. (TT527:20-528:2,535:7-536:5.) He did not call or visit for weeks on end – a practice that continued for several years. (*Id.*) Chris's visits with the children were sporadic at best – he mostly ignored them in favor of hanging out with his golf buddies. (*Id.*;App.23-33.)

Even after separation, Susan continued paying for many of Chris's expenses, including his credit card bill, the MCC bill, and his health and car insurance. (TT684:5-14.) Chris sometimes reimbursed Susan for these expenses, but his reimbursements were sporadic. (TT699:22-700:5.) Chris never paid child support after separation (TT685:14-21) until years later, when the court set Chris's obligation in December 2018.

Long before having children, Chris and Susan discussed sending them to Catholic school. (TT560:2-561:4.) Chris was impressed with the O'Gorman community and was committed to sending the children there. (*Id*.) When the parties separated, Chris promised to pay the children's tuition. (TT561:8-20.) Chris paid the children's tuition for the 2014-15 school year, but then stopped the next year after he hired a divorce attorney. (TT561:21-563:15.)

After Chris's attorney noticed his appearance, Susan hired Bill Fuller to represent her. (TT526:4-6.) The parties, through counsel, began months of discussions and attempted mediation. (TT526:4-6;TT779:13-19.) The mediation ended early when Chris demanded custody of the children despite being emotionally and physically abusive toward them, emotionally abusive toward Susan, and largely absent from the children's lives since separation. (*Id*.)

Chris emailed Susan on June 30, 2016, asking when she was leaving with the children for a weekend in Minnesota. (TT525:8-526:2.) Susan thought it meant Chris was going to see the children before they left, and responded that they planned on leaving the next day around 1:00 p.m. (*Id*.) Instead, when Susan arrived home from work, the children told Susan that a woman kept coming to the door saying she had something for Susan. (*Id*.) Almost immediately, the doorbell rang. (*Id*.) When Susan answered, the woman stated, "Susan Sabers, you're served." (*Id*.) The parties' attorneys had been communicating over divorce-related issues for many months, but Chris chose to have Susan served with divorce papers – at home and in front of the children – instead of asking her to admit service. (TT526:3-8.) That was the first of many litigation tactics employed throughout the divorce.

After being served, Susan started crying, and it scared the children. (TT526:9-18.) Susan called Chris and asked him to come over so they could explain to the children what was going on and reassure them about the process. (*Id*.) Chris responded that it was "none of [the children's] fucking business" and he would not come talk to them. (*Id*.)

In his Complaint, Chris sought a divorce on grounds of irreconcilable differences and extreme cruelty, asked for shared physical custody of the children, and child support. (RA(1)4-7.) Susan filed an Answer and Counterclaim, seeking a divorce on grounds of irreconcilable differences and extreme cruelty. (RA(1)4291-94.) Susan sought primary physical custody, sole legal custody, and asked the court to set child support. (*Id.*)

Susan filed an Objection to the Implementation of the South Dakota Parenting Time Guidelines on July 11, 2016, requesting a deviation from the parenting time schedule because of Chris's anger issues and strained relationship with the children. (App.18-22.) An evidentiary hearing was held on August 12, 2016. (RA(1)56-207.) The court granted Susan's motion – ordering visitation to occur every Wednesday evening and rotating Saturdays and Sundays every other week. (RA(1)39-51.) The court stated, "I could tell from the testimony here, the demeanor of the father from when he testified, that he does have a problem with a short fuse." (8-12-16-HT121:22-24.) And, speaking to Chris directly, "So now, basically, the ball is in your court, sir. You're going to have to work on these relationships and get those relationships solidified, and this will give you an opportunity to do that. You've got some substantial work to do, especially with [Q.S.D]." (8-12-16-HT123:24-124:3.)

From the initial stages of discovery, Chris made the process difficult. He refused to produce discovery without a protective order in place and, when Susan proposed a standard protective order, Chris rejected it and requested a hearing. (RA(1)213-18.) The court adopted Susan's proposed order. (RA(1)258-61.) Before the protective order was even signed by the court, Chris filed a motion for reconsideration (*Compare* RA(1)243-57 *with* RA(1)258-61) – a recurring theme in Chris's litigation strategy whenever a ruling did not go his way.

After Chris's violent acts toward the children intensified, Susan filed a motion asking that Chris's visitation be supervised. (RA(1)268-70.) The court granted Susan's motion, finding that Chris used "excessive and abusive force" on Q.S.D., and there was "no excuse" for Chris's behavior. (1-2-18-HT114:11-14.) The court also recognized that Chris's violence did not occur on a single occasion, but, rather, there were numerous "incidents." (1-2-18-HT114:25-115:2.) The file is replete with pictures of blood, bruises, and welts inflicted by Chris. (RA(1)312-35;RA(2)1468-1507;Ex.202(video).)

When Susan sought supervised visitation, Chris responded by seeking alimony. (RA(1)281-91.) After living paycheck-to-paycheck for some time and paying all of the household and children's expenses with no help from Chris, Susan sought alimony herself. (RA(1)548-54,635-37.) Susan was just beginning to learn the extent of Chris's hiding of money and assets.

In October 2018, Susan asked the court to establish Chris's child support, and sought arrearages since separation and Chris's share of the children's healthcare expenses. (RA(1)603-08.) In response, Chris stated that he "resent[ed]" that Susan was seeking child support and claimed she was only trying to "punish [him] financially" by

pursuing child support. (RA(1)624-26.) Chris also argued that Susan had not provided *him* any financial support in the years since separation (when Susan singlehandedly provided for their children). (*Id*.) The court set Chris's child support obligation, but reserved ruling until trial on Susan's requests for arrearages and healthcare expenses. (RA(1)2147-48.)

Chris consistently blamed the children for his abuse of them. He filed four motions seeking to force the children into counseling, claiming it was the children's behavior that forced him to respond with violence. (RA(1)297-300,2182-84,2868-70,3590-3663.) The court denied Chris's motions. (RA(1)570,2704-06,3577-81,3745-46.)

Throughout the action, Chris repeatedly refused to produce relevant, discoverable information requested of him – including information about the Trust and Estate, into which he had been funneling marital assets since the parties' separation. As a result, Susan was forced to file three lengthy motions to compel: in May 2019 (RA(1)2191-92); in October 2019 (RA(1)3031-33); and in May 2020 (RA(1)3946-48). Two of Susan's motions to compel were granted in their entirety (RA(1)3577-81,4083-84), and one granted in its near-entirety (RA(1)2704-06).

When Susan sought production of the Trust instruments, the court granted Susan's motion. (RA(1)3031-48,3577-81.) Instead of complying, Chris filed a Motion for "Informal Discovery Conference" – a thinly veiled motion to reconsider. (RA(1)3014-16.) The court denied Chris's motion and his subsequent motion to reconsider. (RA(1)3577-81,3707-09,3745-46.) Chris still refused to produce the Trust documents, forcing Susan to file a motion for ruling on relevance and a motion for order to show

cause, which were granted. (RA(1)3752-54,3847-48,3957-59,4083-84.) Susan was later forced to file another motion after learning that Chris was spending significant amounts of marital assets to invest in Tatar Quincey, LLC ("TQ") in violation of the Temporary Restraining Order. (RA(1)2831-33.) That motion was also granted. (RA(1)3577-81.)

Even after the court ordered that information about the Trust and Estate were discoverable, Chris still refused its production, forced a motion in the Estate court, and then violated the Estate court's order by producing substantially less than what he was ordered to produce. (RA(1)4104-82,4193-4254.)

Chris's refusals to produce discoverable information also forced Susan to file *five* motions to continue trial – the majority of which were granted. (RA(1)2322-23,3028-30,3877-79,4104-06,4193-95.) Susan's last Motion for Continuance was filed on August 11, 2020, one week before trial. (RA(1)4193-4254.) Susan sought a continuance of trial because information about the Trust and Estate had still not been produced by Chris, despite the court's orders. (*Id.*) Although Susan was not provided the necessary discovery to adequately present her case regarding how many marital assets Chris had funneled into the Estate, trial was held August 17-21, 2020. (RA(2)4490-5390.)

STANDARD OF REVIEW

The court's failures to value ALDC's 92% interest in TQ, Chris's 20% interest in DEM, and Chris's 40% interest in DP, all of which Chris injected into the Estate, and the court's failure to value the Estate itself, are reviewed de novo. *Endres v. Endres*, 532 N.W.2d 65, 68 (S.D. 1995) ("The trial court is required to place a value on all of the property held by the parties and to make an equitable distribution of the property.").

All other issues raised by Chris and Susan are reviewed for an abuse of discretion. *See Nickles v. Nickles*, 2015 S.D. 40, 865 N.W.2d 142.

APPEAL ARGUMENT

I. The court's denial of forced counseling and visitation was in the children's best interests and supported by overwhelming evidence of Chris's emotional and physical abuse.

The primary focus in determining parenting time is always the best interests of the children. The record is replete with evidence of Chris's excessive force and abuse toward the children. (1-2-18-HT19:18-20:10 (Chris pushed Q.S.D. down at public park; a stranger approached and asked if the children needed protection from Chris); RA(2)1468-1507;Ex. 202(video);TT539:22-545:14 (Chris hit Q.S.D., giving him a bloody nose, and pushed his face into the floor); TT546:2-7 (Chris slapped Q.S.D.'s back, leaving large welt); TT547:20-23 (Chris grabbed Q.S.D.'s arm and threw him down, leaving fingerprint marks and bruises); TT547:24-548:1 (Chris left fingernail scrapes all over Q.S.D.'s throat and cheek); TT548:2-4 (Chris grabbed Q.S.D. around the neck and left a fingernail mark); TT548:5-20 (Chris on Q.S.D.'s back, yanking arm while Q.S.D. screams in pain); TT548:24-549:6 (Chris jammed paper towel down Q.S.D.'s throat for eating too much bacon). Those incidents are just a sampling from years of abuse.

Two independent experts – Stephan Langenfeld and Judy Zimbelman – provided opinions on both visitation and counseling. (RA(2)2013-28,2029-30.) Langenfeld was appointed by the court (RA(1)538), and Zimbelman was agreed to by the parties. Both experts opined the children should not be forced to attend visitation with Chris, but should be able to choose if they want to see him. (RA(2)2013-28,2029-30.) Langenfeld specifically opined the children did not need counseling and should not be forced to go.

(RA(2)2029-30.) Langenfeld concluded if he were to diagnose Q.S.D. with anything, it would be as the victim of child abuse at the hands of his father. (*Id*.) In turn, Zimbelman opined "Chris has been physically abusive to the children and has minimized his behavior[,]" so the first step was for Chris to work on himself. (RA(2)2023-25,¶¶41,45,46.) She also stated the children should *not* be forced to go to counseling or visitation with Chris, especially with his history of abuse. (RA(2)2024-25,¶46.)

Chris later asked his therapist, Michael Wheaton, to testify in support of his request for unsupervised visitation. Chris had not been honest with Wheaton about the extent of the abuse. (11-12-19-HT26:1-42:10.) Wheaton was unaware of the court's finding of "excessive and abusive force" and the numerous incidents of physical abuse. (11-12-19-HT29:1-3,4-24.) Wheaton had not been shown photographs of most of the injuries, and was unaware Chris had called Q.S.D. a "liar" for reporting the abuse. (11-12-19-HT29:1-24,22:24-35:25.)

Chris testified at trial that he did not need counseling and only sought counseling because Zimbelman recommended it. (TT396:16-24.) Chris continues to blame others for his actions, including the court, Susan, and the children – refusing to acknowledge his own wrongdoing.

At trial, Chris asked the court to set a visitation schedule, but conceded the children's attendance should be voluntary. (TT493:2-7,22-24.) The court agreed and declined to set a schedule for future visitation – noting "the children may choose when, where, and for how long visitations should take place." (RA(3)25.) Against this backdrop, Chris's challenge to the court's denials of forced counseling and forced visitation are difficult to understand. The court's decisions were supported by South

Dakota law. *See Pieper v. Pieper*, 2013 S.D. 98, ¶¶ 15, 16, 841 N.W.2d 781, 786 (visitation can be limited or prohibited when the evidence establishes that exercise of visitation will be harmful to the children's welfare) (citations/quotations omitted). They were also overwhelmingly supported by the facts, and the opinions of Langenfeld and Zimbelman. And the court listened to the children and their preferences along the way. These children are bright young men who are now 18 and 16 years old and fully capable of explaining their father's mistreatment of them.

II. The court's inclusion of Chris's K-1 income in past and current child support calculations is supported by the evidence and law.

Chris's expert argued Chris's K-1 income should not be included in calculating Chris's past and current child support calculations because the income was not actually "received." (TT68:1-11.) South Dakota law directs Schedule E income "received" shall be included in a parent's monthly net income for purposes of calculating child support. SDCL §§ 25-7-6.3, 25-7-6.6. This Court has held if a parent can control a distribution, it is deemed constructively received for child support purposes. *Roberts v. Roberts*, 2003 S.D. 75, ¶ 21, 666 N.W.2d 477. "A shareholder may be considered to have control over and to have received retained company income if the shareholder has the ability to direct distributions." *Nace v. Nace*, 2008 S.D. 74, ¶ 8, 754 N.W.2d 820, 823. Minority status is not dispositive of the control issue. *Id*. at ¶ 9, 754 N.W.2d at 823.

The court appropriately considered the factors to determine whether Chris had control over the companies' distributions of business income: (1) comparison of the amount of retained income versus the parent/obligor's gross income and percent of ownership; (2) a history or pattern of past retained income; (3) the company's need to

retain income to "maintain or increase past or current levels of income production as opposed to unnecessary, premature, unrelated or overly aggressive expansion of business;" (4) whether the retained income is acquired from the current year's profits or out of past year(s)' savings; (5) comparison of the ordinary rate of return for a similar investment; (6) the ability to receive favorable or fictitious loans (constructive distributions) from the company; and (7) any other factor that bears on the issue of whether the obligor is manipulating his or her income in an effort to avoid the proper payment of child support. *Nace*, 2008 S.D. 74, ¶ 9, 754 N.W.2d at 823. The court analyzed these factors, heard the evidence presented, and found that Chris either wholly controls or has de facto control over: the Dunham Company; American Land Development Company ("ALDC"); Milestone; Hospitality Apartments; QAZ; and TQ. (RA(3)26-28.) The court found that "Chris has the discretion whether to make distributions, keep money in the entities as retained earnings, or make company investments." (RA(3)28.) Furthermore, the court found Chris did not provide any evidence of what entities he claims should be excluded or the amounts he requests excluded, which was his burden of proof to bear. (*Id*.) The court's inclusion of Chris's business income (and losses, to Chris's benefit) in the child support calculations was supported both by the law and evidence.

III. The court correctly concluded that Chris wholly failed to satisfy his burden of proof regarding his claimed in-kind child support payments.

Chris did not pay Susan child support from the time of separation until the court set child support in December 2018 – a period of more than *five* years. (TT684:22-685:21.) Chris showed up at trial, however, with an exhibit in which he claimed an offset

of $217,115 against his arrearages. (RA(2)1167-72.) There were many issues with Chris's claim as were detailed in Susan's trial testimony and post-trial brief. Chris now claims the amounts spent from the Fuller Sabers and Dakota Law buyouts, and amounts spent on entertainment and food for himself during his parenting time in 2018 should be credited to him.

As part of his offset claim, Chris argued he was entitled to credit in the amount of $115,018.50. (TT388:17-389:18,697:16-698:11.) That amount consisted *solely* of funds taken from Susan's bank accounts from separation through December 2018. (*Id.*) Chris offered no testimony or evidence about what the funds were used for, but, nevertheless, claimed since those amounts had gone through Susan's accounts, he should get dollar-for-dollar credit against his arrearages. After speaking with his attorney during trial, Chris clarified he was claiming an offset to all funds used from Susan's bank accounts from the time of separation until December 2018. (TT392:19-395:11.) However, as Susan testified and the court found, much of the proceeds from the Fuller Sabers and Dakota Law buyouts were spent by the parties *before* their separation. The much smaller amount that remained was spent, in good faith, on expenses for both Susan and the children. Child support comes from the obligor, not from the custodial mother's bank accounts.

Regarding occasional food and entertainment costs for the children during visitation since 2018 – another chunk of his offset claim – paying for the occasional meal and video-game-playing during visitation is not child support under SDCL § 25-7-6.1. The court rightly agreed. (RA(3)29-30 ("It [] strains credulity to conclude that minor expenditures for occasional lunches and entertainment while exercising visitation

constitute 'necessary maintenance, education, and support' of the children within the meaning of SDCL § 25-7-6.1.").) Moreover, Chris admitted his personal food and video-game-playing charges were included in his claimed offsets. (TT370:9-12,15-18,385:10-12.) Chris did not know which amounts were attributable to him personally or, conversely, to the children. (TT371:5-11.) He claimed that was for the court to decide. (TT371:5-11.) Chris bore the burden of proof on this issue and did not even begin to satisfy it.

Additionally, Chris claimed offsets for hotel expenses for rooms the children never stayed in. (TT385:22-386:15.) He claimed expenses incurred long before the parties' separation. (TT693:13-21;RA(2)1167-72 (payments from 12/8/12- 9/19/13).) He included his own travel expenses to the children's sports tournaments, despite not taking the children with him. Perhaps one of the most telling examples of the unsound methods behind Chris's calculation, however, was the swimming pool example. Chris claimed an item dated 1/23/2014 and titled "Support:Country Club" on his offset Exhibit 100. (TT378:21-23;RA(2)1167-72.) He claimed this was an amount spent by Susan and the children while swimming at the MCC outdoor pool. (*Id*.) The date for the charge was in January 2014. After realizing it was the middle of winter, Chris admitted he had no idea what the charge was for or why he was entitled to an offset for it. (TT378:23-379:7.)

The court listened to Chris's testimony, considered his offset, and correctly rejected it as unsound. (*See* RA(3)29-30 (Chris did not "show any verification of any claimed expenditure," and he "wholly failed to meet his burden to show entitlement to in-kind support contributions[.]").) The court also correctly distinguished the case on which

Chris relied, *State ex rel. Tegegne v. Andalo*, recognizing that in that case, the obligor introduced bank statements, sales receipts, and other documentation proving his support toward the children, specifically. (*Id*. (citing *Andalo*, 2015 S.D. 57, 866 N.W.2d 550).) Chris now claims the court's adverse ruling showed "bias" toward Susan. It did not; it showed a judge who understood the burden of proof and held Chris to the same.

IV. The upward deviation for the children's education expenses is supported by the law and evidence.

The children have attended private school since they were three years old and have attended Catholic schools for more than ten years. Susan and Chris were both dedicated to keeping the children in the Catholic school system – that is, until Chris changed his mind. Chris's membership at MCC has remained his number one priority, all to the detriment of his children.

Chris promised to fund the children's education following separation and did fund their education for that first year, consistent with his promise. (TT561:8-563:3;RA(2)1947-49.) Chris stopped that assistance, however, after hiring his first divorce attorney. (TT563:1-10.)

SDCL § 25-7-6.1 states the parents of a child are jointly obligated for the necessary education of a child in accordance with their respective needs. In determining whether to apply an upward deviation to provide for a child's needs, courts can consider "the effect of agreements between parents regarding extra forms of support for the direct benefit of the child." SDCL § 25-7-6.10. The court found Chris values and supports the children's private school education. (RA(3)30.) Considering the trial testimony and Chris's past payments of the children's school tuition, the court was within its discretion

in finding an agreement between Chris and Susan regarding paying for private school. Even without that finding, the court could order an upward deviation from the child support guidelines for each party to pay half of the children's education expenses. SDCL § 25-7-6.1. The children want to continue to attend O'Gorman High School, surrounded by the same friends with which they have spent the last decade. This consistency need not be destroyed, or the children's education disrupted, simply because their father wants to play more golf at the country club.

V. The 2001 Ford F-150 and 1969 Firebird were gifted to the parties during their marriage and are marital property.

The court's inclusion of the 2001 Ford F-150 and 1969 Firebird convertible as part of the marital estate was supported by the evidence. Chris's parents gifted these vehicles to the couple during their marriage. (TT734:24-735:19,868:24-869:12.) Susan proved she paid the registration, insurance, and maintenance on those vehicles. (TT869:1-7.) The 1969 Firebird convertible is even jointly titled in her name. (TT735:11-735:19,868:24-869:12;RA(2)5696.) The vehicles' inclusion was also supported by South Dakota law. *See Godfrey v. Godfrey*, 2005 S.D. 101, 705 N.W.2d 77 (reversing trial court's exclusion of gifted property from marital estate where property was gifted to both the husband and wife by husband's parents during marriage and wife contributed to the property's acquisition or maintenance). There was no abuse of discretion in including these vehicles in the marital estate.

VI. The court correctly granted Susan a premarital offset in the value of the Devitt Drive property.

The court's determination that Susan was entitled to a premarital offset of $78,804 in the Devitt Drive property was supported by South Dakota law. *See Scherer v.*

Scherer, 2015 S.D. 32, ¶ 7, 864 N.W.2d 490, 493 (recognizing that trial courts have discretion to exclude premarital assets from the marital estate). It was also supported by the evidence. Susan injected $9,341 from a premarital savings account, $1,289 from a premarital checking account, and $68,174 from the sale of her premarital home, into the purchase of the home at Devitt Drive. (TT515:8-516:18,721:17-723:12;RA(2)1514.) Chris did not dispute this testimony.

Chris now claims, however, he helped Susan finish out her basement (on Belmont Street) and is, therefore, somehow entitled to an offset for his labor. (Appellant's Brf, 26.) Chris did not argue he was entitled to credit in Susan's premarital home at trial or in his post-trial brief, so this argument is waived. *See, e.g.*, *Legrand v. Weber*, 2014 S.D. 71, ¶ 26, 855 N.W.2d 121, 129. Even if Chris assisted Susan in finishing the basement of her premarital home, the court was within its discretion to find that contribution to be de minimis, given only Susan's money was used to purchase the home and Chris lived in Susan's premarital home rent-free. Moreover, Chris has no need for support. The $78,804 premarital offset in the Devitt Drive home was proper and supported by the evidence.

VII. The court correctly treated QAZ as marital property.

Chris claims the court abused its discretion in failing to consider the 20% interest in Dunham Partnership ("DP") held in QAZ as his separate property. QAZ was an entity formed and owned by Chris and Susan. (RA(2)63.) The company was a holding company for various assets and businesses, including DP. (*Id.*) Chris never asked the court for a premarital offset for QAZ's interest in DP at trial or in his post-trial brief. He never presented the court with evidence supporting his claimed offset or any

corresponding value for it. Chris's expert testified, "QAZ, LLC is a limited liability company taxed as a partnership 50 percent owned by each party to the divorce, so as – in terms of the marital property, we're looking at a hundred percent of this QAZ." (TT37:3-6.) Later, Chris's expert again confirmed QAZ is "100 percent marital property." (TT37:20-22.) QAZ was always marital property – as both the court and Chris's expert found.

VIII. The court correctly placed a $0 value on Susan's checking account.

The court heard ample testimony about how Susan's checking account is drained every month and is either at a zero or negative balance by the time her next paycheck clears. (TT725:21-727:4.) Susan testified she is now carrying credit card debt for the first time in her life and living at a monthly deficit. (TT717:4-9.) All of this makes sense given Chris refused to pay child support for more than five years while Susan singlehandedly paid for all of the children's expenses. Susan brought her check register to the witness stand with her, and offered Chris and his counsel the opportunity to examine it. (TT734:3-7;TT863:10-23.) They did not take her up on that offer. The court specifically found Susan's testimony credible and placed a $0 value on the account, which was both appropriate and within its discretion.

IX. The 2008 GMC Yukon is non-marital property.

Chris claims error in the court's failure to value the 2008 GMC Yukon as marital property. The car belongs to Q.S.D. and was purchased entirely with funds from Susan's personal injury settlement. (TT737:18-738:6.) Chris did not dispute either fact at trial, nor did he ask that Z.S.D.'s car (the Buick) be part of the marital estate. There was no

error. *See Green v. Green*, 2019 S.D. 5, ¶ 22, 922 N.W.2d 283, 290 ("The court has broad discretion in classifying property as marital or nonmarital.").

X. The court correctly granted Susan an offset for post-separation growth in her South Dakota Retirement System accounts.

At trial, Susan sought a post-separation interest of $149,308 in her South Dakota Retirement System ("SDRS") account and a post-separation interest of $3,966 in her Supplemental SDRS Account, reflecting the accounts' increase in value from the separation forward. (RA(2)1574;TT731:17-733:16.)

The parties were separated during the growth of these accounts. (TT525:1-7;RA(2)1376-81,1574.) Their value increased solely through Susan's efforts while employed as a judge. Chris did not contribute to the value of these retirement accounts in any way. It was within the court's discretion to grant Susan an offset for this after finding that Chris made no contributions to the same and had no need for support. *See Muenster v. Muenster*, 2009 S.D. 23, ¶ 17, 764 N.W.2d 712, 717 (recognizing that trial courts can set property aside as non-marital property when one spouse has made no or de minimis contributions to the acquisition of maintenance of the item of property and has no need for support).

XI. The court properly considered the amounts of the life insurance funds that were injected into Milestone Consulting and Construction Company and American Land Development Company as marital property.

Chris received $322,000 of life insurance proceeds when he and Susan still lived together as husband and wife, with shared expenses and a shared life. (TT349:3-350:7;TT746:15-747:2.) Opening a bank account to hide money from a spouse does not transform the money into separate property, nor should it be encouraged. Chris argues

the life insurance proceeds were an "inheritance." Life insurance proceeds are not inheritance. *See In re: Cline's Estate*, 132 Mont. 328, 332-33 (1957) (recognizing that courts have uniformly held that life insurance is not subject to inheritance tax because proceeds are acquired by virtue of contract and do not pass through a decedent's estate); *see also In re: Succession of Halligan*, 887 So. 2d 109, 113 (La. App. 1 Cir. 2004). And they were received long before the parties' separation. Nevertheless, and contrary to Chris's argument to this Court, the court placed no value on the life insurance proceeds. Rather, the court considered the $82,000 injected into Milestone and the $141,000 injected into ALDC part of the marital estate because it found Susan's contributions to Chris's business entities were "substantial[]" and "more than de minimis" and Susan *has* a need for support. (*See Muenster*, 2009 S.D. 23, ¶ 17, 764 N.W.2d at 717 (courts can set aside property as non-marital *only when* the other party has made no or de minimis contributions to the property and has no need for support); *see also* RA(3)23-54,523 (finding that the property awarded to Chris includes numerous income-producing assets and the property awarded to Susan includes no income-producing assets).) In fact, the court received overwhelming evidence showing Susan paid the household expenses during the parties' marriage, in addition to taking care of the children and tending to the household, so Chris could focus on pursuing his business opportunities. (TT506:1-15,508:12-511:6,680:24-684:8.) The court also heard about Susan's work for Chris's businesses and free legal representation of them. (TT680:4-23.) Chris did not dispute Susan's testimony, and the court found it to be credible. It was well within the court's discretion to consider the $82,000 and the $141,000 injected into Milestone and ALDC as part of the marital estate.

XII. Chris is a 100% owner of Milestone.

Chris claims he owns one-half of Milestone. But in every year since Milestone's formation, Chris has sworn in his tax returns, signed under penalty of perjury, to be its sole owner. That includes all the time from 2014 forward, when Chris claims to have formed an invisible partnership with his mother. (*See, e.g.*, RA(2)4315,4322 (2018 return); RA(2)4269,4276 (2017 return); RA(2)4224,4231 (2016 return); RA(2)4192,4198 (2015 return); RA(2)4164,4170 (2014 return).) This argument is nothing more than another fraud perpetrated by Chris to reduce the size of the marital estate.

Before Chris retained his present attorney, he answered discovery responses in October 2016 stating: "I have a 100% interest in Milestone[]." (RA(2)5698(f).) Chris signed these discovery responses under oath two years *after* the so-called "constructive partnership" with his mother began. (RA(2)5697-99.) Chris's 2014, 2015, and 2016 Personal Financial Statements also make no mention of this so-called "constructive partnership" and show Chris as a 100% owner of Milestone. (RA(2)2037,2041,2046.) Susan's expert, John Mitchell, testified he had never heard of a "constructive partnership" as it pertains to business valuations and assumed it was a term manufactured by Chris to shield half of Milestone from division. (TT625:7-626:5.) In turn, the court relied on this indisputable, unbiased evidence in finding Chris a 100% owner of Milestone.

Chris also claims the court committed reversible error in failing to reduce the value of Milestone by the $40,907 in rent payments allegedly owed by him to Milestone. Despite the fact Milestone owns no property other than homes it builds and sells, Milestone "bought" the home where Chris now lives. It bought the home during the Divorce Action, presumably so that Chris could avoid the Temporary Restraining Order.

Chris is, and was, the sole owner of Milestone, and is now allegedly *years*-delinquent on paying rent. With this, the court reasonably found the $40,907 "will very likely never be paid" and refused to treat it as an offset. (RA(3)38-39.) Additionally, the $40,907 Chris claims he owes to Milestone in outstanding rent would be an account receivable to Milestone and would *increase* Milestone's value, not decrease it.

XIII. The court correctly determined that the buyout funds from Dakota Law and Fuller Sabers were spent in good faith long before trial and appropriately excluded from the marital estate.

Susan testified that after a large tax liability of $73,000 (a direct result of the buyout), the purchase of a jet-ski and two four-wheelers for the children, and contributions to the children's college accounts, there was only approximately $124,000 left in the account which held the Dakota Law buyout funds at the time of the parties' separation. (TT752:19-753:8.) She clarified that not all of that sum was attributable to the Dakota Law buyout. (*Id*.) Susan drew down those funds to support herself and the children over the next several years; by January 2017, the funds were gone and the account closed. (TT753:6-8.) Similarly, the account that held the Fuller Sabers buyout funds was drawn down and closed by 2018. (TT753:9-14.) The court found these funds no longer existed at the time of trial and were spent by Susan in good faith, appropriately excluding them from the marital estate. (RA(3)37; *Anderson v. Anderson*, 2015 S.D. 28, ¶ 12, 864 N.W.2d 10, 16 (affirming the trial court's exclusion from the marital estate money that no longer existed at the time of trial).)

XIV. The court did not err in referencing Chris's interest in the Trust when discussing his post-trial financial condition and ability to pay the property equalization payment.

Chris is a beneficiary of the Trust that is worth millions of dollars and which was funded a mere two weeks after the divorce trial ended. Eide Bailly valued the Estate at $4,225,473.49 as of December 31, 2018. (RA(2)4362.) When the Estate closed, the full value of the Estate poured over into the Trust. The Trust instrument itself confirms Chris has the sole authority to appoint and remove Trustees at any time, for any reason. (*See* RA(2)4487,4(B) ("Christopher A. Dunham may appoint a Trustee and may remove and replace a Trustee at any time.").) Chris agreed under oath he has influence over the Trustee because he can fire the Trustee at any time. (TT342:25-344:6.) He also confirmed he can replace the Trustee if he does not like the Trustee's decisions. (*Id*.) In other words, the Trust is Chris's personal piggy bank, and the court committed no abuse of discretion in referencing Chris's future access to the Trust funds when addressing his financial condition after the divorce.

It was not reversible error for the court to make this reference when addressing Chris's ability to pay the property equalization. Chris can afford the property equalization amount even without the Trust funds because he was awarded *all* of the parties' income-producing property and other marital assets – at valuations exceeding $1.2 million combined and a total net value of $1,199,979[1] compared to the total net value of the property awarded to Susan of $674,269. If Chris declines to tap into the millions of dollars in Trust funds at his disposal, that is his prerogative. He can simply

[1] (RA(3)33-37.)

sell one of his many buildings and pay the equalization payment in that manner. The court did not create reversible error by simply mentioning a possible payment source when the underlying properties awarded to Chris, alone, were more than enough to support that payment. This is how the court arrived at the property equalization payment of $262,905 in the first place. Chris was awarded significantly more property than Susan, and now needs to pay for it.

XV. The court's award of attorneys' fees was within its discretion, but should have been larger given Chris's delay tactics, withholding of relevant information, and gamesmanship.

Courts have broad discretion in awarding attorneys' fees. *Palmer v. Palmer*, 316 N.W.2d 631 (S.D. 1982). Susan was forced to incur over $200,000 of attorneys' fees and expenses, in large part as a result of Chris's conduct, frivolous filings, and repeated violations of court orders. (RA(2)4410-51;RA(3)40.) And that was just the amount incurred *before* trial. The court found both Susan's testimony and the affidavit of counsel to be credible, and was within its discretion in awarding Susan attorneys' fees. (RA(3)40.) The attorneys' fees award should have been much higher under the circumstances, as addressed more fully in Susan's argument below.

XVI. The court's order that the parties exchange tax returns every year until Z.S.D. is no longer eligible for child support was within its discretion.

Z.S.D., the younger of the two children, is now 16, so it bears mention that this issue is a rather time-limited one. The court was presented with evidence showing Chris's income changes from year to year. And despite trial occurring in August 2020, the court still did not have Chris's 2019 tax returns to work with, meaning that its child support computation was outdated even before it was completed. Finally, the court was

faced with a father who "resent[ed]" paying child support and who, even now on appeal, argues he should pay less. That is the context in which the court ordered the annual exchange – in an effort to ensure accurate support for the children moving forward.

The annual exchange benefits both parties, although it was Susan that requested it. Chris now argues the order violates his right to privacy. He has no right to privacy in his tax returns when child support is involved and, even if he did, it would clearly be of lesser importance than the children's right to support from their father. SDCL §§ 25-7-6.1, 25-7-6.3.

NOTICE OF REVIEW ARGUMENT

I. The court committed reversible error in failing to value American Land Development Company's 92% interest in Tatar Quincey, Chris's 20% interest in Dunham Equity Management, and Chris's 40% interest in Dunham Partnership, all of which Chris transferred in to the Estate; and it abused its discretion in failing to consider these assets marital property.

The evidence at trial established, and the court in its Decision found, ALDC purchased the entirety of TQ and injected 92% of its interest in TQ *into* the Estate, in a transfer "undoubtedly engineered by Chris" in violation of the restraining order, years *after* the death of Don Dunham, and during this action. (TT362:5-7,328:18-22;RA(3)37.) When questioned by the court, Chris admitted he made the decision to transfer the TQ asset *into* the Estate. (TT362:19-23.) Specifically, the following exchange occurred between the court and Chris:

THE COURT:	Whose decision was that on behalf of the estate?
CHRIS:	It was the – it was the personal representative and – and counsel.
THE COURT:	You.

CHRIS: Me, yep.

(TT362:19-23.) Interestingly, this was the first time Chris made that admission. Susan's counsel asked that same question in several forms, both in Chris's pre-trial deposition and at trial, but Chris refused to answer it until the court itself posed the question.

Chris's injection of 92% of TQ into the Estate was an attempt to insulate it from the reach of the court and Susan. The court's error is clear. After first treating ALDC as marital property subject to division and finding Chris transferred ALDC's 92% interest of TQ into the Estate in violation of the restraining order, the court refused to value that same 92% interest. The court concluded, "Chris's motivation in transferring TQ into the estate is an open question," (*Id.*) but then went on to make an assumption that was wholly unsupported by any evidence – stating "one *possibility*" for Chris's motivation in making the transfer was "that the other assets of the estate could serve as collateral to facilitate the loan to purchase the asset." (*Id.*) Chris offered no evidence of that possibility, nor is there any evidence to support any such finding. Regardless of the motivation behind the transfer, it is undisputed that the transfer occurred at Chris's direction. There is no support in the law for the court's failure to value that asset. *See Endres*, 532 N.W.2d at 68 (recognizing trial courts are required to place a value on all property held by parties before making an equitable distribution, and failure to do so is reversible error). There is also no legal support for the ensuing failure to treat it as part of the marital estate. *See Grode v. Grode*, 1996 S.D. 15, ¶ 27, 543 N.W.2d 795, 802 ("[T]he omission of assets which should properly be included as marital property is an abuse of discretion."). A contrary decision allows spouses to flaunt the court's restraining orders and hide millions of dollars of assets during divorce actions.

If ALDC is marital property, then the *entirety* of ALDC is marital property. To value only ALDC's 8% interest in TQ, and not the other 92% interest that was moved by Chris during the underlying action, is an abuse of discretion and reversible error. The transfer was made in bad faith and amounts to fraud against Susan and the court.

Susan asked the court to value the Estate or Trust as marital property for this very reason – Chris wrongly injected marital property *into* the Estate, and, in turn, the Trust. Even if this Court holds the Estate and Trust should not be valued as marital assets, then, at a minimum, this Court should reverse and remand for the full value of TQ to be included in the marital estate. TQ was *never* an Estate asset. Indeed, it was created *years* after Don's death. (TT269:19-22;TT328:18-22.) A wrongful transfer of marital assets *into* an estate does not make them estate assets or shield them from division in a pending divorce action. *All* of TQ should be valued as a marital asset based on these facts.

ALDC's 92% interest in TQ is not the only property the court failed to value, and it is not the only marital asset Chris injected into the Estate to hide from division. Evidence from Chris's own trial exhibits establishes he personally bought out his half-brothers' 20% interests in Dunham Equity Management ("DEM") and 40% interests in DP, and then transferred those *into* the Estate, as well. (*See* RA(1)4485-86 ("6/1/2016 Chris purchases brothers' interest in [DEM] ($20,000 x 2)=20% and transfers to estate" and "6/1/2016 Chris purchases brothers' interest in [DP] ($310,785 x 2)=40% and transfers to Estate"); *see also* RA(1)4407 (establishing Chris bought out his brothers' interests in DP and DEM in 2016 and which interests were transferred *into* the Estate).) These transactions were completed three years after Don Dunham's death, while the parties were still married. Chris used marital funds to buy out his half-brother's interests

so he could have a larger share of those companies and be the sole beneficiary of the Estate, and then hid the purchases by transferring them *into* the Estate. And, so far, he has gotten away with it. The court incorrectly assumed the transactions regarding Chris's purchases of interests in DEM and DP for a total of $661,570 using personal, marital assets were the same transaction as the Estate redeeming Chris's brothers' interests in the Estate for a combined total of $3 million over time from May 2016 to July 2017 using Estate assets. (RA(3)37.) Those transactions are not the same. One transaction involves Chris's purchases of business interests using personal, marital assets; the other involves the redemption of his brothers' interests in the Estate over time using Estate assets.

Susan and Chris owned 20% of DP through QAZ. Chris then purchased his half-brother's 40% interests in DP and 20% interests in DEM using marital funds, and transferred them into the Estate. Yet, only the parties' 20% ownership of DP was valued by the court as marital property. The additional 40% ownership in DP and 20% ownership in DEM should have also been valued as marital property. The court committed reversible error in failing to value this property and abused its discretion in failing to include these assets in the marital estate.

Susan attempted for years to obtain discovery regarding the marital assets Chris was hiding in the Estate. The Estate remained open until just a couple of weeks after trial. (RA(2)5652.) This is no coincidence. Chris transferred these assets *into* the Estate during this action and, once trial was completed, is believed to have transferred them *out of* the Estate before the Estate was closed and the Trust funded. Susan was entitled to this discovery for use at trial. Despite repeated court orders that she be given this information, Chris never produced it.

II. A 50/50 division of the marital estate was inequitable under the facts of this case.

Susan supported Chris personally and professionally throughout their marriage, including paying for the MCC membership, Chris's cars, most of his credit card expenses, and nearly all of the household expenses. She also cleaned and decorated the homes Chris built, and represented his companies in legal transactions and trial. She worked hard and paid for nearly everything, while Chris golfed and claimed to be building companies to support the family.

Susan left one successful law practice to start another. When she signed on to a much smaller state salary as a judge, Chris hid assets as quickly as he could. He now claims companies that did not even exist when his father was alive were somehow gifts from his father and appropriately hidden within the Estate. Divorces are supposed to be based on equity, and there is nothing equitable about a 50/50 split of marital assets on these facts – especially when the "marital" property has been artificially minimized by sleight of hand. Susan is the sole reason this family achieved and maintained their lifestyle, and the property division should rightly acknowledge that fact.

The court found Susan's testimony credible in every single instance, and repeatedly found Chris's testimony to not be credible. Moreover, the court found, "Susan contributed the lion's share of household and living expenses," (RA(3)32) and, "Susan paid all the house mortgage and interest payments both pre and post separation." (RA(3)24.) Susan was the party who contributed constantly and nearly exclusively to the accumulation of the parties' assets. That factor overwhelmingly weighs in favor of a property division greater than 50% for Susan. *See Halbersma v. Halbersma*, 2009 S.D.

98, ¶ 11, 775 N.W.2d 210, 215 (a party's contribution to accumulated property is a factor in determining equitable division of property). Other factors for equitable division of marital property include the parties' assets' ability to produce income and the financial condition of the parties after the divorce. *Id*. These factors, too, weigh overwhelmingly in Susan's favor.

The court stated that Chris received "most" of the income-producing assets – but he actually received *all* of those assets. He now personally owns several office buildings, storage units, a residential property, several holding companies, and many other business entities. Susan has her state salary and her home, with the accompanying mortgage debt. Chris's ability to earn a sizable salary and income is much greater than Susan's. On top of that, he gets additional investment properties and companies to do with as he pleases, and is presently benefitting from contemptuous behavior that made valuation and division of the marital assets impossible. *See Taylor v. Taylor*, 2019 S.D. 27, 928 N.W.2d 458 (recognizing a party's lack of candor and cooperation can be considered when equitably dividing property and upholding a trial court's unequal division of property in favor of the wife when the husband withheld information necessary to value and divide assets). The court's 50/50 division of marital property was an inequitable abuse of discretion based on these facts.

III. Susan was entitled to a divorce on the grounds of extreme cruelty.

The court was presented with overwhelming evidence of Chris's anger issues, emotional and physical abuse of the children, and emotional abuse of Susan over the years. Its failure to grant Susan a divorce from Chris on the grounds of extreme cruelty was an abuse of discretion. *See* SDCL § 25-4-4; *Osman v. Keating-Osman*, 521 N.W.2d

655, 658 (S.D. 1994) (affirming the trial court's finding of cruelty under far less egregious facts than those present here). The man who beat his children and "resent[ed]" being asked to pay child support five years after separation is unfortunately the same man to whom Susan was married. She was expected to do all of the work and earn all of the money, while Chris golfed and did as he pleased. Huge business transactions like the purchase of a company for $1.5 million were hidden from her, as were hundreds of thousands of dollars in cash. And all the while, Susan tried to protect her children and keep them safe. Susan is entitled to a divorce on the grounds of extreme cruelty.

IV. The court abused its discretion in failing to award Susan more than $50,000 in attorneys' fees.

Throughout this action, *thirty-four* motions were filed with the court. Half of those motions pertained to Chris's unreasonable prolonging of the divorce action and included: Chris's *seven* motions to reconsider the court's ruling on issues such as forced counseling, forced mediation, and resisting production of the Estate and Trust documents (RA(1)243-57,555-60,2182-84,2868-70,3590-3645,3014-16,3646-63); *three* lengthy motions to compel regarding Chris's refusals to produce relevant and discoverable evidence (RA(1)2191-92,3031-33,3946-48) and *five* motions to continue trial resulting from the same (RA(1)2322-23,3028-30,3877-79,4104-06,4193-95); and *two* motions for orders to show cause as to Chris's continued violations of court orders and attempts to withhold relevant and discoverable information (RA(1)2831-33,397-99). In addition to these seventeen motions, the *entirety* of the pleadings Susan filed in the Estate action stemmed from Chris's refusals to produce relevant discovery, even after the court ordered that they be produced. Susan's attorneys' fees were listed at $205,224.24 before trial in

this matter. (RA(2)4410-51.) More than half of those fees resulted from Chris's unreasonable tactics. In addition, several days of trial were spent responding to and rebutting Chris's claims that the court found meritless.

The court found:

> Chris unreasonably prolonged the divorce by his actions. He continuously resisted discovery requests and intentionally entered into financial transactions in violation of the Temporary Restraining Order, which resulted in at least one hearing and sowed seeds of suspicion and distrust of his actions and motives. He also unreasonably withheld discovery concerning the Donald Dunham Estate, which resulted in Susan having to file discovery motions both in this Court and the Estate Court. Chris resisted discovery of estate assets from the start, contending that discovery of any estate asset for any purpose is prohibited by operation of SDCL § 55-1-30, even though that statute relates to trusts.

(RA(3)40.) Given all of this, an attorneys' fee award of $50,000 is a reversible abuse of discretion.

Dated: November 22, 2021.

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CERTIFICATE OF SERVICE

I certify that on November 22, 2021, I e-filed with the South Dakota Supreme Court Clerk and served via electronic mail, a true and correct copy of Appellee's Brief and Appendix, on:

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/s/ William Fuller
One of the Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Office Word 2013 and contains 9,922 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this Certificate.

/s/ William Fuller
One of the Attorneys for Appellee

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29558
NOTICE OF REVIEW NO. 29582

CHRISTOPHER ALAN DUNHAM,

Plaintiff and Appellant,

v.

SUSAN MICHELLE SABERS,

Defendant and Appellee.

Appeal from the First Judicial Circuit
Union County, South Dakota
The Honorable Rodney J. Steele, Retired Circuit Court Judge

APPELLANT'S REPLY BRIEF AND REPLY BRIEF APPENDIX

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Citations and references in this Reply Brief will be consistent with those made in the Appellant's initial brief filed on July 13, 2021.

REPLY TO APPELLEE'S STATEMENT OF THE ISSUES

The Appellee renumbered and restated several issues found in Appellant's Brief. Appellant's Issue VIII was split into VIII, IX and X; Appellant's Issue XI was split into XI and XII; and Appellant's Issue X was referred to as Issue XIII.

REPLY TO APPELLEE'S STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. Reply to Appellee's Statement of the Case.

Susan took great liberties in her Statement of the Case by misstating the record, embellishing the record and citing incorrect page numbers. For instance, there was no finding that Chris was emotionally abusive to Susan.

B. Reply to Appellee's Statement of the Facts.

Susan's brief complained mightily regarding the living situation that she enjoyed and condoned for fifteen years.[1] To suggest that Chris paid for absolutely none of the marital bills and living expenses is ridiculous. Susan's statements smack of reverse sexism. No one would ridicule a male attorney's wife for taking care of the children and trying to maintain a family business.

On page 11 of Susan's brief, she referred to funds received beginning in 2013 and stated, "All of the buyout related funds had been gone for several years before the divorce trial began".[2] On page 12 of her Brief, Susan noted that Chris received $322,603 in life

[1] 1998 (cohabitation) to 2013 (separation). (R.p. 4638; 4994)
[2] Susan received $303,080.22 in buyouts from her law firm and Dakota Law due to her appointment as a judge in January, 2013. (R.pp. 5010; 5012)

insurance proceeds from his father, who died in 2013. Susan argued that the buyout funds that she dissipated should be overlooked, but that she was fully entitled to the life insurance proceeds that were received at the same time by Chris and invested into Chris's business ventures.[3] This argument is illogical and inequitable.

On page 12 of her Brief, Susan stated that she "asked" Chris to transfer to her the title to the house, various vehicles, and a joint savings account. The truth was that Susan, in anger, demanded that Chris sign over the above assets and that he move out immediately. (R.pp. 4778; 4633). This, among other things, was consistent with the Court's finding that Susan was controlling. (Court's Memorandum Decision, p.17).

REPLY TO APPELLEE'S ARGUMENTS

Reply to Appellee's Argument I: Parenting Plan

Susan argued that the Court's decisions denying family counseling and restricting visitation were in the best interest of the boys. Susan relied heavily on a cursory opinion authored by Stephen Langerfeld. Susan's Brief is filled with accusations of Chris' alleged child abuse, yet the South Dakota Department of Social Services did not make any such finding when it reviewed this situation. Sadly, Susan's exaggerated and theatrical testimony robbed Chris of valuable time with the boys. Q.S.D. is now 18, so this issue is moot. Z.S.D. and Chris have now reunited, but they can never recapture the precious time they lost together.

[3] Chris invested the life insurance proceeds into Milestone and ALDC. (R.pp. 4759; 4761; 13)

Reply to Appellee's Argument II: K-1 Income

Susan argued that, "Chris did not provide any evidence of what entities he claims should be excluded or the amounts he requests to be excluded, which was his burden of proof to bear". This is not accurate. Chris' expert, Mike Snyder, spent several hours explaining, among other things, that K-1 income shown on either party's tax return should not be included as income for child support purposes. Full discussion ensued regarding Chris' K-1 distributions from The Dunham Company; QAZ, LLC; Pollyanna's, Inc.; Milestone and ALDC from 2013 to 2018.

The parties agree that the distributions from The Dunham Company should be included. Susan is correct that Schedule E income "received" should be included as monthly net income for child support purposes per SDCL § 25-7-6.3 and § 25-7-6.6. That is exactly why, for instance, it was error to include Chris' 2015 K-1 income of $100,952 when he only received $4,329 in his pocket. He didn't receive it. It shouldn't be included.

The Court abused its discretion by including Chris' K-1 income to calculate retroactive and current child support calculations.

Reply to Appellee's Argument III: In-Kind Child Support

A.

Susan admitted to depleting 100% of the buyout funds from her law partnership ($91,980) and the law building ($216,410) which were all marital funds. Susan admitted these funds were used to pay for the boys' private education and monthly expenses. (R.p. 4292). Despite depleting these marital funds, Susan wants to give no credit to Chris for

half of them, she wants him to pay retroactive support and she further wants pre-judgment interest. Chris should receive credit for half of the marital funds dissipated by Susan.

B.

Chris was told by the Court that he could not have home visits with the boys unless they were supervised. This requirement was degrading and forced Chris to conduct his parenting time in public, which became very expensive. Per the Court's direction, Chris created Exhibit 100 which outlined over $217,115.00 spent on the boys prior to child support being ordered.[4] Chris should get some credit for his in-kind child support contributions.

Reply to Appellee's Argument IV: Parochial School Tuition.

Susan argued that the upward deviation for the children's parochial school tuition was justified, yet there was no specific finding concerning deviation supporting this award. Parochial school tuition is a luxury item and not a necessary education expense per SDCL § 25-7-6.10. It was error for the Court to award Susan half of all parochial school tuition paid since 2013 and half of all future tuition payments, plus interest.

Reply to Appellee's Argument V: F-150 and Firebird.

Susan argued that the Ford F-150 and the Firebird were gifted to the parties during the marriage and boasts that the title to the Firebird is titled jointly in her name. Chris provided testimony that he drove the Firebird in high school, and this was

[4] See, Exhibit 100, p. 6. (R.p. 1167)

corroborated by Troy Stanges. This was a special gift from Don Dunham, Jr. to Chris when he was in high school. Chris received his father's Ford F-150 after his father died. It was a work truck that was used by The Dunham Company. The Ford F-150 ($2,025 value) and the Firebird ($18,000 value) should not have been included as marital property.

Reply to Appellee's Argument VI: Devitt Drive Offset.

Susan argued that the Court was justified in granting her a $78,804 premarital offset from the marital home on Devitt Drive. $68,174 of that offset was from the sale of the Belmont Street home. The Court disregarded the fact that Susan lived on Belmont Street for only one (1) year before Chris moved in during 1998. (R.pp. 4624, 380-5381). They married in 2002. The Belmont Street was their joint residence from 1998 until 2004. Chris made repairs to this house, he worked, he contributed to family living expenses, and he took care of the boys while Susan focused on her legal career.

South Dakota cases routinely give credit to spouses for contributing to the household, even if they are not the primary breadwinners. *Muenster v. Muenster*, 2009 S.D. 23, ¶21, 764 N.W.2d 712, 718 ("…this Court has repeatedly concluded, the duties of mother and homemaker 'constitute a valuable contribution to marital property.`"). The $68,174 offset for the sale of the Belmont Street home should be reversed.

Reply to Appellee's Argument VII: 20% Interest in Dunham Partnership/QAZ.

Susan misinterprets Chris' argument regarding QAZ, and she complicated the issues by splitting them up. Chris' argument has been that if Susan received a premarital

offset for the sale of the Belmont Street home, he should receive similar treatment for his 20% interest in the Dunham Partnership gifted to him in 1989 (pre-marriage).The last investment in the Dunham Partnership was made by Donald Dunham, Jr. in 2003. (R.pp. 4752-4755). Susan had zero involvement in the Dunham Partnership valued at $260,000. The Court applied two different standards to Susan and Chris, and the 20% interest in the Dunham Partnership transferred into QAZ should not have been considered marital property.

Reply to Appellee's Argument VIII, IX and X: Valuation of Personal Property.

The Court heard Susan's testimony about her Wells Fargo account, but received no proof. Exhibit 145 showed a $5,152.22 balance in Susan's Wells Fargo account. (R.p. 4295). The Court accepted Susan's testimony of a zero balance with no documentary evidence. It was not Chris' job to prove her case.

The 2008 GMC Yukon was purchased by the parties during the marriage and the Blue Book value was $8,025. The Court chose to award this asset to Q.S.D. and assign it zero marital value. Chris did not ask that Z.S.D.'s car be considered a marital asset because it was a gift to Z.S.D. from his beloved maternal grandfather.

The setting aside of Susan's post-separation interest in her SDRS account ($149,308) and her Supplemental SDRS account ($4,181) was one of the most egregious errors made by the Court. Susan chose to leave her lucrative private practice and take a lower paying judicial position. Her SDRS contributions were mandatory, which further reduced the family's gross income. Chris made significant contributions that allowed Susan to obtain her position as a judge. "With regard to the timing of a property

valuation, the general rule is that the date of the granting of the divorce is the proper time for determining the value of the marital estate." *Geraets v. Geraets*, SD 1996 119, ¶8, 554 N.W.2d 198.

The Wells Fargo bank account should have been valued at $5,152.22, the $8,025 GMC Yukon should have been considered a marital asset and the $153,489 of post-separation SDRS growth should also have been considered a marital asset.

Reply to Appellee's Arguments XI: Life Insurance Proceeds.

Susan argued that her SDRS growth of $153,489 should be set aside to her, yet Chris' request for offsets related to his father's life insurance proceeds should be completely denied. Chris traced the life insurance proceeds of $82,000 invested into Milestone and the $141,000 invested into ALDC, yet the Court refused to set them aside. Susan made no contributions to these life insurance proceeds and had no need for support, and they should not have been considered marital assets. *Muenster v. Muenster*, 2009 S.D. 23, ¶17, 764 N.W.2d 712, 717. ("Only in the case where one spouse has made no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support, should a court set it aside as non-marital property."). The parties should be treated equally, and the life insurance proceeds should not be considered marital property. Equity demands that both parties be treated with consistency and fairness, and that simply did not happen in this situation.

Reply to Appellee's Argument XII: Milestone.

Susan refused to acknowledge the fact that Milestone is owned 50% by Chris and 50% by his mother. The 50/50 ownership was supported by Chris' expert and the Ownership Statement (Exhibit 44). (R.p. 4575; 13). This was a constructive partnership, and was confirmed by Karen Dunham's testimony.

Susan stated that it was correct to ignore the $40,907 rent payable to Milestone. This debt was an outstanding mortgage and, no matter what percentage of ownership was assigned, it should have been subtracted from the value assigned to Milestone.

The Court should have considered Chris the 50% owner of Milestone and it should have deducted the $40,907 debt from Milestone's value.

Reply to Appellee's Argument XIII: Exclusion of Buyout Monies.

Susan and Chris received $308,390 from the sale of Susan's law practice and the law building. Susan admitted that she spent the funds on herself and the boys, and expected the dissipated marital funds to be ignored by the Court. Chris is asking that the funds be accounted for somewhere – either as an asset awarded to Susan or by crediting half of the funds towards Chris' retroactive/future child support obligation. This was Chris' money also. Susan forced Chris off of the account where the funds were deposited, and then spent the funds. There must be consideration of the $308,390 in depleted funds.

Reply to Appellee's Argument XIV: Consideration of Chris's Discretionary Interest.

Susan described the Trust as being "worth millions of dollars" and claimed that the Trust "is Chris' personal piggy bank". The Trust's value was unknown due to the nature of its liabilities and the inability to know when those significant liabilities would be resolved. It will be up to the corporate Trustee, Trident Trust, to determine in the future whether Chris will receive a distribution.

The approach taken by Susan and the Court was contrary to the expert testimony of Professor Simmons. The Court's speculation, along with the mandate for Chris to pay all judgments "immediately", will cause great financial harm to Chris. Chris does not have liquid funds to pay the judgment immediately and cannot use the Trust like a "piggy bank" to obtain funds. A close review of the spreadsheet attached to the Judgment shows that less than $900 in cash was available to Chris. The Court should have considered this lack of liquidity and ordered a structured payment plan over a period of years with interest. The Court should have ordered a structured payment plan similar to that granted in almost every South Dakota farm divorce, where there may be significant assets, but those assets are not liquid. There was no cash or asset available for immediate payment to Susan. SDCL ' 55-1-30 states "Neither a distribution interest nor a remainder interest are relevant in the equitable division of marital property." In a recent South Dakota Supreme Court case involving child support, the Court opined as follows:

> "Our Legislature has placed formidable barriers between creditor claims and trust funds protected by a spendthrift provision. See SDCL ' 55-1-41 ("If the trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level."); SDCL ' 55-1-35 ("No trustee is liable to any creditor for paying the expenses of a spendthrift trust."). More to the point, the Legislature has emphatically rejected even the specter of an argument that would allow a child support creditor to reach trust funds protected

> by a spendthrift provision." *In the Matter of the Cleopatra Cameron Gift Trust*, 2019 S.D. 35, ¶26, 931 N.W.2d 244, 251.

Any future distributions from the Trust were not Chris' assets in existence at the time of trial, when the marital estate was valued and divided. "In divorce proceedings, the date of valuation of the marital estate is generally the date of the granting of the divorce.". *Duran v. Duran*, 2003 S.D. 15, ¶12, 657 N.W.2d 692, 697.

SDCL ' 55-1-30 is a simple and clear directive to the court. Our Supreme Court has often held "that we determine the intent of a statute from what the legislature said, rather than what we think it should have said, and we confine ourselves in making this determination to the language used by the legislature." *M.B. v. Konenkamp*, 523 N.W.2d 94, 97 (S.D. 1994). SDCL 55-1-30 simply provides that the beneficiary interests are not relevant to the equitable division of the marital estate, and this court should not strain to find a way around the statute just to appease Susan's greed.

The Court should not have considered Chris' discretionary interest in the Trust in determining Chris' financial condition and a long-term payment plan should have been implemented for Chris to pay the judgment to Susan.

Reply to Appellee's Argument XV: Award of Attorney Fees to Susan.

The Court's award of $50,000 in attorney fees to Susan was previously addressed in Appellant's Brief (p. 37) and will be further addressed in response to Appellee's Issue IV. Susan's behaviors and excessive discovery tactics caused Chris to incur significant attorney fees of his own.

Reply to Appellee's Argument XVI: Mandatory Exchange of Tax Returns.

Susan could cite no South Dakota case law regarding a mandatory exchange of tax returns because there is none. This Judgment set Chris and Susan up for years of post-decree litigation. Neither party requested this relief at trial, and it violates the privacy of Chris and his business partners. This requirement is not in accord with South Dakota's child support statutes and will set a dangerous precedent. The requirement for a yearly exchange of tax returns should be stricken.

CROSS APPEAL STATEMENT OF THE ISSUES

I. Whether the court erred in failing to value all of the parties' property and abused its discretion in failing to treat marital assets injected into the Estate as marital property.

The Court correctly determined that the Donald A. Dunham, Jr. Estate was not marital property.

- *Billion v. Billion*, 1996 S.D. 101, 553 N.W.2d 226
- *Giesen v. Giesen*, 2018 S.D. 36, 911 N.W.2d 750
- *Schieffer v. Schieffer*, 2013 S.D. 11, 826 N.W.2d 627
- SDCL § 25-44-4

II. Whether the court abused its discretion in dividing the marital property 50/50.

Susan received a windfall from the Court's application of inconsistent standards which were favorable to Susan.

- *Bell v. Bell*, 499 N.W.2d 145 (S.D. 1993)

III. Whether the court abused its discretion in failing to grant Susan a divorce on the grounds of extreme cruelty.

The Court correctly determined that irreconcilable differences existed.

- *Schaack v. Schaack*, 414 N.W.2d 818 (S.D. 1987)

- SDCL § 25-4-2(7)
- SDCL § 25-4-4

IV. Whether the court erred in not awarding Susan more in attorneys' fees.

Susan's bad behavior and litigation tactics did not support the Court's award of attorney fees to Susan.

- SDCL § 15-17-38

REPLY TO APPELLEE'S CROSS APPEAL ARGUMENTS

I. Whether the court erred in failing to value all of the parties' property and abused its discretion in failing to treat marital assets injected into the Estate as marital property.

Susan argued that the Court committed reversible error by failing to value the 92% interest in Tatar Quincey, the 20% interest in Dunham Equity Management, and the 40% interest in Dunham Partnership which was in the Estate at the time of trial. This new argument completely contradicts Susan's attorney's prior proclamation that "We are not bringing the Estate into this. We are not asking the Court to put a value on the Estate."[5] Susan's expert offered no testimony regarding this new argument.

Susan referenced the *Endres* case in her argument. However, *Endres'* discussion of valuing a concrete business, valuing goodwill and the omission of three pieces of real estate is not helpful. See *Endres v. Endres,* 532 N.W.2d 65 (S.D. 1995). The reference to the *Grode* decision is also non-applicable, as that case involved a non-vested military pension.

Billion v. Billion offers a more useful analysis applicable to this case. In *Billion*, the husband contended that SDCL § 25-44-4 required the trial court to place all of the

[5] June 25, 2019 hearing transcript, p. 75, lines 21-23.

property of the parties into one pot labeled "marital property" and then divide it equitably. *Billion v. Billion*, 1996 S.D. 101, ¶19, 553 N.W.2d 226, 231. The Court disagreed with the Husband's "one pot" interpretation of SDCL § 25-44-4. *Id*. at ¶20, 553 N.W.2d at 232. The *Billion* court noted that in *Heckenliable*, it was found "a trial court has broad discretion in determining whether property is marital in nature and subject to division." *Id*. This portion of the *Billion* case focused on a trust and an investment.

This Court has held that it does "not attempt to place valuations on the assets because that is a task for the trial court as the trier of fact. *Giesen v. Giesen*, 2018 S.D. 36, ¶26, 911 N.W.2d 750, 757. Rather, this Court will review the circuit court's findings under the clearly erroneous standard of review. *Id*. 911 N.W.2d at 756. "As a result, this Court 'will overturn the trial court's findings of fact on appeal only when a complete review of the evidence leaves [this] Court with a definite and firm conviction that a mistake has been made."' *Schieffer v. Schieffer*, 2013 S.D. 11, ¶15, 826 N.W.2d 627, 633.

In the case at hand, the court was correct in deciding that these entities should be excluded from the marital property division. The trial court was correct to exclude the future inheritance not yet in existence. There was no current ownership at the time of the divorce, which made it impossible to include in the marital estate. The court found Chris' testimony to be logical when he stated that when the Estate purchased a 92% interest in Tatar Quincy and it was financed chiefly by a $1.4 million loan to the Estate. (Memorandum Decision, p. 15). Chris and his mother purchased the other 8% through

ALDC. (*Id.*) There was absolutely no evidence or finding that Chris purposefully "hid" any marital assets from Susan. Susan's argument is purely speculation.

Chris presented significant testimony regarding the purchase of his brothers' interests in Dunham Equity Management and the Dunham Partnership by the Estate. The Estate attorneys spent many hours with Susan's attorneys explaining these transactions. The Court found that the purchase of those interests by the Estate was appropriate. (*Id.*).

The rebuttal expert testimony of Professor Thomas Simmons supported the Court's conclusion that the assets of the Estate (including the assets at issue here) were not divisible for purposes of marital property division.

The Court properly set aside the entirety of the Donald Dunham, Jr. Estate and this should be upheld.

II. Whether the court abused its discretion in dividing the marital property 50/50.

Susan argued that she was the party who contributed consistently and nearly exclusively to the accumulation of the parties assets. She concluded that this factor weighs in favor of a greater property division to her. From Chris' viewpoint, however, Susan has already been awarded more than one-half of the marital estate and that is one of the primary reasons that he appealed the trial court's decision.

Susan admitted in her Brief that she "signed on to a much smaller state salary as a judge".[6] This fact, combined with the fact that Susan and her new employer contributed to a retirement plan of which $153,489 was set aside to Susan as non-marital, shows just how inequitable the final division was to Chris.

[6] See, Appellee's Brief, p. 39

This Court has repeatedly held that retirement plans accrued during the marriage, whether contributing or noncontributory, are divisible marital assets. *Bell v. Bell*, 499 N.W.2d 145, 147-148 (S.D. 1993).

In South Dakota, a retirement plan has been recognized as a divisible marital asset since it represents consideration in lieu of a higher present salary. Contributions made to the pension plan would have been available to the family as disposable income during the marriage. *Id*.

Not only did Susan and her employer's post-separation SDRS contributions get set aside, but Susan's lower salary skewed the back and current child support calculations.

The Court made no findings that Chris did not contribute to the household, or that he was a ne'er do well, as Susan suggested.

Susan encouraged the Court to diminish the role that Chris played during their eighteen year marriage. The parties are near the same age and in relatively the same health condition. Susan's salary and position with the State of South Dakota is much more stable than that of Chris. Chris is a real estate entrepreneur and his income ebbs and flows with the market. While Chris did not directly contribute funds to Susan's retirement accounts, Chris was the primary caretaker of the boys and passionately supported Susan's career. Susan was able to open her own practice, work hard and do well at that practice, and eventually become a circuit court judge due in part to the contributions made by Chris. Chris designed the Dakota Law Building for Susan and was a partner in Dakota Law, LLC. These were not de minimis contributions.

The Court abused its discretion by settling the marital estate using inconsistent standards. The Court's division of property and award of a cash equalization payment produced a windfall for Susan.

Chris asked at trial that the following NOT BE INCLUDED as marital assets:

ITEM	**VALUE**
2001 Ford F-150	$ 2,025
1969 Firebird	$ 18,000
20% interest in Dunham Partnership	$260,000
Inheritance investment in Milestone	$ 82,000
Inheritance investment in ALDC	$141,000

Chris asked at trial that the following BE INCLUDED as marital assets:

ITEM	**VALUE**
2008 Yukon	$ 8,025
Belmont house offset	$ 78,804
Wells Fargo checking	$ 5,152
Milestone debt	($ 40,907)
Fuller & Sabers buyout	$ 91,980
Dakota Law buyout	$216,410
SDRS contributions	$149,308
Supplemental SDRS contributions	$ 4,181

Chris asks this Court to correct the division of marital assets and debt, as set forth above, and remedy the financial windfall that was given to Susan.

III. Whether the court abused its discretion in failing to grant Susan a divorce on the grounds of extreme cruelty.

Susan's request for a divorce on the grounds of extreme cruelty was mentioned briefly in her Answer filed on August 1, 2016 and then it was never heard of again. Susan did not argue that she was entitled to a divorce on this ground at trial, nor was she asked a question regarding this request for relief during trial. This argument should be waived.

"Extreme cruelty is the infliction of … grievous mental suffering upon the other, by one party to the marriage." SDCL § 25-4-4. In a marital setting, the definition of extreme cruelty differs according to the personalities of the parties involved. *Schaack v. Schaack*, 414 N.W.2d 818, 820 (S.D. 1987).

Judge Steele observed the behavior of the parties from the date he was appointed in 2016 through the date he filed his Amended Memorandum Decision in 2021. Findings of fact are not set aside unless the court finds them to be clearly erroneous; and we must give "due regard" to the opportunity of the trial court "to judge the credibility of the witnesses". *Schaack*, 414 N.W.2d at 820.

The trial court knew that Chris purposefully filed this case in Union County, South Dakota so that Susan's peers and the public would not know that she was going through a divorce. The trial court was also aware of Susan's temper, her disdain of Chris and her bad behavior during the proceedings. Some examples of Susan's bad behavior towards Chris include:

1) Susan requiring Chris to use her UJS email and demeaningly respond to "The Honorable Susan Sabers" regarding simple parenting issues. (Reply Appendix, pp. 001-002);

2) Susan sharing her condescending UJS emails sent to Chris with members of the public. (Reply Appendix, pp. 001-003);

3) Susan violating Chris' privacy by entering and taking pictures of the inside of his home without consent. (Reply Appendix pp. 006-022);

4) Susan removing Chris as a beneficiary on her life insurance policy without his written consent. (Reply Appendix pp. 023-038);

5) Susan changing her Principle Financial policy and removing Chris as a beneficiary without his consent. (Reply Appendix pp. 023-033; 039);

6) Susan removing Chris as a beneficiary of her Will. (Reply Appendix pp. 023-033; 40-43); and

7) Susan removing Chris from two of her State of South Dakota insurance policies without Chris' consent. (Reply Appendix pp. 023-033; 039).

On top of this, Chris was forced to sign over the marital home, the car titles, the bank accounts and move out of the house. The Court found Susan to be "controlling, stubborn and dismissive."[7] Perhaps it is Chris who should have been awarded a divorce on the grounds of extreme cruelty. Both parties indicated that irreconcilable differences exist.[8] The Court found that "both parties bear some blame in the break-up of the marriage" and correctly granted the divorce on the grounds of irreconcilable differences per SDCL 25-4-2(7).[9]

IV. Whether the court erred in not awarding Susan more in attorneys' fees.

Susan was awarded $50,000 in attorney fees. Susan now requests an even greater award of fees. Chris reiterates his argument against the award of any attorney fees to

[7] See, Court's Memorandum Decision filed November 23, 2020, p. 17
[8] See, Complaint filed July 7, 2016; See, Answer and Counterclaim filed August 1, 2016.
[9] See, Court's Memorandum Decision filed November 23, 2020, p. 2 and p. 17.

Susan, as set out on pages 37-39 of his Brief. Susan's fees of over $200,000 remain questionable, especially due to the fact that no payments were made to her old law firm and friends for over four (4) years. Chris incurred his own legal fees of over $208,557.53 during the course of this action. [10]

Susan's attempts to harass Chris and the Estate attorneys to find a "smoking gun" failed. Susan served nine (9) sets of discovery upon Chris which included 482 interrogatories (counting subparts) and 78 requests for production. Susan's discovery tactics became so burdensome that Chris was forced to file a Motion for Relief from Discovery Abuse. (Reply Appendix, pp. 004-005). Susan's abusive discovery tactics coupled with Chris' need to seek protection from the invasion of his privacy and violations of the Temporary Restraining Order, among other things, are all reasons why Susan should not be awarded any attorney fees at all.

The Court stated, "This is one of the most toxic and contentious divorce cases experienced by the undersigned. Just about every issue possible is and has been contested from the start."[11]

Although attorney fees may be ordered pursuant to SDCL 15-17-38, the award of $50,000 to Susan in this case was an abuse of discretion and should be reversed.

[10] See, Plaintiff's Exhibit 143, p. 6
[11] See, Court's Amended Memorandum Decision filed January 12, 2021, p. 4

CONCLUSION

The Appellant respectfully requests that this Court grant the relief as stated in the Appellant's Brief and Reply Brief, deny the Appellee's cross appeal, and order a reasonable and realistic payment plan for any amounts ultimately awarded to the Defendant/Appellee.

Respectfully submitted this 14th day of February, 2022.

_____
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RENEWED REQUEST FOR ORAL ARGUMENT

The Appellant respectfully renews his request for oral argument in this matter.

CERTIFICATE OF SERVICE

I certify that on February 14, 2022, I e-filed with the South Dakota Supreme Court Clerk and served via electronic mail, a true and correct copy of Appellant's Reply Brief on:

William Fuller (BFuller@fullerandwilliamson.com) and
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_____
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CERTIFICATE OF COMPLIANCE

I, Elizabeth A. Rosenbaum, certify that this Reply Brief is submitted in Times New Roman typeface, 12 pt., and that the word processing system used to prepare the brief indicates that the number of words used was 4,991 and the character count was 25,458 without counting spaces.

Dated this 14th day of February, 2022.

_____
ELIZABETH A. ROSENBAUM

INDEX TO REPLY BRIEF APPENDIX