

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL No. 30953

**CATHLEEN SMITH,
Plaintiff/Appellee,**

v.

**RICK SMITH,
Defendant/Appellant.**

**APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT,
MEADE COUNTY, SOUTH DAKOTA**

The Honorable John Fitzgerald
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Reference to Appellee is "Cathy." Reference to Appellant is "Rick."

The trial transcript consists of three volumes, totaling 727 pages. Citation to the trial transcript is "TR" followed by the specific page number, with line citations where given. There is also a 20-page fourth transcript of the circuit court's oral ruling of November 25, 2024. Citation to the oral ruling transcript is "OR" followed by the page number. Citation to the Clerk's Index is "CI" followed by the document number.

Reference to the circuit court's Findings of Fact are "FoF," and to its Conclusions of Law are "CoL." Reference to the circuit court's Appendix A chart, which was incorporated into the final Judgment, Findings and Conclusions is "Appdx. A."

JURISDICTIONAL STATEMENT

Rick appealed under SDCL § 15-26A-4 from the final Judgment and Decree of Divorce (CI 127) entered by Hon. John Fitzgerald, circuit court judge, on December 5, 2024. The trial court's Findings and Conclusions were entered that day (CI 86). Notice of Entry was given on December 5, 2024 (CI 130). Notice of Appeal was timely filed on January 2, 2025 (CI 132).

STATEMENT OF LEGAL ISSUES

1. Did the trial court abuse its discretion and commit error when it awarded alimony to Cathy?

Held: The circuit court granted Cathy seven years of monthly alimony totaling \$72,000 despite her receiving \$696,925 in property division, including a lump sum payment of \$140,243 due 60 days after entry of the Judgment and Decree of Divorce.

Source: *Goff v. Goff*, 2024 SD 60, 12 N.W.3d 139
Kolbach v. Kolbach, 2016 SD 30

- 2a. Did the circuit court abuse its discretion and commit error in its property division regarding Rick's nonmarital property?

Held: The circuit court categorized all of Rick's gifted and inherited property as "marital," but excluded the value of Cathy's reasonably expected inheritance.

Source: SDCL § 25-4-44
SDCL § 25-4-45.1

- 2b. Did the trial court abuse its discretion and commit error in its property division regarding the value of a certain marital asset, that being cash in the safe?

Held: The circuit court decreed that its determination of the property value and evidence regarding cash in the safe was within its discretion.

Source: *Stockwell v. Stockwell*, 2010 SD 79, 790 N.W.2d 52
SDPJ 1-10-40
SDPJ 1-60-20

3. Did the trial court abuse its discretion and commit error when it ordered Rick to pay \$10,000 of Cathy's attorneys fees?

Held: The circuit court held that Rick should pay \$10,000 of Cathy's attorneys fees because he had wrongly increased the time and cost of the litigation, and had the greater income.

Source: *Taylor v. Taylor*, 2019 SD 27

STANDARD OF REVIEW

The application of law to fact is to be reviewed de novo by this Court. *State v. Liaw*, 2016 SD 31, ¶8, 878 N.W.2d 97, 100; *People ex rel. J.L.*, 2011 SD 36, ¶4, 800 N.W.2d 720, 722. The standard of review regarding factual matters is under the "abuse of discretion" standard. *See, e.g., Billion v. Billion*, 1996 SD 101, ¶14, 553 N.W.2d 226, 230. "We find an abuse of discretion when discretion is exercised 'to an end or purpose

not justified by, and clearly against, reason and evidence.” *Novak v. Novak*, 2006 SD 34, ¶3, 713 N.W.2d 551, 552 (quoting *Godfrey v. Godfrey*, 2005 SD 101, ¶11, 705 N.W.2d 77, 80). . . . An “[a]buse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *Hogen v. Pifer*, 2008 SD 96, ¶9, 757 N.W.2d 160, 163 (quoting *Maxner v. Maxner*, 2007 SD 30, ¶11, 730 N.W.2d 619, 622); *see also*, *Brosnan v. Brosnan*, 2013 SD 81, ¶¶11-13, 840 N.W.2d 240, 245-246. “An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *Gartner v. Temple*, 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850. The term “‘abuse of discretion’ defies an easy description. It is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” *Arneson v. Arneson*, 2003 SD 125, ¶14, 670 N.W.2d 904, 910. An abuse of discretion also occurs when the court bases “its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). “Where findings of the trial court are based on conflicting testimony, . . . we will not disturb them on appeal.” *Schaack v. Schaack*, 414 N.W.2d 818, 820 (S.D. 1987)

The bottom line is that to avoid constituting an abuse of discretion, the circuit court’s Findings of Fact must support its Conclusions of Law, and the Conclusions of Law must be in accord with the controlling rules of law. *See e.g., Huith v. Hoffman*, 464 N.W.2d 637 (1991); *GMS, Inc. v. Deadwood Social Club*, 333 N.W.2d 442, 443

(S.D.1983); and *In re Application of Veith*, 261 N.W.2d 424, 425 (S.D. 1978). And although Rick vigorously disputes the trial court's Findings of Fact and Conclusions of Law, for purposes of this appeal, he references them here essentially verbatim, recognizing the appellate court's obligation to view such findings in the light most favorable to the non-appealing party.

STATEMENT OF THE CASE AND FACTS

Relative to the issues in this appeal, numerous superfluous court filings are identified in the Clerk's Index. Similarly, a plethora of superfluous facts concerning Cathy and Rick's marriage are found in their pleadings and their testimony. Rather than parrot the entire marital and legal history of this couple, Rick's Statement of the Case and Facts will focus on the case history and marital facts that are pertinent to this appeal.

Rick preserved his appeal issues through the filing of his own proposed Findings of Fact and Conclusions of Law (CI 1739, 1795), Judgment and Decree of Divorce (CI 1739). He also filed Objections (CI 74, 81) to the circuit court's Findings and Conclusions (CI 86) and its standard Judgment and Decree of Divorce (CI 127).

In this Appeal, Rick is not contending the circuit court's Findings and Conclusions are inconsistent with the its oral ruling, but rather that the circuit court's Findings and Conclusions are erroneously tainted with abuse of discretion as well as erroneous application of law to the credible facts in the trial record.

This three-day trial commenced on October 25, 2024, continued on October 29, 2024, and concluded with a final day of testimony on November 15, 2024. Testimony was presented by eight witnesses: (1) Troy Jantz (TR 4-37), a realtor who testified for

Cathy on real estate values; (2) Seth Smith (TR 38-69), the parties' 30-year old son who had worked with his father at Rick's Auto Body; (3) Randall Smith (TR 70-110), another of the parties' adult-age sons; (4) Cathy (TR 111-257; 266-333; 368-457; and 705-724); (5) Artic Gifford (TR 334-368), Rick's real estate value expert; (6) Vicky Briggs (TR 458-489), Rick's adult-age sister; (7) Christi Marchant (TR 490-509), Rick's other adult-age sister; and (8) Rick (TR 576-704).

This appeal involves only these issues: (1) the alimony award; (2a and 2b) property division; and (3) attorneys fees. Except where necessary for context, unrelated Facts and Conclusions may not be addressed herein.

Statement of the Case

Cathy filed her divorce Complaint on February 24, 2023 (CI 1). Rick admitted service of the Summons and Complaint on March 15, 2023 (CI 6), and his Answer and Counterclaim were filed on March 31, 2023 (CI 9). Cathy filed her Reply to Counterclaim the same day (CI 12). Discovery efforts and negotiations bore fruit and produced certain agreements on issues of property value and property division, although some remained to be litigated before circuit court judge John Fitzgerald. The trial was held on those remaining issues of property value and division, as well as concerning grounds for the divorce, plus Cathy's alimony request and her demand for payment of her attorneys fees.

After three days of trial, Judge Fitzgerald permitted the parties to submit proposed Findings and Conclusions. In open court on November 25, 2024 the circuit court announced its oral ruling, and instructed Cathy's counsel to prepare Findings of Fact and Conclusions of Law consistent with his oral ruling (OR 19, lines 24-25). Rick's attorney

timely filed Objections (CI 76, 81). On December 5, 2024 the court entered its Judgment and Decree of Divorce (CI 127), as well as 37-page set of supportive Findings and Conclusions (CI 86). The circuit court incorporated within its Findings and Conclusions a four-page chart of the Property Division, identified as "Appendix A." Notice of Entry was given on December 5, 2024 (CI 130). Rick's Notice of Appeal was timely filed on January 2, 2025 (CI 132).

Statement of Facts

Rick and Cathy were married on April 30, 1988 in Sturgis (FoF 8). They resided in Faith before moving to Aberdeen where Cathy obtained a B.S. in Elementary Education, and completed some course work toward a Masters Degree (FoF 10, 11). Meanwhile, to financially support the family Rick worked full time at John Deere (FoF 11). The couple had four children: Randy, Tiffany, Seth and Mark (FoF 12, 14 and 15), each of whom had reached adult age when their parents separated after 36.5 years of marriage (FoF 8).

In 1992 Cathy finished her post-high school education (FoF 13). A year later the family moved back to Faith, where they lived in their mobile home. Rick worked at an auto repair shop/gas station (*Id.*). When the family's youngest child, Mark, reached public school age Cathy returned to teaching (Special Education), which she continued to do until Mark graduated from high school (FoF 13, 18). Prior to starting the 1997-98 school year, Cathy left teaching to stay home (FoF 14) and sell Mary Kay cosmetics, as well as to do secretarial work for the church. Later she did daycare work (FoF 15). She also gave massages (TR 25). However, Cathy was not the "workaholic" that Rick was. She

admitted she had chosen to limit her employment (TR 448-450). For example, she rejected a stable UPS position in favor of having Rick take it (*Id.*). In 2001, Cathy began cleaning motel rooms (FoF 23).

In 2000, Rick rented a building to open “Rick’s Auto Repair Shop” (FoF 16). Cathy did the business’s bookkeeping (*Id.*). Rick, who was a dedicated and hard working “workaholic” — slaving as many as 100 hours a week to feed his family (TR 23, lines 4-6) — built the business from the ground up, and throughout the marriage the income he generated was for the family the primary source of financial support (TR 3, lines 16-20; TR 4, lines 16-21; FoF 17).

At one point Cathy worked as a receptionist at Bogue and Bogue Law Office, and picking up shifts as seasonal UPS delivery driver (FoF 22).

Rick’s dedication to working hard for the family had negative consequences for his health. He suffered from asthma, rheumatoid arthritis, and eosinophilic esophagitis¹ conditions that required expensive medications costing roughly \$10,000 per month (TR 561-564), fortunately the health insurance Rick had because of his second job with UPS covered much of it (*Id.*).

¹Eosinophilic Esophagitis (EoE) is a chronic inflammatory condition characterized by an excessive accumulation of eosinophils, a type of white blood cell, in the lining of the esophagus. This buildup causes inflammation, difficulty swallowing, food impaction, and chronic pain or discomfort. EoE is typically triggered by environmental factors or allergens, including chemicals, airborne particles, and fumes. Rick Smith’s prolonged occupational exposure to solvents, automotive chemicals, exhaust fumes, and particulate matter in his auto shop likely contributed significantly to the onset and progression of his EoE symptoms. Over time, continued exposure can lead to scarring, narrowing of the esophagus, and further health complications.

Cathy's health was far better than Rick's. The only chinks in her armor were an injured shoulder in 2021 that a year later needed a surgical repair (FoF 24). She recovered well, to the point that at trial her shoulder condition did not prevent her from working (*Id.*).

In 2015, Rick's parents, Tom and Linda Smith, realized that their health was declining and they should take measures to protect their substantial property and plan for transferring it to their adult children, i.e., Rick and his two sisters Vicky Briggs and Christi Marchant (FoF 19). Tom and Linda hired an attorney (ironically, the spouse of Cathy's eventual divorce lawyer) to put together the documents to reflect their intentions (*Id.*). An entity called RVC Ranch, LLC was created (*Id.*). However, Tom and Linda's lawyer neglected to devise a Trust or other means to ensure protection of his clients' intentions so that if a divorce should occur in any of their children's marriages, the ex-spouse would not become an "heir" to their bounty (*see* TR 496, lines 2-8, 498-505). Unfortunately, Tom and Linda had died by the time this trial was held.

As for Cathy's father Larry Brown and his wife, they were present at each day of this trial, sitting directly behind Cathy to offer her emotional support, and silently intimating their commitment to provide Cathy financial stability via eventual inheritance (*see* TR 480, lines 14-17). Larry Brown owned approximately 3,200 acres of ranch land in Perkins County worth millions of dollars, a prospect which ought to have equitably negated any claim by Cathy that her future financial condition was dependent on an alimony award against Rick, as well as the circuit court giving her an overly generous

share of marital property plus a healthy chunk of Rick's inherited and/or gifted nonmarital property (*see* TR 480-490).

Because Rick needed help in the Auto Repair shop he sought Shandee Gillin's help (FoF 25). What seemed to spur the circuit court to abuse its discretion against Rick and erroneously apply the law to fact — as if it [the circuit court] were granting Cathy punitive or exemplary damages — was Rick's revelation in December 2022 to Cathy that he wanted to end their marriage (FoF 26). Cathy responded by packing Rick's things to move him out of the house (*Id.*). During discovery, Rick admitted to Cathy that his relationship with Ms. Gillin had begun in May 2022 (*Id.*). Two-plus years later, when this trial was held, Rick and Ms. Gillin were still together (*Id.*).

When the circuit court orally announced its ruling it was clear that its determination of property values as generally favoring Cathy, and its categorizing Rick's gifted and inherited property as marital, as well as its alimony award to Cathy, and also its placing the responsibility for paying a portion of Cathy's attorneys fees, was a method of punishing Rick, as if punitive damages were being awarded against him and in favor of Cathy, for his having had an extramarital relationship. In its oral ruling the court emphasized — using such blaming words as “adultery” and “adulterous affair” no less than nine times over the span of 19 transcript pages — that Rick's actions were the cause of the marriage's folding. It is not unreasonable to say that the circuit court's decision to place the fault blame solely on Rick's shoulders became a proverbial snowball pushed down the mountain, where as it rolls it gains momentum and size.

By the end of the circuit court's analysis Cathy came out with \$696,925 in assets, a total of \$72,000 in alimony stretched out in seven years of monthly payments, and \$10,000 toward her attorneys fees. As such, Cathy's result was an inequitable \$775,925 while Rick's \$696,924 became reduced to an inequitable \$618,925.

Summary itemization of court's Findings and Conclusions

The circuit court's Findings and Conclusions were derived from its oral ruling, and consistent with it. They were incorporated within the Judgment and Decree of Divorce. The Findings and Conclusions consume 37 pages. The following is a summary of them. The summary reveals how the circuit court's roll of its snowball to the bottom of the mountain resulted in reversible error. [Both the Findings and the Conclusions contain skips in the consecutive numbering.]

FINDINGS

<u>Number</u>	<u>Substance</u>
23	<u>UPS</u> — In 2020 Cathy let Rick take the UPS job. In 2021 she took a job cleaning motel rooms.
24	<u>Shoulder injury</u> — Cathy injured her shoulder in 2021, and in 2022 had surgery to fix it.
25	<u>Affair</u> — In Oct. 2022 Rick hired Shandee Gillin to work at his shop.
26	<u>Affair</u> — In Dec. 2022 Rick disclosed to Cathy that he and Shandee were having an extramarital relationship that had begun in May 2022.
27	<u>Property</u> — Exhibit 13 Joint Property list setting forth each party's value contentions — Cathy's in green, Rick's in blue.
28	<u>Property</u> — Circuit court accepted green values in Exhibit 13 — Cathy \$6,000; Rick \$9,000.
30	<u>Firearms</u> — Exhibit 14 Mark Blote's values were stipulated as acceptable.
32	<u>Firearms</u> — Approx. 25 of 125 were missing.

33 Firearms — Circuit court is not making a Finding on what happened that
guns are missing. Cathy is to receive a gun valued at \$400; Rick is to
receive the others, total worth \$49,600.

37 Vehicles — Appendix A sets forth division and values.

40 Retirement Account — Exhibit 32 shows Cathy's SDRS = \$49,489
[\$914.15 per month at age 65].

41 Retirement Account — Exhibit 33 shows value of Rick's UPS Empower
401(k).

47 Retirement Account — Exhibit 41 shows that Rick is expected to
receive Social Security at age 65 in the sum of \$2,191 per month at
age 65. Cathy is expected to receive Social Security at age 65 of
\$1,224 per month.

48 Gift/Inheritance — Exhibit 34 shows Rick's LPL Financial Acct value at
\$430,855.21 — a gift from the sale in 2015 of his parents' land.

49 Gift/Inheritance — Cathy contributed to the acquisition and maintenance
of gifts through love and companionship, and indirect contribution of
effort. Funds from RVC Ranch, LLC were used to pay bills for Rick's
parents prior to their deaths.

50 Gift/Inheritance — Cathy's efforts as wife and mother, and her outside
income, constituted indirect contributions to the maintenance of all assets,
including Rick's share of RVC Ranch, LLC.

54 Cash Accounts and deposits — Appendix A shows that Cathy has a
checking and savings account at Dakota Plains FCU. She gets it.

55 Cash Accounts and deposits — Exhibit 29 shows Rick has a checking and
savings acct at Dakota Plains FCU of \$155,543.47 [Auto Shop checking]
including his removal in Jan. 2023 of \$140,000. Divided equally, each
party is to receive \$77,821.

56 Cash Accounts and deposits — Exhibit 29/Appendix A shows Rick's
personal acct at Dakota Plains FCU. This goes to Rick.

57 Cash in safe — This is the subject of a dispute. Rick contends that when
he moved out \$50,000 was there, including 1,600 collectable coins.

58 Cash in safe — Only the family members knew the access code for the
safe. Cathy claims that when she inventoried the safe it only contained
\$12,600 cash, various old cash bills, 1300 silver coins, and information
about cryptocurrency.

60 Cash in safe — Cathy admitted she took \$7,000 from the safe to pay
property taxes and insurance on the jointly-owned residence and their
vehicles; plus \$1,400 for their son's rent. She says there was \$4,200 left in
safe. For silver coins and cryptocurrency the market value fluctuates. The
court valued the silver coins at \$40,651 and the cryptocurrency at \$725.22.

61 Cash in safe — There was insufficient proof by Rick that there was ever
\$50,000 in the safe, or that Cathy had anything to do with its removal.

62 Cash in safe — Appendix A shows that Rick is to receive the old bills and
the coins in the safe, and that Cathy gets \$8,000.

63 Life Insurance — Exhibit 30/Appendix A shows that Cathy's Farm Bureau
life insurance policy has a surrender value of \$4,025. Cathy gets it.

64 Life Insurance — Rick's life insurance policy with Lincoln National Life
Insurance has a surrender value of \$22,404. Rick gets it.

65 Land/Houses/Bldgs — Exhibits 2-4 relate to the house at 313 South Third
Ave, Faith, SD. It was bought in Dec. 2000, and is mortgaged. Its value is
\$130,051.

66 Land/Houses/Bldgs — Cathy's expert Troy Jantz places sales value on the
house at \$200,000 to \$220,000.

67 Land/Houses/Bldgs — Cathy proposed the value be \$210,000.

68 Land/Houses/Bldgs — Rick's expert Artie Gifford valued the house on
open market at \$317,500 to \$320,000.

69 Land/Houses/Bldgs — Circuit court valued the property, shed and
appliances at \$210,000, and awarded it to Cathy.

75 Land/Houses/Bldgs — Cathy is to be responsible for \$16,800 in realtor
fees and closing costs concerning the house.

77 Land/Houses/Bldgs — In August 2023 Rick used RVC Ranch, LLC funds
to buy a home for himself.

78 Land/Houses/Bldgs — Rick has not paid rent to his siblings, who also own
a share of RVC Ranch, LLC, for their share of home.

79 Land/Houses/Bldgs — Exhibit 29 shows that Rick paid \$199,900 for his
home.

80 Land/Houses/Bldgs — Rick gets the home at a value of \$200,000 minus
\$16,000 for realtor's fees and closing costs, for a total value of \$184,000.

81 Land/Houses/Bldgs — As being one of the 1/3rd owners of RVC Ranch,
LLC, Rick has a 1/3rd ownership interest in land outside Faith and a bank
account.

82 Land/Houses/Bldgs — Appendix A shows the value of Rick's 1/3rd
interest in RVC Ranch, LLC as \$50,677. Rick gets it.

83 Land/Houses/Bldgs — Rick is only working Rick's Auto Body
part-time now. The building, tools and equipment are in good
condition.

84 Land/Houses/Bldgs — Cathy's expert Troy Jantz initially valued the
building at \$90,000, but then lowered its current value.

90 Land/Houses/Bldgs — Rick's expert Artie Gifford valued building at and
open market sales range of \$137,500 to \$142,500.

91 Land/Houses/Bldgs — Rick's sales value of building was \$80,000 due to
condition of 2nd bldg on property. Rick gets property at \$80,000, less 8%
[\$6,400 = \$73,600 value].

92 Land/Houses/Bldgs — A storage container has a value of \$1,600 plus
\$10,000 as the value of the tools. This goes to Rick.

- 95 Land/Houses/Bldgs — The business checking account goes to Cathy at a
value of \$5,272.
- 96 Land/Houses/Bldgs — The business savings account goes to Rick at a
value of \$295.
- 97 Gifts received during marriage — In 2015 Rick's parents created RVC
Ranch, LLC, with Rick and each of his sisters designated as 1/3rd owners.
From 2015 forward whenever RVC assets were sold, the income would go
to Rick and sisters in 1/3rd shares, but the taxes and capital gains were
reported on Rick and Cathy's joint federal tax returns.
- 98 Gifts received during marriage — Rick's 1/3rd value of LPL transfers was
formerly valued at \$306,000 but now is valued at \$443,000. This means
there was an increase during the marriage of \$137,000.
- 101 Gifts received during marriage — Cathy's contributions to the marriage
have aided these assets maintain and grow.
- 102 Cathy's need for support/alimony — As the result of choices the parties
made during the marriage, and by being a stay-at-home wife and mother
through much of marriage, Cathy is in need of alimony.
- 104 Unsecured marital liabilities — As shown on Appendix A, Cathy has
credit card debt balances on a Discover Card, an Amazon Card, a Chase
Freedom Card, and on a Green Sky loan. These are Cathy's responsibility.
- 105 Unsecured marital liabilities — As shown on Appendix A, Rick has a debt
balance on a Cabelas Card. This is his responsibility.
- 106 Divorce grounds — "[T]he . . . marriage had its ups and downs and had
become more distant . . ." However, Rick's behavior was not justified by
this. "The poison that caused in [*sic*] the breakdown of the marriage, and
resulting divorce, was Rick's adulterous affair. Rick is at fault for the
breakdown of the marriage."
- 109 Alimony — Exhibit 40 shows that Cathy's earning average is \$1,161 per
month as a motel room housekeeper, plus \$60 per week from another
cleaning job. She accepts other cleaning jobs as they become available.
Cathy is underemployed. She could maximize her earnings by returning to
teaching.
- 111 Alimony — Exhibit 39 shows that Rick is earning approximately
\$9,234.25 per month from UPS, plus has income from Rick's Auto and
from dividends.
- 112 Alimony — Exhibit 42 shows that Cathy's monthly budget is \$4,130.57
— a \$2,089 shortfall. At 65 she will receive Medicare, Social Security and
her SDRS retirement, meaning her need will decrease to \$442.41 per
month.
- 113 Alimony — Exhibits 42 and 43 show that Rick's monthly budget is
\$2,648.78. Using only his primary income, Rick's income compared to
outgo is \$5,369.28 per month. At 65 his excess goes down to \$542.

- 114 Alimony — Exhibit 41-42 shows that Cathy has need for alimony. Rick has a financial ability to pay Cathy monthly spousal support, both currently and after retirement.
- 115 Attorneys fees — Rick increased the monetary cost of this action by sending excessive discovery requests, including at times two different sets on the same day as well as some after the discovery deadline (Exhibit 47).

CONCLUSIONS OF LAW

- | <u>Number</u> | <u>Substance</u> |
|----------------------|--|
| 2 | <u>Credibility</u> — Court has judged the credibility of the witnesses. |
| 5 | <u>Grounds</u> — Cathy has requested the divorce grounds be adultery; Rick has requested that the grounds be extreme cruelty. |
| 7 | <u>Grounds</u> — Cathy gets divorce on basis of adultery. |
| 14 | <u>Property Division</u> — Equitable distribution is required. |
| 17 | <u>Property Division</u> — A circuit court is to first classify property as marital or nonmarital. |
| 18 | <u>Property Division</u> — The marital estate may include all property, including premarital, inherited and gifted property. Only where the other spouse has made no or a de minimus contribution to the acquisition or the maintenance of an item of property, and has no need of support, should the court set aside that property item as nonmarital. |
| 19 | <u>Inherited property</u> — Receipt of an inheritance late in a long-term marriage weighs in favor of inclusion within the marital estate. |
| 20 | <u>Inherited property</u> — This marriage is a long-term marriage. Cathy's contribution as wife and mother is substantial, and an important consideration. |
| 21 | <u>Property division/Gifted property</u> — The factors in dividing property, and determining whether gifted property should be deemed marital, are: (1) duration of marriage; (2) value of property owned by parties; (3) ages of parties; (4) health of parties; (5) competency of parties to earn a living; (6) contribution of each party to accumulation of property; and (7) income-producing capacity of assets. |
| 23 | <u>Property division</u> — (1) <u>duration of marriage</u> = 36.5 years; (2) <u>value of property owned by parties</u> = \$1,423,682.00; (3) <u>parties' ages</u> = Cathy is 54; Rick is 58; (4) <u>parties' health</u> = Cathy is in good health; Rick has EoE and asthma-related breathing disorders requiring expensive medicine each month covered by UPS insurance, as well as arthritis, but is able to work; (5) <u>competency of each party to earn a living</u> = Cathy has paused her career on a number of occasions to stay home and raise their four kids; in later years she worked odd jobs to be available to the family and Rick's aging parents; and her connection to UPS allowed Rick to get hired full-time with UPS; (6) <u>contribution of each party to accumulation of property</u> |

- = after they married they worked as a team; later they commingled gifted assets; and they remained true to each other "until Rick began an adulterous affair and decided that he no longer wished to be married"; and (7) income-producing capacity of assets = "Rick has a significantly greater earning capacity both now and into retirement."
- 25 Gifted property — Receipt of a gift late in a long-term marriage weighs in favor of its inclusion in marital estate.
- 26 Property division/Gifted property — Cathy provided direct care for Rick's mother. In doing so, Cathy saved her family costs which would have been spent on long-term care. Her efforts allowed the gifted ranch value to increase. Her contributions were not de minimus, and increased value of the gift Rick and his sisters had received.
- 27 Property division/Gifted property — Cathy has made a significant direct and indirect contribution to the growth and maintenance of the parties' assets regardless of their origin, and were not de minimus. To exclude the gifted property from inclusion in the marital estate would be inappropriate.
- 28 Property division — In a divorce-related division of assets, neither party is entitled to 50-50 split. The circuit court may premise an unequal distribution of marital assets on the fact that one party is likely to receive more Social Security benefits.
- 29 Property division — Cathy's Social Security benefits will be substantially less than Rick's because she "stayed home during much of the marriage and took jobs that fit the family schedule later on[,] and due to Cathy's current underemployment, . . ."
- 31 Property division — Regarding the value of a home, a reasonable range of figures based on the evidence may be made by the court.
- 32 Property division — The value of real estate should be reduced by 8% for realtor's fees and closing costs.
- 33 Property division — Appendix A's result is equitable. Rick is to pay Cathy \$140,243 within 60 days of entry of Judgment and Decree of Divorce.
- 36 Alimony — A party requesting alimony must establish a need for the support, and that the other spouse has sufficient means and an ability to pay.
- 37 Alimony — The factors are: (1) Length of marriage; (2) the parties' earning capacity; (3) the financial condition of each party after property division; (4) the age, health, and physical condition of each party; (5) the station in life or social standing; and (6) the relative fault in the termination of the marriage.
- 38 Property division/Alimony — The circuit court is to consider the allocation of property and the alimony award together as being a symbiotic relationship, because an award to a party of more assets can eliminate or reduce that party's need for alimony, or vice versa.

39 Alimony — (1) Length of marriage = 36.5 years; (2) each party's earning capacity = Cathy 54 years old; Rick 58; (3) financial condition of each party after property division = Rick has a successful career and a side business; Cathy is earning at least \$1,161 per month as a motel room housekeeper, but is underemployed. Cathy's earnings are approximately 1/9th of Rick's, and too little to allow her to properly support herself after the divorce; (4) each party's age, health, and physical condition; (5) each party's station in life or social standing = Rick is getting awarded the business and half of income-producing investment account, and his station in life or social standing will not change significantly after property division; Cathy is getting awarded half of the investment account. However, after the divorce, without financial assistance from Rick she will be unable to maintain basic comforts and her standard of living; and (6) relative fault in termination of marriage = Rick's adulterous affair with Shandee Gillen was the catalyst of this divorce.

40 Alimony — Due to the joint efforts of each party during the marriage, Rick has the ability to pay financial support to Cathy. She will need \$2,089 each month to meet her basic need. At 65 this will decrease to \$442 per month. Rick has surplus funds to pay her.

41 Alimony — Cathy has a need for alimony from Rick of \$2,089.57 per month. She can reduce this need by seeking employment in field of education.

42 Alimony — Rick's excess income after covering his own expenses is sufficient to pay Cathy alimony.

43 Alimony — Alimony award goes to Cathy of \$1,000 per month for 5 years [\$60,000], commencing the first of month after the entry of Judgment and Decree of Divorce. After 60 months, her monthly alimony will reduce to \$500 for 2 years [\$12,000].

46 Attorneys fees — The factors are: (1) property owned by each party; (2) relative incomes; (3) liquidity of assets; (4) whether a party has unreasonably increased time spent on the case; (5) labor and time involved; (6) skill needed; (7) discovery utilized; and (8) complexity of issues.

47 Attorneys fees — After the equitable division of property has been made, Rick has a substantially higher income than Cathy.

49 Attorneys fees/Increased work — Rick increased work on the case by conduct concerning discovery.

113 [sic] Attorneys fees — The hourly rates for Cathy's attorney and staff are reasonable. Rick increased the work needed by misusing/refusing to comply with the discovery process.

50 Attorneys fees/Increased work — Rick increased attorney labor. For Cathy's attorney a rate of \$300 per hour was not unreasonable.

- 51 Attorneys fees/Increased work — Rick’s use of unnecessary and repetitive
discovery increased Cathy’s attorney’s time and her expenses of this
litigation.
- 52 Attorneys fees/Increased work — Rick is to pay Cathy’s attorney \$10,000
toward Cathy’s attorneys fees. The payment is to be made within 10 days
of entry of Judgment and Decree of Divorce.

ARGUMENT

General Statement

In *Goff v. Goff*, 2024 SD 60, 12 N.W.3d 139, this Court reversed in part and affirmed in part where Husband had committed adultery. On appeal, this Court found that the circuit court had abused its discretion when setting child support in that it failed to consider deviations from child support schedule, and when it granted a child support arrearage judgment to Wife, and when it failed to make sufficient Findings to support its limitation that the Husband’s child visitation in South Dakota should be restricted, and when it failed to consider all of the proper factors when it awarded attorneys fees to Wife. *Id.* In this case, as in *Goff*, it is not a mere coincidence that adultery was used as a misguided motivation behind a series of abuses of discretion. Here, the circuit court’s oral ruling, from which its Findings and Conclusions were crafted, were overly peppered with the words “adultery,” “adulterous affair,” or “affair” — multiple times in 17 transcript pages (i.e., seven on Page 14, lines 12-25; two on Page 15, lines 5-7; and one on Page 17, line 15). Even though adultery is an allowable “fault” ground for inclusion in a Finding of Fact to explain the breakdown of the marriage, it is an abuse of discretion, as well as an illegitimate legal foundation (*see*, SDCL § 25-4-45.1 (“Fault shall not be taken into account with regard to the awarding of property . . . , except as it may be relevant to the

acquisition of property during the marriage . . .”) upon which to premise a determination against Husband of what constitutes marital property. Or even to craft against Husband an alimony award to Wife where she otherwise does not meet the qualifications for one. Or compel Husband to pay Wife a five-figure attorneys fee sum.

1. **The trial court abused its discretion and committed error when it awarded Cathy \$72,000 of alimony based on “need” when she was awarded \$696,9256 in property division, including receiving a lump sum of \$140,000 in “equalization” cash within 60 days of entry of the Judgment and Decree.**

In the present case, the motivation of punishing Rick for being “at fault” for ending the marriage, appeared to lurk behind the circuit court’s discretionary decisions on each issue. This is reminiscent of what happened in *Goff v. Goff*, 2024 SD 60, 12 N.W.3d 139, where this Court reversed in part and affirmed in part this circuit court’s determinations where Husband had committed adultery. On appeal, this Court found that the circuit court had abused its discretion (1) when it set child support in that it failed to consider deviations from child support schedule; (2) when it granted a child support arrearage judgment to Wife; (3) when it failed to make sufficient Findings to support its limitation that the Husband’s child visitation in South Dakota should be restricted; (4) and when it failed to consider all of the proper factors when it awarded attorneys fees to Wife. *Id.*

In this case, as in *Goff*, it is not a mere coincidence that adultery was used as a misguided motivation behind these series of abuses of discretion. Here, the circuit court’s oral ruling, from which its Findings and Conclusions were crafted, were overly peppered

with the words “adultery,” “adulterous affair,” and “affair” — multiple times in 17 transcript pages (i.e., seven on Page 14, lines 12-25; two on Page 15, lines 5-7; and one on Page 17, line 15).

Even though adultery may be a “fault” ground to explain the breakdown of a marriage, it can be an abuse of discretion, as well as an illegitimate legal foundation (*see* SDCL § 25-4-45.1), upon which to premise a determination against Husband of what constitutes marital property. Or even to craft against Husband an alimony award to Wife where she otherwise does not meet the qualifications for one. Or compel Husband to pay Wife a five-figure attorneys fee sum.

After the circuit court granted Cathy an overly abundant share of Rick’s inherited and gifted property, it ordered Rick to pay Cathy \$72,000 in alimony, stretched out as monthly payments over seven years. The circuit court failed to classify what type of alimony it was (i.e., restitutional, rehabilitative or permanent). *See, e.g., Fox v. Fox*, 467 N.W.2d 762 (S.D. 1991); *Kolbach v. Kolbach*, 2016 SD 30. The alimony award was made to her even though the evidence was that Cathy is in good health, and was correctly characterized by the circuit court as purposely “underemployed.” In contrast, Rick is a “workaholic,” despite having such significant health problems that he needs prescribed medication that costs \$10,000 per month.

Although the phrase “flail the male” may be considered to be over-the-top, when it appears applicable it has an apt persuasiveness. This phrase was a favorite of former Justice Henderson who used it in several separate writings. In *Henrichs v. Henrichs*, 426 N.W.2d 569 (S.D. 1988) (HENDERSON, J., concurring in part, dissenting in part) he

wrote: “[Wife] is able to make a living in life and so is [Husband]. Finding of Fact 10 states: ‘[B]oth Plaintiff and Defendant are able bodied, in good health, and capable of earning a living wage . . .’ An alimony award here, if any, should have been a rather insignificant supplement to [Wife] rather than an economic penalty of gigantic proportions simply because Jerry is of the male gender. This is another instance of ‘flail the male.’” *Id.* at 574. Similarly, in *Kappenman v. Kappenman*, 479 N.W.2d 520 (S.D. 1992), where the majority writer pointed out that alimony should not be awarded “to spouses who are capable of employment so that they can sit by in idleness,” *Id.* at 523, in his separate writing Justice Henderson added, “Let us not flail the male because he exists and ended up being in a courtroom.” (Henderson, J., concurring in part; concurring in result in part; dissenting in part, at 526).

Permanent Alimony

Despite the failure of the circuit court to expressly declare in its Findings and Conclusions what category of spousal support the \$72,000 award fit, its oral discussion of the award bears the hallmarks of it being a “permanent alimony” award. “Permanent alimony . . . is an allowance for support and maintenance (i.e. the provision of food, clothing, habitation, and other necessities) of the dependent/obligee spouse.” *Fox*, at 767.

“In deciding whether alimony is warranted, the court should consider: (1) the length of the marriage; (2) each party’s earning capacity; (3) their financial conditions after the property division; (4) each party’s age, health, and physical condition; (5) their station in life or social standing; and (6) the relative fault in the termination of the marriage.” *Lovejoy v. Lovejoy*, 2010 SD 39, ¶ 7, 782 N.W.2d 669, 672.

Here, as with the property division and the award of attorneys fees, there are strong indications that the alimony order against Rick constituted a form of punitive damage punishment for Rick having engaged in an extramarital relationship that flowered into a committed relationship. As such, it was an abuse of discretion and/or an erroneous application of law to fact. A comparison between the alimony factors as they apply to Rick and Cathy show as much.

(1) LENGTH OF THE MARRIAGE: 36.5 years.

(2) EARNING CAPACITY: Rick has maxed out his earning capacity. He has no higher education to fall back on. His health is deteriorating. Cathy is underemployed by choice. She has a bachelor's degree in education, with additional credit hours earned toward a master's degree (OR 3, 15). She has ample years of teaching experience. The parties' children are adults and do not rely on a parent to watch over them at home. Cathy has no health problems to keep her restricted to being home.

(3) FINANCIAL CONDITION AFTER PROPERTY DIVISION: As is shown on the last page of the circuit court's Appendix A, Rick received \$696,924 in marital assets. His 1/3rd share of inherited land from his parents has already been received by him, and carved up so that Cathy received a bountiful share of it. His health is deteriorating, and the only reason Rick is not having to personally pay the \$10,000 monthly cost of his necessary prescribed medication is because the health insurance his job with UPS is paying for it. If the circuit court's Judgment is allowed to stand, the final analysis will not be \$696,924 to Rick, but \$618,925. In comparison, as is shown on the last page of the circuit court's Appendix A, Cathy received \$696,925 in marital assets. Her share of inherited land from her parents has not yet come to her, and its value may be in the millions. Not a penny of it will go to Rick. Cathy's health is good. If the circuit court's Judgment is allowed to stand, the final analysis will not be \$696,925 to Cathy, but \$778,925.

(4) EACH PARTY'S AGE, HEALTH, AND PHYSICAL CONDITION: Rick's age: 58; Cathy's age: 54. Regarding health and physical condition: See factor (3) above.

(5) STATION IN LIFE OR SOCIAL STANDING: Rick is a "workaholic" without an education beyond high school who has worked hard jobs, in the sense of physical exertion. Per the circuit court's rulings Cathy will have assets worth \$696,925 — plus \$10,000 paid to her attorney, as well as an extremely valuable inheritance.

(6) RELATIVE FAULT IN THE TERMINATION OF THE MARRIAGE: The circuit court blamed **Rick's** extramarital relationship with Shandee Gillen for the termination of the marriage, even though it wasn't — and isn't today — a mere "fling." **Cathy** admitted to her own proclivities that hurt the marriage.

Even excluding the value of **Cathy's** expected future inheritance, and focusing on her "need" for monthly financial support, under the circuit court's property division **Rick** had to pay her \$140,243 in equalization cash within 60 days of the entry of the Judgment and Decree of Divorce. This alone negates a notion that she faces extreme financial hardship unless **Rick** pays her monthly spousal support. The circuit court's Findings and Conclusions that paint a picture of **Cathy** being rendered essentially penniless without monthly alimony is far from realistic. Similarly, regarding **Rick's** "ability to pay" an alimony award the circuit court's award fails to take into account that he is having to disgorge in a span of 60-days a large portion of the wealth that took decades to earn.

The circuit court treated alimony as a form of punitive damage award to **Cathy** as punishment against **Rick**. To do that is both an abuse of discretion and an error of law.

This Court's decision in *Kolbach v. Kolbach*, 2016 SD 30, is an example of when a circuit court is held to have abused its discretion in awarding alimony to a wife who should not have been eligible for it after the appropriate factors were applied to her situation. In *Kolbach*, Wife was, like **Cathy** here, a college graduate who was capable of earning a living after the marriage; and, like **Cathy**, was in good health, plus had been awarded a cash equalization from Husband of \$1,097,109.00. (Here, **Cathy's** property division value was \$696,925, including a cash equalization payment of \$140,243.) Despite Wife's receipt of an enormous cash payment, in *Kolbach* the circuit court nevertheless ordered Husband to pay her a monthly alimony award of \$1,000. The court's

finding on spousal support merely restated the legal requirement of “need for support.” *Id.* at ¶17.

Similarly, in *Scherer v. Scherer*, 2015 SD 32, 864 N.W.2d 490, the circuit court awarded alimony to Wife, but made no finding regarding the need for support other than the recipient’s statement that her expenses exceeded her income. This Court reversed, concluding that such a record did not support the need for the alimony that was awarded. *Id.* at ¶11, 864 N.W.2d at 494-495.

In *Kolbach*, this Court compared the facts there with those in *Scherer* in that Wife’s claim of need for spousal support should have been deemed extinguished by the value of the award of property. *Kolbach*, at ¶19. “A court abuses its discretion in awarding alimony when there is ‘insufficient evidence in the record to support findings necessary for spousal support[.]’” *Id.* at ¶21 (citing *Havlik v. Havlik*, 2014 SD 84, ¶17, 857 N.W.2d 422, 427; *Billion v. Billion*, 1996 SD 101, ¶37, 553 N.W.2d 226, 234).

In short, the equities here do not support the circuit court’s alimony award. Thus, an abuse of discretion occurred. Reversal is warranted.

2a. The circuit court abused its discretion and committed error in its property division regarding Rick’s nonmarital property.

“Fault” for the causing the dissolution of a marriage is generally not a permissible factor upon which to classify property as “marital” or “nonmarital.” *See, e.g., Kanta v. Kanta*, 479 N.W.2d 505 (S.D. 1991) (“The trial court in its conclusions of law stated it was dividing the property inequitably due to the relative fault of the parties. There is no finding that fault in any way affected acquisition of marital property. Accordingly, fault

was not a proper factor for consideration in this property division.” *Kanta*, at 510.) This applies to a party in the marriage gaining ownership of the property as a gift or through inheritance, and whether the same ought to be deemed “marital” anyway.

SDCL § 25-4-45.1 is clear that fault is not to be taken into account when determining the marital estate in a divorce case. The exception regarding “acquisition of property during the marriage” concerns acquisition, not maintenance, of property. Nor is it permissible to allow “fault” concerns to sneak in. *See e.g., Price v. Price*, 278 N.W.2d 455, 458 (S.D. 1979) (“We will not discuss the faults and circumstances leading up to the divorce as a factor to be considered in the analysis of the property division, because fault was not relevant to the acquisition of the marital property.”)

The importance of the circuit court’s getting this issue correct can be seen by this Court’s emphasis that whether a non-receiving spouse did or did not make a de minimis contribution to the acquisition of gifted and/or inherited property may be based on clear error. *See, e.g., Ahrendt v. Chamberlain*, 2018 SD 31, ¶13, 910 N.W.2d 913, 919; *Halbersma v. Halbersma*, 2007 SD 91, ¶17, 738 N.W.2d 545, 549-550.

A rule regarding division of inherited and gifted property in a divorce case is that equity under SDCL § 25-4-44 is that “South Dakota is an ‘all property state,’ meaning that ‘all property of either or both divorcing parties is subject to equitable division by the court, regardless of title or origin.’” *Midzak v. Midzak*, 2005 SD 58, ¶22, 697 N.W.2d 733, 739. However, this aphorism does not mean that each gifted and/or inherited property item is *ipso facto* marital in nature. Nor does it swallow a contrary consideration under the evidence.

“Before dividing property, the court must classify it as marital or nonmarital.” *Ahrendt*, 2018 SD at ¶8, 910 N.W.2d at 918. Seven factors are to guide the classification and division of inherited and gifted property. They are: “(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.” *Id.* ¶10; *Conti v. Conti*, 2021 SD 62, ¶30.

Where the spouse who was not the recipient of the gift or inheritance “has made no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support,” the circuit court should set aside the property as nonmarital. *Conti*, at ¶31, citing *Ahrendt*, 2018 SD 31, ¶10, 910 N.W.2d at 918.

The intent of the donor is a consideration that the circuit court may use in its determination. *Terca v. Terca*, 2008 SD 99, ¶21, 757 N.W.2d 319. This makes sense. Where, as here, the donor of the property could easily have named the other spouse as an intended recipient but didn’t, that omission speaks volumes that the omission was telling.

Although “the intent of the donor, while a consideration, is not determinative,” there is no rule against allowing it to be a part of the equity analysis. *Id.* It is also true that a homemaker’s contribution to the family’s upkeep is valuable and is to be considered as no less significant and substantial to the accumulation of marital property than the other spouse’s labor outside the home. *Terca*, at ¶25, 757 N.W.2d at 326. *See also Billion v. Billion*, 1996 SD 101, ¶30, 553 N.W.2d 226, 233. Contrarily, the adverse

health condition of the party receiving the inheritance or the gift is not to be overlooked. Even though in *Terca*, it was Husband who had inherited property and where the evidence was not persuasive that Wife had played a notable part in Husband's inheriting it, he was in deteriorating health plus the circuit court had awarded him approximately two-and-a-half times the monetary value of marital property than was awarded to Wife. Thus, it was not an abuse of discretion for the circuit court to have classified the inherited property as marital. *Terca*, at ¶27, 757 N.W.2d at 326.

It has also been held that a "symbiotic relationship" should exist between the property division and the alimony award, because an award of more assets can eliminate or reduce the need for spousal support. *Terca*, at ¶28, 757 N.W.2d at 326, quoting *Heckenlaible v. Heckenlaible*, 1996 SD 32, ¶20, 545 N.W.2d 481, 485. However, such consideration should not negate the overriding directive in SDCL § 25-4-45.1 that whereas fault is a permissible factor regarding alimony, fault is not generally to be a such consideration should not negate the overriding directive in SDCL § 25-4-45.1 that whereas fault is a permissible factor regarding alimony, fault is not to be a factor in equitably dividing property, including, generally, inherited and/or gifted property.

Here, Rick's gifted and inherited property came to him with no evidence, other than pure legalistic supposition, that Cathy played a role in Rick receiving it. Rick's parents had formed a corporation (RVC Ranch, LLC) within which to hold their assets. Rick and his two sisters were equal owners of it. Cathy could have been named as one of the owners, but wasn't. No testimony was adduced during trial that she was made a beneficiary of Rick's parents' Last Wills and Testaments.

This is an example of the “negative implication canon” that holds “*expressio unius est exclusio alterius*,” a Latin phrase that translates as “[T]he expression of one thing is the exclusion of another.” See *Matter of Guardianship and Conservatorship of Flyte*, 2025 SD 21, ¶46; *In re Est. of Flaws*, 2012 SD 3, ¶19, 811 N.W.2d 749, 753.

This may not have been a knock on Cathy, but rather merely a “blood’s thicker than water” scenario. However, the fiction that the circuit court carved out of a proof-texting of legal proclamations constitutes an abuse of discretion that ought to be reversed.

2b. The trial court abused its discretion and committed error in its property division regarding the value of a marital asset, that being the cash in the safe.

The circuit court rejected testimony from Rick and one or more of his witnesses on a number of property valuation issues, instead favoring Cathy’s side. However, rather than challenge each example, in this appeal Rick is focusing on one disputed item or valuation of property, that being missing cash in the safe.

According to the circuit court’s Findings of Fact (FoF 57-62) Rick contentions, through his testimony was that at least \$50,000 of cash and 1,600 valuable coins were in the safe when he moved out (FoF 57). Only the family members knew the access code to open the safe (FoF 58). Contrarily, Cathy testified that when she later inventoried the safe it only contained \$12,600 cash, various old cash bills, 1300 silver coins, and information about cryptocurrency (FoF 58). Cathy denied that she was responsible for any alleged depletion of the safe’s contents. The circuit court agreed. In Finding of Fact 61 the circuit court declared that Rick had failed to provide sufficient proof that there was ever \$50,000 in the safe, or that Cathy had anything to do with its removal. This was not at all correct,

as was shown unequivocally on cross-examination. She suddenly remember that she had removed from it thousands of dollars. She claimed she had to do it to pay property taxes and insurance on the couple's residence and their vehicles, plus \$1,400 for their son's rent. She says there was \$4,200 left in safe. Although the circuit court during its oral ruling had ruled that Cathy had played no part in any alleged removal of cash or other valuable items from the safe, Rick's attorney had to correct the court on what Cathy later had admitted. This reminder found its way into the Findings at FoF 60. There, the circuit court recited that Cathy admitted she took \$8,400 from the safe, leaving \$4,200 in the safe. The court then stated valuations: the silver coins at \$40,651 and the cryptocurrency at \$725.22 (FoF 61), with Rick getting the old bills and coins in the safe, and Cathy receiving \$8,000 (FoF 62; Appendix A).

The court had clearly erred. Whereas Cathy had been shown to give non-credible testimony on this issue by being impeached on cross-examination, Rick's contrary testimony held up as essentially not refuted. An aphorism of trial law is that if a witness knowingly testifies falsely to any material matter, then all of that witnesses' testimony may be rejected. *See e.g.*, SDPJ 1-30-30; *Stockwell v. Stockwell*, 2010 SD 79, ¶24, 790 N.W.2d 52, 61-62. Also, the court's statement that Rick had failed to provide evidence that Cathy had anything to do with the safe being allegedly deficient in its contents failed to honor the fact that "evidence" includes testimony. *See e.g.*, SDPJ 1-10-40. Additionally, proof can be circumstantial in nature. "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." *See e.g.*, SDPJ 1-60-20.

The circuit court committed an abuse of discretion on this issue that ought to compel reversal or remand.

3. **The trial court abused its discretion and committed error when it ordered Rick to pay \$10,000 of Cathy's attorneys fees.**

In *Taylor v. Taylor*, 2019 SD 27, this Court addressed the matter of an award of attorneys fees and costs in a divorce action, saying that SDCL §15-17-38 permits a court to award attorney fees in a divorce. Before awarding attorney fees under the statute, the circuit court must apply a two-step analysis. *Streier v. Pike*, 2016 SD 71, ¶25, 886 N.W.2d 573, 581. First, the court must consider whether the requested fees are reasonable. *Id.* Second, the court is required to consider “the parties’ relative worth, income, liquidity, and whether either party unreasonably increased the time spent on the case.” *Id.* (quoting *Nickles v. Nickles*, 2015 SD 40, ¶34, 865 N.W.2d 142, 154). *Taylor*, at ¶45.

Cathy’s attorney filed an itemized Affidavit with incorporated therein each Invoice that had been transmitted to Cathy for work done on her case. Rick did not object to the hourly rates charged as indicated in the Affidavit and Invoices. The total sum came to \$51,277.22.

At trial Cathy contended that Rick had committed certain discovery process abuses that had caused Cathy’s debt to her attorney to be unnecessarily increased, and because of that (and also due to need) should be ordered to pay some or all of her attorney’s fees. In both its oral ruling as well in its Findings and Conclusions the circuit

court declared that because of Rick's discovery fault he was to pay directly to Cathy's lawyer \$10,000 within 10 days of entry of the Judgment and Decree of Divorce.

Despite its declaration that Rick had abused the discovery process and in doing so had increased Cathy's attorney's fees and costs, there was no Finding and no Conclusion that explained the particulars of how the \$10,000 sum was arrived at, or described which Invoice and which dates and times were the product of abuses. As this Court held in *Taylor v. Taylor*, 2019 SD 27, such a failure constitutes reversible error: "The court also failed to make any findings of fact or conclusions of law under either step of the analysis. 'This Court has consistently required trial courts to enter findings of fact and conclusions of law when ruling on a request for attorney fees. Without findings of facts and conclusions of law there is nothing to review. *Streler [v. Pike]*, 2016 SD 71, ¶26, 886 N.W.2d [573] at 581 (quoting *Nickles*, 2015 SD 40, ¶35, 865 N.W.2d at 154).'" *Taylor*, at ¶46. Thus, remand was necessary. *Id.* at ¶47.

Because "the court is required to consider 'the parties' relative worth, income, liquidity,'" and Cathy's "relative worth, income, liquidity" after the property division and alimony award is ample, any award of attorneys fees to her was an abuse of discretion that deserves reversal. At the very least there ought to be a remand to the circuit court for a re-analysis of the attorneys fees award.

CONCLUSION

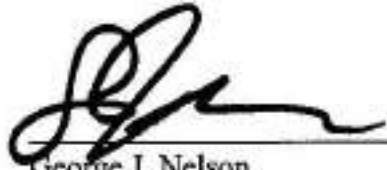
Rick respectfully requests that this Court grant the relief he seeks, and grant him such other and further relief as is just and proper under the circumstances.

REGARDING ORAL ARGUMENT

Should this Court desire oral argument, Rick requests the same. Otherwise, he waives oral argument.

Dated this 7th day of April, 2025.

GEORGE NELSON LAW OFFICE

A handwritten signature in black ink, appearing to be "G. Nelson", written over a horizontal line.

George J. Nelson
Attorney for Appellant
2640 Jackson Boulevard, #1
Rapid City, SD 57702
(605) 719-9470
gjnlaw@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 9,641 words. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 7 day of April, 2025.

LAW OFFICE OF GEORGE NELSON

/s/ George J. Nelson
George Nelson
Attorney for Appellant
2640 Jackson Boulevard #1
Rapid City, SD 57702
gjnlaw@gmail.com
(605) 719-9470

CERTIFICATE OF SERVICE

I certify that on the 7th day of April, 2025, I caused to be served via electronic service a true and correct copy of *Appellant's Brief* to:

Kylie Riggins
902 Columbus St.
Rapid City, SD 57701
kylie@rigginsfamilylaw.com

/s/ George J. Nelson
George Nelson

APPENDIX

Table of Contents

	<u>Appendix Document</u>	<u>Pages</u>
1.	Judgment and Decree of Divorce [December 5, 2024] (CI 127)	A1-A3
2.	Findings of Fact and Conclusions of Law [December 5, 2024] with Appendix A (CI 86)	A4-44

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT
)	
CATHLEEN SMITH,	)	File No. 46DIV23-000019
)	
Plaintiff,)	
	)	JUDGMENT AND DECREE OF
vs.	)	DIVORCE
)	
RICKY SMITH,)	
)	
Defendant.)	

This matter came before the Court on the 28th and the 29th days of October and the 15th day of November, 2024, before Honorable John H. Fitzgerald, in the Circuit Courthouse in Sturgis, Meade County, South Dakota. Plaintiff and Defendant both appeared personally and through counsel. Plaintiff was represented by Kylie M. Riggins, attorney of record, and Defendant was represented by George J. Nelson, attorney of record.

It appears to the Court that the Summons and Complaint were properly served, as shown by the Notice of Admission of Summons and Complaint on file herein, and more than sixty (60) days have elapsed since such service and that the Court has jurisdiction of this matter and the parties.

The Court has considered their testimony and evidence offered by the parties, both oral and documentary, the arguments of counsel, all files and records herein, and has been fully advised herein as to all matters pertinent hereto. After the trial was completed, this Court entered an oral ruling on the 25th day of November, 2024 that was the framework for the Findings of Fact and Conclusions of Law. The Court entered

its Findings of Fact and Conclusions of Law on the 5th day of Dec. 2024, which Findings of Fact and Conclusions of Law are incorporated herein by reference as if set forth in their entirety herein. Now, therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED that Plaintiff is hereby granted a divorce from Defendant on the grounds of adultery. That the marriage heretofore existing between the parties be, and the same hereby is, dissolved and set aside, and that the parties be, and each of them is, restored to the status, conditions and rights of single persons; and it is further

ORDERED, ADJUDGED AND DECREED that the parties' debts and assets shall be divided as set forth on the Court's Appendix A as filed on the 5th day of December; 2024 and it is further

ORDERED, ADJUDGED AND DECREED that each party shall make any property that the other is to receive but is currently in their possession, available to the other party within the timelines established in the Findings of Fact and Conclusions of Law or, if not stated therein, within thirty (30) days of the Judgment and Decree of Divorce; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay by way of alimony to Plaintiff of \$1,000 per month commencing January 1, 2025 and continuing for a period of five (5) years. Following payment of the 60th alimony payment, alimony shall be reduced to \$500 per month for two additional years; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay to Plaintiff as and for attorney's fees the sum of \$10,000. Said payment shall be made within ten (10) days of the entry of the Judgment and Decree of Divorce and shall be made directly to Plaintiff's counsel; it is further

ORDERED, ADJUDGED AND DECREED that Defendant shall pay to Plaintiff as and for a final equity payment, a sum of \$140,243 within thirty (30) days of the entry of the Judgment and Decree of Divorce; and it is further

ORDERED, ADJUDGED AND DECREED that each party shall, at the request of the other, execute and deliver any such instruments as may be required in order to carry out the intentions and provisions of the Court's orders. In the event either party shall fail to execute deeds, titles, or other appropriate instruments of conveyance as required by the Court's orders, this Judgment and Decree shall act in lieu of such conveyance; and it is further

ORDERED, ADJUDGED AND DECREED that as may be necessary, this Court will enter any such Orders as may be needed to carry out the terms of the Agreement; and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff shall be restored to her maiden name and be known as Cathleen Margaret Brown. Her birth date is January 16, 1970, and her place of birth is Pennington County, Rapid City, South Dakota.

Attest:
Molstad, Stephany
Clerk/Deputy



BY THE COURT:


Honorable John H. Fitzgerald
Circuit Court Judge

12/5/24

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF MEADE	)	FOURTH JUDICIAL CIRCUIT
)	
CATHLEEN SMITH,	)	File No. 46DIV23-000019
)	
Plaintiff,)	
	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
)	
RICKY SMITH,)	
)	
Defendant.)	

This matter came before the Court on the 28th and 29th days of October, 2024 and the 15th day of November, 2024, before Honorable John H. Fitzgerald, in the Circuit Courthouse, Sturgis, Meade County, South Dakota. Plaintiff was personally present and represented by her counsel, Kylie M. Riggins, and Defendant was personally present and represented by his counsel, George J. Nelson.

The Court considered the evidence introduced, both oral and documentary, the testimony of the parties, and the arguments of counsel, and having been fully advised as to all matters pertinent hereto,

NOW, THEREFORE, the undersigned makes the following:

FINDINGS OF FACT

1.

There is herein incorporated by reference all the findings of fact made by the Court from the bench at trial, which are not inconsistent with the following.

2.

The parties hereto will be referred to as "Cathy," and "Rick". The joint property exhibit will be referred to as "Appendix A." Plaintiff's exhibits are numerical beginning with the number "1;" Defendant's exhibits are also numerical beginning with the number 101."

PLEADINGS

3.

The Summons and Complaint in this action were filed on February 24, 2023. Within the Complaint, Cathy requested a divorce on the grounds of irreconcilable differences. If the parties could not agree to the use of irreconcilable differences, then she requested a divorce on the grounds of adultery and extreme cruelty. In her prayer for relief, she has requested an equitable division of debts and assets, and alimony sufficient to assist in her support post-divorce.

4.

An admission of service was filed by Rick on March 15, 2023.

5.

Rick, filed an Answer to the Complaint on March 31, 2023. In his Answer, Rick requested a divorce on the grounds of irreconcilable differences, or in the alternative, extreme cruelty. In his prayer for relief, he requested an equitable division of debts and assets.

6.

More than sixty (60) days have passed since the service of the Summons and Complaint.

7.

The parties were residents of Meade County, South Dakota, when this matter commenced; the parties continue to reside in Meade County, South Dakota.

8.

The parties were married on April 30, 1988, in Sturgis, Meade County, South Dakota. They separated on or about December 14, 2022. Their marriage is 36.5 years in duration at the time of divorce.

9.

The parties engaged in mediation with Terri Lee Williams on July 22, 2024. Mediation was unsuccessful.

FACTUAL BACKGROUND

10.

Cathy and Rick met in 1984 when Cathy was a 14-year-old freshman in high school and Rick was 18. They were engaged in 1986 and married in 1988. At that time Cathy was 18 years old and still finishing her senior year of High School. Rick was 21. The couple resided in Faith, South Dakota while Cathy finished her senior year of high school.

11.

In August of 1988, the couple moved to Aberdeen, where Cathy earned her Bachelor of Science in elementary education and completed some masters level coursework. In order to provide for their support, Rick worked full time at John Deere and Cathy found work on campus.

12.

While in Aberdeen, the family welcomed two children, a son, Randy, and a daughter, Tiffany.

13.

In 1992, Cathy graduated and in 1993, the family moved their mobile home back to Faith, South Dakota where Rick resumed work at the local gas station and car repair shop and Cathy began teaching for the Faith School District.

14.

In 1994, as Cathy was finishing her first year of teaching, the family welcomed their third child, Seth. Cathy taught one additional year at that time, but prior to starting the 1997-1998 school year, the family considered the costs of daycare and Cathy's income and determined that it made the most sense for Cathy to be a stay-at-home wife and mother.

15.

In an effort to contribute financially, she also began selling Mary Kay, took on secretarial work with the parish church in order to help provide support while being available full time for Rick and the children. In 1999, the couple completed their family with the birth of their fourth child, Mark. Thereafter, Cathy continued to stay home and began taking in daycare children. At one time she was caring for three one-year olds, three two-year-olds, and several school age children who came after school.

16.

In 2000, Rick came to Cathy with the idea of opening his own business. The couple leveraged their assets, rented a building and Rick's Auto Repair Shop was

created. Cathy assisted with bookkeeping at the shop and supported Rick as she could. In the same year, the parties bought their current home.

17.

Rick worked diligently to build the business from the ground up. He was described in testimony as a "workaholic." His hard work created a strong and successful business for the family and his income was the primary source of support throughout the marriage.

18.

As the parties' youngest son, Mark, reached school age, Cathy returned to teaching as a Special Education Teacher with the Faith School District in 2006. This position allowed her to provide an income, while still maintaining primary responsibility for their children and the household. She remained in this position until Mark graduated high school in 2018.

19.

In 2015, Rick's parents, who were becoming more aware of their declining health, began transferring assets to Rick and his siblings as part of their estate plan. In order to hold the assets received, RVC Ranch, LLC was created on April 22, 2015. In preparation for this transfer of assets, Tom and Linda Smith met with their attorney alone, with the attorney and their children, and with the attorney, their children, and the spouses of their children. At that time, Rick and Cathy had been married for 27 years and all family members testified that there was no indication that the marriage was in trouble. Thus, there would have been no indication to Tom or Linda Smith that if they wished to protect Cathy or any other spouse, additional action would be necessary.

20.

In early 2018, Rick's parents were in a car accident. As a result, Rick's mother broke her right arm and required surgery. As his father was actively battling leukemia at the time, Cathy joined in with Rick's siblings to help care for both of Rick's parents, travelling to help them on weekends, during spring blizzards, and during breaks from school.

21.

In May of 2018, the parties lost Rick's father. Rick's relationship with his mother was strained following his father's death and he asked Cathy not to help his mom. Cathy continued to help Rick's mother as best she could. Rick's mother passed in January of 2022.

22.

In 2019, Cathy's contract with the Faith school expired and she changed jobs to allow for her to meet the increased needs of her family. She moved to the Dupre School District. When her position there was not renewed, the parties agreed that Cathy would not travel any further for a teaching position and Cathy looked for work in other fields. Her next job was with Bogue and Bogue Law office as a receptionist. Around this time, Cathy also began picking up seasonal shifts as a delivery driver for UPS.

23.

In 2020, UPS decided to add a full-time position in Faith. Cathy planned to apply for the position as the couple recognized the benefits of working with the company. It was at that time, however, that Rick advised Cathy that he would like to take the position. Cathy agreed not to apply following their conversation. Rick applied

instead and was hired and both believed she would still continue with seasonal employment. Just after Rick's completion of training, however, the couple learned that the addition of his full-time position had essentially eliminated her position with UPS. In 2021, Cathy found a job with a local hotel, cleaning rooms. The pay was much less than her prior position with UPS, but Rick's income was sufficient for the family.

24.

In 2021 Cathy suffered a shoulder injury that led to a year of appointments with doctors, physical therapists and chiropractors. 2022 was a hard year for the couple, beginning with the loss of Rick's mother and continuing with Cathy's shoulder pain growing worse. In June of 2022, Cathy was forced to undergo surgery in order to relieve her unbearable pain. While this resulted in her being out of work for a time, through physical therapy, Cathy has regained movement in her shoulder and at the time of trial was no longer prevented from working.

25.

By the end of October of 2022, Rick had distanced himself even further. At this time, a woman named Shandee Gillin began working at his shop. Rick told Cathy that he hired Shandee because he needed more help in the shop for projects that Cathy could no longer assist with, following her shoulder injury.

26.

On December 14, 2022, Cathy finally pushed the issue. The discussion resulted in Rick telling her that he did not love her anymore and that he did not want to continue a relationship with her. He told her he was done. Cathy helped Rick pack his bags and he moved out of the home. Soon thereafter, it came to light Rick was involved in an

adulterous affair with Shandee Gillen. Rick admitted to this affair starting in May of 2022 and continuing at the time of trial.

MARITAL PERSONAL PROPERTY

27.

Cathy and Rick have some disagreements on the values of personal property. Cathy provided Exhibit 13 which sets forth Cathy's initial proposal for valuation and division (pink), Rick's proposal received October 8, 2024 (blue), and finally Cathy's proposed compromises offered in an attempt to resolve the matter (green). Exhibit 13.

28.

The Court accepts the proposed distribution as set forth in the green columns of Exhibit 13 and assigns a value of \$6,000 to the property received by Cathy and \$9,000 to the property received by Rick.

29.

Cathy and Rick own a collection of firearms. Cathy began her attempts to value the firearms by taking the handwritten inventory drafted by Rick and stored in the home. A typed version of Rick's inventory list was then sent to Mark Blote, owner and operator of First Stop Guns in Rapid City, South Dakota. She asked that he provide his expert opinion as to the value of the firearms listed.

30.

Mr. Blote has decades of experience running First Stop Guns where he is engaged in the buying and selling of firearms. He has significant insight into the gun market. Further he has no tie to either party and was unaware of how the firearms were to be

divided. Prior to trial the parties stipulated to accepting his values as set forth on **Exhibit 14.**

31.

Rick and his children testified that Rick was very familiar with his firearms. Rick testified that the list Cathy found was created years prior to separation and that he kept close tabs on his collection. Cathy and the boys made it clear that while she supported the investment in firearms, her ability to identify or handle them was limited at best.

32.

In response to formal discovery posed in in July of 2023, prior to Rick understanding that Cathy was using his years old list, Rick stated under oath that he had 125+ guns. **Exhibit 58, pg. 4, #17.** After learning that Cathy had utilized his list, Rick suddenly claimed that he had 150 firearms in the home and that 25+/- were suddenly missing. It is noted that while not having knowledge of firearms, Cathy did carefully photograph the firearms in the home. Those claimed as "missing" were not present when the photo inventory was taken. Further, Cathy allowed Rick and the parties' two oldest sons to inventory every inch of the home she was in. Rick did not allow the children to inventory his home or vehicles. He insisted instead that they take his word that he did not have his favorite portion of his firearm collection in his possession.

33.

The Court is unable to determine what happened to the firearms that were not in the home when Cathy inventoried them following Rick's departure. Cathy shall receive the Walter CCMP2 w/laser WK116876 she has requested at a value of \$400. The

firearms marked as missing on exhibit 14 will be deemed lost. Rick shall receive all remaining firearms on exhibit 14 at a value of \$49,600.

PERSONAL VEHICLES

37.

The parties have a 1996 Chevy S10 Pickup, a 1997 Vern 5*8 Trailer, a 2003 Chevy Silverado 1500 LS Pickup, a 2004 Buick LeSabre, a 2004 Chevy Suburban, a 2005 GMC Sierra 1500 Pickup, a 2007 Chrysler Town and Country, a 2010 Dressen Custom Trailer, a 2014 Dodge Grand Caravan, a 2016 Flatbed Trailer, and Ultima Lawn Mower, and a 2016 Bobcat 5185 with Bucket. Exhibits 16 to 27. With the exception of the 2004 Suburban, the parties are in agreement with the distribution of the vehicles, but have disputes as to value on the 1996 Chevy S10 Pickup, the 2007 Town and Country, the 2014 Dodge Grand Caravan and the 2016 Bobcat with Bucket.

38.

The Court has valued and divided the vehicles and equipment between the parties as set forth in the Court's column of **Appendix A** attached.

RETIREMENT ACCOUNTS

40.

Cathy has a South Dakota Retirement Systems (SDRS) account. **Exhibit 32.** This is a defined benefit plan which would provide a monthly payment of \$914.16 should Cathy draw retirement at age 65. The value of the contributions made during Cathy's employment was \$47,489. Cathy shall receive this account.

41.

Rick has an Empower 401(k) with UPS. **Exhibit 33.** The parties are in agreement that Rick should receive this account.

47.

Due to his work outside of the home throughout the marriage Rick is currently expected to receive \$2,191 at age 65 from Social Security while Cathy will receive \$1,224 at the same age. **Exhibit 41.** This disparity is due to joint decisions made during the marriage which resulted in Cathy remaining in the home as a wife and mother and out of the workforce.

INVESTMENTS/SECURITIES

48.

Rick has an Investment Account through LPL Financial. **Exhibit 34.** As of June, 2024, this account had a total value of \$430,855.21. This account was generated by the sale of land gifted from Rick's parents in 2015.

49.

Cathy joined the Smith family at the young age of 18. She shared in love and companionship with both of Rick's mother during her life. As the funds in RVC Ranch, LLC were used to pay bills for Rick's parents prior to their passing, she directly contributed to the maintenance of this asset after its receipt. Cathy also picked up the slack in the home when Rick was travelling to the ranch to either care for his parents or to prepare the ranch for sale. This indirect contribution likely increased the value of the property received by not only Rick, but by his siblings as well.

50.

By way of indirect contribution, Cathy contributed to the maintenance of all assets, including Rick's interest in RVC, Ranch, LLC. via her outside income, her role as a wife and mother (full time for large portions of the marriage). Both of these indirect

methods of contribution allowed Rick to maintain the inherited funds without needing to use them to pay regular household/other expenses.

51.

Rick's ownership interests in the assets that resulted in the funds that are now the LPL investment account were received in 2015, 27 years into this 36-year marriage.

CASH/DEPOSIT ACCOUNTS

54.

Cathy has a checking and savings account with Dakota Plains Federal Credit Union. This Court assigns these accounts to Cathy as set forth on the attached **Appendix A.**

55.

Rick has checking and savings accounts with Dakota Plains Federal Credit Union. The balance in his checking account as of August 30, 2024 was \$155,543.47. **Exhibit 29.** This balance included \$140,000 that Rick removed from the parties joint Rick's Auto account in January, 2023.

The account will be divided equally between the parties. Rick shall provide Cathy with \$77,821 at the time of divorce within three days of the entry of the Judgment and Decree of Divorce.

56.

Rick also has a Personal savings account at Dakota Plains Federal Credit Union. **Exhibit 29.** Rick will receive this account as set forth on the attached **Appendix A.**

57.

Cathy and Rick have a safe in the marital home. The parties testified that Rick maintained cash in the safe during the marriage. The actual amount of cash within the

safe is the subject of dispute between the parties. Shortly after this matter began, Rick began to claim that there was \$50,000 within the safe when he moved out of the home. He also testified that there were 1,600 collectable coins.

58.

Rick testified that only he, Cathy, and their children knew the code to access the safe and accuses Cathy of taking funds. Cathy has been clear that when she opened the safe to inventory it, there was \$12,600 in cash, various old cash bills, 1,300 silver coins and information related to the parties' crypto currency account.

59.

Rick's testified adamantly that the safe contained 1,600 coins, \$50,000 and that he had never entered or removed anything from the safe without the parties' adult son, Randy, watching him do so, it is noted that Randy testified that he never watched his father remove anything from the safe. When responding to discovery in posed in July of 2023, Rick stated that the safe contained 650 silver coins **Exhibit 57, pg. 3.**

60.

While this matter was pending, Cathy, who was recovering from surgery and then getting back into the workforce did not have the income to support the payment of property taxes, homeowners and vehicle insurance. Accordingly, she used \$7,000 to pay the property taxes and insurance on jointly owned marital residence and vehicles. She also used \$1,400 to help their son meet his rental obligations. Each expenditure was disclosed to Rick and his attorney both informally and via discovery responses. At the time of trial, there was \$4,200 in the safe. The value of the silver coins and the crypto currency fluctuates with the market. As of 10/7/2024 the value of the crypto currency was \$725.22 and the value of each coin was \$31.37 for a total of \$40,651.

61.

Rick provided no evidence to substantiate his claim of there ever being \$50,000 in the safe. Further, there is no evidence that if \$50,000 was in the safe, Cathy had anything to do with its removal.

62.

Rick shall receive the old bills valued at and the coins from the safe. Cathy shall receive the remaining cash at a value of \$8,000 to account for a portion of the funds used during the pendency this action. **See attached Appendix A.**

LIFE INSURANCE

63.

Cathy has a life insurance policy through Farm Bureau. The policy has a net surrender value of \$4,025. **Exhibit 30.** The parties agree that this policy should be assigned to Cathy at the net surrender value. The Court will accept this agreement as set forth on the attached **Appendix A.**

64.

Rick has a life insurance policy through Lincoln National Life Insurance Company. The policy had a net surrender value of \$22,404 as of June 8, 2023. The parties agree that this policy shall be assigned to Rick at value of \$22,404.

REAL PROPERTY

65.

The parties purchased a home located at 313 S. Third Avenue, Faith, South Dakota, 57626 in December of 2000. The property has an outstanding mortgage. **Exhibits 2-4.** The property is currently assessed at \$130,051. Both parties originally

proposed that Cathy receive the home. At trial, Rick testified that the home should be sold.

66.

Cathy provided testimony from realtor Troy Jantz, who advised that the home would likely sell between \$200,000 and \$220,000. Mr. Jantz has no prior relationship with either party. He testified that it was his policy to view the interior of the home due to the impact it could have on overall valuation.

67.

Cathy proposed that the average of the value range given by Mr. Jantz, \$210,000 be utilized.

68.

Rick provided testimony from realtor Artie Gifford. Mr. Gifford originally opined that the if placed upon the open market a value of \$317,500 to \$320,000 could be achieved.

69.

The Court considered the values proposed by both Mr. Jantz and Mr. Gifford along with shared by Cathy from other testimony and evidence at trial. The property including the shed and appliances will be awarded to Cathy at a value of \$210,000.

75.

This Court assigns realtor's fees and closing costs to Cathy at a value of \$-16,800.

76.

While this matter was pending it was discovered that the bathtub in the residence had been leaking for some time. The long-term leak caused extensive rot and the need

to remove the fixtures and flooring in the area. **Exhibit 4.** Cathy completed the demolition and repairs in order to preserve the assets but was required to take out a small loan to do so.

77.

In August of 2023, Rick utilized funds remaining in RVC, Ranch LLC to purchase a home for himself. The value of the home is essentially equal to his remaining share of RVC Ranch, LLC. Attorney Nelson, acting on Rick's behalf, advised both at the time of the telephonic hearing on the Motion to Compel, following trial that this property had been held in RVC Ranch, LLC pending the resolution of this divorce when it will be deeded to Rick outright.

78.

Rick admitted that while this matter has been pending, Rick has paid no rent to RVC Ranch and distributions between the siblings would be equal upon his receipt of an asset of equal value to the home purchased on his behalf.

79.

Due to the recency of the purchase of this home, Cathy did not undertake the additional cost of having a CMA completed for this property. As set forth in Exhibit 29, the property was purchased at the price of \$199,900.

80.

Rick shall receive this home at a starting value of \$200,000. The home value shall be reduced by \$16,000 for the realtors' fees and closing costs that would be incurred to obtain its net value.

81.

Rick also has a 1/3 interest in real property outside of Faith, SD and a bank account both of which are held in RVC Ranch, LLC. As the property was not fully disclosed to counsel for either party prior to the discovery deadline, a CMA was not completed. Upon discovery of the fact that the property was still owned, Plaintiff commissioned an expedited CMA and requested a continuance of trial.

82.

At trial, Troy Jantz provided a CMA providing that the property had a current market value of \$900-\$950 per acre. Rick's 1/3 interest in the property using the midrange of that proposed is \$50,677. Mr. Gifford agreed that with the information available, this valuation is reasonable. This property will be awarded to Rick. See the attached **Appendix A**.

83.

During the marriage, the parties owned and operated Rick's Auto Body. While Rick is only doing this work part time at this point, the building, tools and equipment remain in good condition.

84.

Cathy presented testimony through Troy Jantz, that the building would sell for approximately \$90,000. He opined that the building had the benefit of great street access and little competition for real estate. He advised, however, that he had not been able to see the interior of the building. Thus, he had no choice but to provide a lower value rather than guess as to the quality and use of the interior.

90.

Artie Gifford testified on behalf of Rick. He advised that the property would likely sell in the range of \$137,500 and \$142,500 on the open market. He testified that he was given the opportunity to view both the interior and exterior of the property.

91.

Upon learning that Mr. Gifford had viewed the property and that he had proposed a value of approximately \$140,000 Mr. Jantz advised that should the interior property be in usable condition for an auto mechanics shop as stated by Mr. Gifford, he would agree it should sell for in the \$137,500 to \$142,500 range.

Rick testified that the building would likely sell for \$80,000 due to the condition of the second building on the property. The Court assigns the property to Rick at a value of \$80,000. Realtors fees and closing costs of 8% will be allowed for this property.

92.

The commercial property also houses a large storage container valued at \$1,600. This shall be assigned to Rick along with the tools at a value of \$10,000.

95.

The business still has a checking account owned jointly by Rick and Cathy. The account shall be assigned to Cathy at a value of \$5,272. As it is a joint account, should Rick have removed funds which result in the account containing less than \$5,272, he shall reimburse the amount necessary to reach \$5,272 to Cathy.

96.

Finally, the business still has a savings account owned jointly by Rick and Cathy. The account shall be assigned to Rick at a value of \$295. As it is a joint account, should Cathy have removed funds which result in the account containing less than \$295, she shall reimburse any amount withdrawn to Rick.

Gifts Received During Marriage.

97.

In 2015 Rick's parents transferred their assets to an entity. They then named Rick and his sisters each as 1/3 owners of the entity which was known as RVC Ranch, LLC. From 2015 forward assets were sold and the income generated therefrom was distributed to Rick and his sisters in 1/3 shares. All distributions and capital gains assigned to Rick were reported on the joint tax returns filed with Cathy.

98.

It is further noted that Rick's 1/3 share of the LPL transfers would have had a value of approximately \$306,000. The account is now worth nearly \$443,000. Thus, by allowing the account to remain untouched, the balance has grown by \$137,000 during the marriage. This does not take in to account the growth in the value of the land that occurred between the time it was gifted and either today or the date it was sold depending on the land to be addressed.

99.

Rick's request for exclusion ignores the fact that the assets received have been maintained and have grown for nearly a decade during the marriage. Further, he makes this request despite the evidence demonstrating the many of the funds received were

commingled and taxes were paid jointly for any and all distributions received and capital gains incurred.

101.

Our Supreme Court has made it clear that it is only appropriate to exclude inherited funds when one party has made no or de minimis contribution to the accumulation or maintenance of the asset **and** has no need for support. In this instance, Cathy's contributions to the marriage, which have allowed these assets to be both maintained and helped them grow, cannot be denied.

102.

Further, given the parties' choices during the marriage, which included Cathy being a stay-at-home wife and mother throughout much of the marriage, she will be in need of support moving forward.

MARITAL UNSECURED LIABILITIES

104.

The parties agree that Cathy's Discover Credit Card *7452, Amazon Credit Card *0756, and Chase Freedom Credit Card *0367 should be assigned to Cathy, and this agreement has been accepted. Cathy has provided statements showing the current balances of the accounts. These debts have increased during the pendency of this divorce due to Rick taking all of the income that was previously used to maintain marital obligations. Cathy will be assigned her Discovery Credit Card, Amazon Credit Card, Chase Freedom Credit Card and Green Sky loan at current balances as set forth on the attached **Appendix A**.

105.

The parties agree that Rick's Cabela's Credit Card should be assigned to Rick, and this agreement has been accepted. Rick testified that due to his access to the martial income his credit cards are paid off monthly and had \$0 due at the time of trial.

GROUND

106.

Cathy has requested a divorce on the basis of adultery. Rick has admitted to a long-term sexual affair beginning as early as May of 2022. This is well in advance of the parties' separation. During the testimony, it was clear that the parties marriage had its ups and downs and had become more distant toward the end this, however does not excuse or justify Rick's behavior. The poison that caused in the breakdown of the marriage, and resulting divorce, was Rick's adulterous affair. Rick is at fault for the break down of the marriage.

ALIMONY

109.

Cathy has requested that this Court award her alimony.

110.

Cathy is currently earning an average of \$1,161 per month from her primary employment as a housekeeper at the local motel. **Exhibit 40.** In order to minimize her need she has also sought out secondary employment and will have approximately two more hours at \$30 per hour per week coming in for another cleaning job. Further, she testified that she is taking on odd cleaning jobs when available and that she continues to

seek work in the area. Despite her efforts, the Court finds that she is currently underemployed and that she could maximize her earnings by returning to teaching.

111.

Rick is currently earning approximately \$9,234.25 per month via his employment at UPS, miscellaneous income from Rick's Auto, and from dividends. **Exhibit 39.**

112.

Cathy has a basic monthly budget of \$4,130.57. After subtracting her income, she has a need of \$2,089 to meet her monthly budget. **Exhibit 42.** At 65, when she is able to receive Medicare, social security, and her SDRS retirement, her need will decrease to \$442.41 per month. **Exhibit 42.**

113.

Rick has a monthly budget of 2,648.78. **Exhibit 43.** With only his primary income considered, this leaves him with an excess of \$5,369.28 per month prior to 65 and approximately \$542 after reaching 65. **Exhibit 42.**

114.

Cathy has provided evidence not only of her need for spousal support but also of Rick's ability to pay. **Exhibits 41-42.** This is true both currently and post-retirement.

ATTORNEY'S FEES

115.

~~Rick made it clear from the beginning of this matter that he would make the process difficult and expensive for Cathy. He followed through with this position by increasing the costs of the action by sending excessive discovery requests, at times two different sets on the same day and by sending discovery requests (many again~~

Rick has
JE.
12-5-24

duplicative) more than a month after the discovery deadline established by this Court.
Exhibit 47.

BASED ON THE FOREGOING FINDINGS, THE COURT HEREBY ENTERS
THE FOLLOWING:

CONCLUSIONS OF LAW

1.

This Court has jurisdiction over the parties and the subject matter herein and venue is proper in Meade County.

2.

In drawing its conclusions, the Court has judged the credibility of the witnesses. *Walker v. Walker*, 2009 S.D. 31, 765 N.W.2d 747; *Matter of Tinklenberg*, 2006 S.D. 52, ¶24, 716 N.W.2d 798; *Mash v. Cutler*, 488 N.W.2d 642, 653-654 (S.D. 1982).

GROUND

5.

Cathy has requested a divorce on the grounds of adultery. Rick has requested a divorce on the basis of extreme cruelty.

6.

Adultery is the voluntary sexual intercourse of a married person with one of the opposite sex to whom he or she is not married. **SDCL 25-4-3.**

7.

Cathy has met her burden, proving that Rick engaged in an intimate affair with Shandee Gillan and that the affair caused the breakdown of the parties' marriage. Cathy is granted a divorce on the basis of adultery.

PROPERTY DIVISION

13.

When a divorce is granted, the Court 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 a division of the property, the Court shall have regard for equity and the circumstances of the parties.

SDCL §25-4-44.

14.

SDCL 25-4-55 requires this Court to give an "equitable distribution." In doing so, the Court must give "due regard to the equities of the parties." The Court is not required to give any particular mathematical division of debts and assets. *Feldhaus v. Schreiner*, 2002 SD 65, ¶15, 464 NW2d 753.

15.

"Absent special circumstances, the date of the granting of the divorce is the proper time for the determination of the value of the estate for purposes of a property division." *Johnson v. Johnson*, 2007 S.D. 56, ¶ 37, 734 N.W.2d 801, 810 (citing *Geraets v. Geraets*, 1996 S.D. 119, § 7, 554 N.W.2d 198, 200).

16.

The first step in formulating an equitable division of property for the Court is to place a value upon all property held by the parties. That value must be based upon the

evidence or within a reasonable range of the values presented to the court. *Farlee v. Farlee*, 2012 SD 21, ¶¶8-10, 812 N.W.2d 501 (S.D.2012).

17.

Next, when "arriving at an equitable division of property, a circuit court must classify property as 'marital' or 'non-marital.'" *Farlee v. Farlee*, 2012 SD 21, ¶11, 812 N.W.2d 501 (S.D.2012).

18.

The Court has the ability to include all premarital, inherited, and gifted property in the marital estate to be divided. *Halbersma v. Halbersma*, 2009 S.D. 98, ¶10, 775 N.W.2d at 215. Our Supreme Court has instructed that "[o]nly 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." *Anderson v. Anderson*, 2015 S.D.1 at ¶6 citing *Novak v. Novak*, 2006 S.D. 34, ¶ 5, 713 N.W.2d 551, 552-53.

19.

When formulating an equitable division of debts and assets in this case, we must consider the overall equity of the outcome. The Court may also consider the fact that caselaw in *Terca v. Terca*, indicates that the receipt of an inheritance late in a long-term marriage weighs in favor of its inclusion in the marital estate 2008 SD 99, ¶23. See also *Novak* 2006 SD 34, ¶ 10.

20.

In a case much like this matter, the South Dakota Supreme Court in *Novak* found that the inheritance ten years into a 16-year marriage weighed in favor of including the inherited property in the marital estate. *Novak v. Novak*, 2006 SD 34,

¶10. In *Garnos*, the Circuit Court was overturned for excluding inherited property when the facts included a 15 +/- year marriage where wife contributed her teaching income and bore two children and performed all the duties of a housewife and mother. When doing so the Court reiterated that our Supreme Court has consistently recognized that the contribution of a wife and mother is substantial and is an important consideration in the determination of property interests of the parties. 376 N.W.2d 517 (S.D. 1985.)

21.

In this case, the parties were married for 27 years when the initial gift was received and have remained married for another 9. In total they were married for 36.5 years. Cathy had been involved with Rick's family since she was 14 years of age and at the time of their receipt, the gifted assets were considered by both parties to be marital assets that would assist in their future. Portions of the gift were comingled as funds were received. Cathy's contribution in the years following receipt allowed for gifted assets/funds to be held and eventually invested, while providing her income and support for Rick to help maintain household expenses, home renovations, vehicle maintenance etc.

22.

Circuit Courts are further instructed to consider the following factors when dividing property and when determining whether gifted property is a marital asset:

(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, 2006 S.D. 34, ¶ 4, 713 N.W.2d at 552.

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When addressing the factors to the facts of this case:

- (1) The parties have been married for 36.5 years.
- (2) The parties' assets have a combined total of \$1,423,681.
- (3) Cathy is 54 years old. Rick is 58 years old.
- (4) Cathy has recovered from a significant shoulder surgery completed just prior to separation and is in good health. Rick suffers from an asthma related breathing disorder which requires expensive medication (currently covered by his UPS health insurance) and arthritis. His ability to work, however, has not been compromised.
- (5) Both parties came into the marriage at a very young age, Cathy, not even out of high school and Rick in his early 20's. The advancement of their careers and therefore their earning capacity, however, was deeply impacted by decisions made during marriage.

Throughout the marriage, Cathy paused her career on a number of occasions. First, she did so in order to stay home and raise the parties four children. In the later years she selected multiple odd jobs to ensure her availability to the family, including Rick's then aging parents.

Rick is self-educated was a very hard worker. His work ethic allowed him to build a very successful car repair business in the Fatih community. Due to joint efforts, the parties were able to build a successful business, raise wonderful children and live a comfortable life for their family.

Later, in the marriage, Cathy's connection to UPS allowed Rick an opportunity to learn of a full time position with the company. This now provides him with a steady income and good insurance.

- (6) The parties began dating when Cathy was just 14 years old. Cathy was still in high school when the parties initially married. Rick too was very young. They worked as a team to grow their assets. Cathy achieved her education as a teacher during the marriage but put her career on hold for many years to support Rick's career and raise the children. Both parties grew up as part of the other's family. When Rick received the gifted assets 27 years into the marriage they were comingled with other assets as the parties historically combined all assets and shared equally in the fruits of their efforts. This remained true until Rick began an adulterous affair and decided that he no longer wished to be married.

(7) Rick has a significantly greater earning capacity both now, and into retirement.

24.

In this instance, the parties entered the marriage just out of high school with little to no assets. Neither provided anything of substance by way of premarital property.

25.

The receipt of a gift late in a long-term marriage weighs in favor of its inclusion in the marital estate. *Terca v. Terca*, 2008 SD 99, ¶23, See also *Novak v. Novak*, 2006 SD 34, ¶ 10.

26.

Cathy provided direct care for Rick's mother when she was in need. She also took on the lion's share of the household work when Rick's assistance was needed to prepare the ranch for sale. Cathy's actions allowed the family to save on the costs associated with long term care and allowed for the increased value of the ranch prior to sale. Her contributions were in no way diminimus increased the value of the gift received by Rick and his siblings.

27.

Cathy has made a significant contribution, both directly and indirectly, to the growth and maintenance of the parties' assets regardless of origin. She worked outside of the home, was the primary caretaker of the parties' four children, supported Rick while he built a business, cared for his ailing parents, carried the extra workload home when Rick's assistance was needed by his parents. Cathy then continued to contribute to Rick and the marital estate for the decade following the receipt of the first gifted assets. Her contribution to this marriage and to Rick's ability to obtain and maintain the assets he seeks to exclude was, by no stretch of the imagination, *de minimus*.

Following the precedent set forth in *Anderson* and *Halbersma II*, exclusion of any property would be inappropriate given the facts of this case.” **2015 S.D. 28, 2009 S.D. 98.**

28.

The South Dakota Supreme Court has held that while Social Security Benefits themselves cannot be reallocated, a general consideration of a party’s anticipated social security benefits in the overall scheme when making a property division is appropriate. “While a trial court may not distribute marital property to offset the computed value of Social Security benefits, it may premise an unequal distribution of property—using, for example, a 60-40 formula instead of 50-50—on the fact that one party is more likely to enjoy a secure retirement.” (Referencing caselaw initially set forth in *In re Marriage of Morehouse*, **121 P.3d at 267**.) The court found that this comports with the general rule that the trial court is not tied to any mathematical formula when structuring the division of property, and neither party is entitled to a 50-50 division of the marital estate. Thus, a court may premise an unequal distribution of marital property on the fact that one party is likely to receive or, in this case, is receiving social security benefits. *Johnson v. Johnson*, **2007 SD 56, 734 N.W.2d 801 (S.D. 2007).**

29.

Due to the parties’ joint decision for Rick to remain in the workforce while Cathy stayed home during much of the marriage and took jobs that fit the family schedule later on and due to Cathy’s current underemployment, Rick will have social security payments that are substantially higher than Cathy. This has been taken into account when formulating the overall property division and alimony calculations.

Trial courts may consider not only the market value of a marital home, but its net value, "even if sale of the home was] not immediately contemplated[.]" *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 14, 913 N.W.2d 496, 501 (quoting *Abrams v. Abrams*, 516 N.W.2d 348, 351 (S.D. 1994)). "[T]he costs of achieving [what a home is worth if it is about to be sold] should be considered." *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 14, 913 N.W.2d 496, 501 (quoting *Abrams v. Abrams*, 516 N.W.2d 348, 350 (S.D. 1994)). *See also Abrams v. Abrams*, 516 N.W.2d 348, 350 (S.D. 1994) (affirming the trial court's accepting one party's net value of the marital home, which included reductions for "brokerage commission, real estate taxes, and other fees.").

Further, the trial court must value the home "within a reasonable range of figures." *Johnson v. Johnson*, 2007 S.D. 56, ¶ 37, 734 N.W.2d 801, 811-12 (quoting *DeVries v. DeVries*, 519 N.W.2d 73, 75 (S.D. 1994)). Specifically, "the value must be within the range of evidence presented to the court." *Johnson v. Johnson*, 2007 S.D. 56, ¶ 37, 734 N.W.2d 801, 811 (quoting *DeVries v. DeVries*, 519 N.W.2d 73, 76 (S.D. 1994)). *See also Hill v. Hill*, 2009 S.D. 18, ¶ 14, 763 N.W.2d 818, 823.

The values of the real estate will be reduced by 8% to account for realtor's fees and closing costs as set forth on the attached **Appendix A**.

After considering the facts of this matter and applying applicable law, a property division as set forth above and on the attached **Appendix A** is hereby deemed equitable by this Court. Rick shall provide an equity payment to Cathy in the amount of \$140,243 within sixty (60) days of the entry of the judgment and decree of divorce.

ALIMONY

34.

"Where a divorce is granted, the court may compel one party to make such suitable allowance to the other party for support during the life of that other party or for a shorter period, as the court may deem just, having regard to the circumstances of the parties represented," and such orders may be modified. **SDCL § 25-4-41.**

35.

Alimony in South Dakota is "an allowance for support and maintenance, with 'its sole object the provision of food, clothing, habitation, and other necessities for the support of a spouse.'" ***Harding-Moyer v. Harding*, 2000 S.D. 126, ¶ 12, 616 N.W.2d 899, 902 (quoting *Urban v. Urban*, 1998 S.D. 29, ¶ 7, 576 N.W.2d 873, 875)).** South Dakota caselaw defines "necessaries" as "food, drink, clothing, medical attention, and a suitable place of residence." ***Harding-Moyer*, ¶ 12, 616 N.W.2d at 902 (quoting *Black's Law Dictionary* 927 (5th ed. 1979)).**

36.

A party requesting alimony "must establish that they have a need for support and that their spouse has sufficient means and abilities to provide for part or all of that need." ***Fausch v. Fausch*, 2005 S.D. 63, ¶ 17, 697 N.W.2d 748, 755 (quoting *Urban v. Urban*, 1998 S.D. 29, ¶ 7, 576 N.W.2d 873, 875).**

37.

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The following factors should be considered when determining alimony: (1) length of the marriage; (2) earning capacity of each party; (3) financial condition of each party after the property division; (4) age, health, and physical condition of the parties; (5) the parties' station in life or social standing; (6) relative fault in the termination of the marriage.

Fausch v. Fausch, 2005 S.D. 63, ¶ 17, 697 N.W.2d 748, 755.

38.

Trial courts must "consider the allocation of property and spousal support together." *Teroa v. Teroa*, 2008 S.D. 99, ¶ 28, 757 N.W.2d 319, 326 (citing *Evans v. Evans*, 1997 S.D. 16, ¶ 31, 559 N.W.2d 240, 247). "The symbiotic relationship between property division and spousal support requires consideration of the two together, as an award of more assets can eliminate or reduce the need for spousal support and vice versa." *Teroa*, ¶ 28, 757 N.W.2d at 326 (citing *Heckenlaible v. Heckenlaible*, 545 N.W.2d 481, 485 (S.D. 1996)).

39.

When applying the factors to consider for alimony awards, this Court concludes that:

- (a) The parties have been married for 36.5 years;
- (b) The parties are 54 and 58 years old;
- (c) Rick has a successful career and side business. Upon his completion of training for his career, Cathy's position with the same employer (UPS) was eliminated.

Cathy is currently earning \$1,161 per month from her primary employment as a housekeeper at a local motel, but the Court finds her currently under employed. Cathy's earnings are currently approximately 1/9 of Rick's and are too little to allow her to properly support herself following the divorce;

- (d) Rick will receive the business and one half of the income producing investment

account. Cathy will receive one half of the investment account.

(e) Rick's station or social standing will not change significantly following the property division. Cathy, absent assistance from Rick, will be unable to maintain basic comforts and standard of living post-divorce.

(f) Rick is responsible for the breakdown of the marriage. His adulterous affair with Shandee Gillen was the catalyst of the divorce.

40.

Cathy's contributions as wife and mother to four children required sacrifice during the marriage. They also allowed Rick to build a business and near the end of the marriage created the connections which allowed Rick to obtain his current job. As a result, she needs financial support in the future. Due to their joint efforts, Rick has the ability to provide the needed support. Cathy has provided her budget which demonstrates that she will need approximately \$2,089 per month to meet her basic needs. Upon reaching the age of 65, this need will decrease to \$442 per month. Rick (without considering the additional income generated by his side work at Rick's Auto) has a surplus sufficient to assist Cathy.

41.

Cathy has shown that she currently needs spousal support from Rick in the amount of \$2,089.57 per month. The Court, however, believes she can reduce this need by seeking higher paying employment in her field of education.

42.

Rick's budget shows that he is able to provide support for Cathy with the excess after covering his own living expenses.

43.

The evidence on all of these factors supports Cathy's request for alimony. Alimony will be entered in the amount of \$1,000 per month for a period of five years commencing the first of the month following the entry of the Judgment and Decree of divorce. After payment of 60 consecutive payments, alimony will be reduced to \$500 per month for an additional two (2) years. This alimony amount is designed to allow Cathy to get on her feet and work to resume employment consistent with her education.

ATTORNEY'S FEES

44.

"[A]uthority to assess attorney's fees may not be implied but must rest upon a clear legislative grant of power." *Hoffman v. Olsen*, 2003 S.D. 26, ¶ 7, 658 N.W.2d 790, 792 (quoting *Estate of O'Keefe*, 1998 S.D. 92, ¶ 17, 583 N.W.2d 138, 142). When it is "in the interests of justice [trial courts] may award payment of attorney's fees . . . before or after judgment or order." SDCL § 15-17-38.

45.

Awarding attorney's fees "is a two-step process in that the trial court must determine what constitutes a reasonable fee in the case, then make the further decision of that portion of a party's attorney fees which should be allowed as costs and paid by the other party." *Ryken v. Ryken*, 440 N.W.2d 300, 305 (S.D. 1989) (citing *Lien v. Lien*, 278 N.W.2d 436, 443 (S.D. 1979)).

46.

In making an award for attorney's fees, "the trial court should consider . . . [t]he property owned by each party; their relative incomes; liquidity of the parties' assets; and whether a party has unreasonably increased the time spent on the case." *Ryken v. Ryken*, 440 N.W.2d 300, 305-06 (S.D. 1989) (citing *Johnson v. Johnson*, 300 N.W.2d 865, 870 (S.D. 1980); *Wallahan v. Wallahan*, 284 N.W.2d 21, 28 (S.D. 1979)). Additionally, the court should consider the labor and time involved, the skill needed, the discovery utilized, and the complexity of the issues. *Ryken v. Ryken*, 440 N.W.2d 300, 306.

47.

In this case, an equal property division has been made. Rick has a substantially higher income than Cathy.

48.

The property division is relatively straightforward with only a few peripheral issues including the categorization of property with its origin in a gift received 27 years into a 36.5 -year marriage.

49.

Under ordinary circumstances, the issues at bar were uncomplicated and straightforward.

Rick's actions, as more thoroughly set forth above, but including his continual repetition of discovery requests to Cathy unduly complicated and increased the cost of the proceedings. His refusal to comply with the discovery requirements and provide information related to assets that were only within his control post separation unnecessarily increased the costs of trial preparations with this matter.

113.

The hourly rates for Attorney Riggins and her staff are reasonable for the locale. The extra time spent was a function of Rick's misuse of/refusal to comply with the discovery process.

50.

Attorney labor was increased. Attorney's fees are allowed by statute and their allowance is encouraged in instances like those presented in this matter. Attorney Riggins's fees at \$300 per hour, considering her experience, reputation, and ability in conjunction with the fees customarily charged in the locale are not unreasonable. The issues, though not particularly complicated, required extensive preparation, organization, and a cogent presentation, as the parties' respective exhibits attest.

51.

12-5-24 JF The Court further finds that the time and expenses of the litigation were unnecessarily increased by the Defendant's ~~intractable and unreasonable stand relative to the property division, his use of repetitive discovery requests to harass Cathy, and his continual baseless allegations of wrongdoing~~ ^{use of repetitive Discovery.}

52.

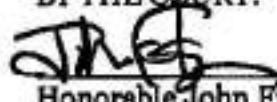
Based on the foregoing, the Court concludes that Rick should be required to \$10,000 toward Cathy's outstanding attorney's fees. Payment shall be made within ten (10) days of the entry of the Judgment and Decree of divorce and shall be made to Counsel directly.

53.

Any Finding of Fact deemed to properly constitute a Conclusion of Law shall be incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

 12-5-24

Honorable John Fitzgerald
Circuit Court Judge

	A	B	C	D	E	F	G	H	I	J
1	DESCRIPTION	Trail Subst	Assets/Liability Value		Cathy's Proposed Division		Ricky's Proposed Division		Court's Division	
2			Cathy	Rick	Cathy	Rick	Cathy	Rick	Cathy	Rick
3	REAL PROPERTY									
4	Marital Residence at 313 S. Third Avenue, Faith, SD	2 & 3	210,000	320,000	210,000		320,000		210,000	
5	Loan with Green Sky Loan for Bathroom Repairs.	4	-11,637	0	-11,637		0		-11,637	
6	Tool Shed		Included in CMA	3,000	X		3,000		X	
7	Stove, Refrigerator in Residence		Included in CMA		X				X	
8	Reduction for Realtor's Fees and Closing Costs at 8% to reach net value.		-16,800	-25,360	-16,800		-25,360		-16,800	
9	405 S. 2nd Avenue W. Faith, SD 57626 *Purchased on 8/9/23 by Rick through RVC Ranch, LLC	5	200,000	0		200,000		0		200,000
10	Reduction for Realtor's Fees and Closing Costs at 8% to reach net value.		-16,000	0		-16,000		0		-16,000
11	Commercial Property at 113 W 1st Street, Faith, South Dakota	6 & 7	140,000	80,000		140,000		80,000		80,000
12	Reduction for Realtor's Fees and Closing Costs at 6% to reach net value.		-8,400	-6,400		-8,400		-6,400		-6,400
13	BUSINESS INTERESTS									
14	Rick's Auto Body LLC equipment, and tools		10,000	10,000		10,000		10,000		10,000
15	40 Foot Metal Storage Container on Shop Property.		1,600	0		1,600		0		1,600
16	Joint Checking Account with DPFCU *00609	11	5,272	5,272	5,272		5,272		5,272	
17	Joint Savings Account with DPFCU *Rick Moved \$140,000 from this account to his personal account on 1/30/23*	11	306	295	306			295		295
18	PERSONAL PROPERTY									
19	Personal Property to Cathy	13	4,498	7,340	4,498		7,340		6,000	
20	Personal Property to Rick	13	16,147	4,076		16,147		4,076		9,000
21	Firearms	14	66,690	66,690	400	66,290	24,420	42,270	400	49,600

	A	B	C	D	E	F	G	H	I	J
1	DESCRIPTION	Total Assets	Assets/Liability Value		Cathy's Proposed Division		Ricky's Proposed Division		Court's Division	
2			Cathy	Rick	Cathy	Rick	Cathy	Rick	Cathy	Rick
22	Acknowledged Gifts to Rick's Paramour	12	170	170		170		170		170
23	Old Cash Bills	15	180	180		180	180			180
24	1,300 Silver Coins @ \$31.27 each (Value last run on 10/8/24)	15	40,651	54,900	40,651		54,900			40,651
25	Crypto Currency (Value last run on 10/8/24)	15	725	725	725		725		725	
26	1953 \$2 Bill		included in old bills above	2	included in old bills above	included in old bills above	2		included in old bills above	included in old bills above
27	15 \$2 Bills		included in old bills above	30	included in old bills above	included in old bills above	30		included in old bills above	included in old bills above
28	2 \$50 Bills (1993/1991)		included in old bills above	100	included in old bills above	included in old bills above	100		included in old bills above	included in old bills above
29	AUTOMOBILES/VEHICLES									
30	1996 Chevy S10 Pickup	16	2,625	1,443		2,625		1,443		1,443
31	1997 Vern 5X8 Trailer	17	500	500		500		500		500
32	2003 Chevy Silverado 1500 LS Pickup	18	12,192	12,192		12,192		12,192		12,192
33	2004 Buick LeSabre	19	2,276	2,276		2,276		2,276		2,276
34	2004 Chevy Suburban 1500 49BRV5	20	4,110	4,306		4,110	4,306			4,110
35	2005 GMC Sierra 1500 Pickup	21	9,216	8,000		9,216		8,000		8,000
36	2007 Chrysler Town and Country	22	2,930	3,500	2,930		3,500		2,930	
37	2010 Dressen Custom Trailer	23	1,200	1,200		1,200		1,200		1,200
38	2014 Dodge Grand Caravan	24	9,965	15,000	9,965		15,000		9,965	
39	2016 DCT 7x20 Flatbed Trailer	25	3,500	3,500		3,500		3,500		3,500
40	Cub Cadet Ultima Lawn Mower	26	3,000	3,000	3,000		3,000		3,000	
41	Push Lawn Mower		5	5	5		5		5	
42	2016 Bobcat S185	27	31,418	25,000		31,418		25,000		27,000
43	Bobcat Bucket	27	1,060	500		1,060		500		500
44	CASH/DEPOSIT ACCOUNTS									

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	A	B	C	D	E	F	G	H	I	J
1	DESCRIPTION	Total Value	Assets/Liability Value		Cathy's Proposed Division		Rick's Proposed Division		Court's Division	
2			Cathy	Rick	Cathy	Rick	Cathy	Rick	Cathy	Rick
45	Cathy's Regular Shares Account with Dakota Plains Federal Credit Union	28	1,307	1,307	1,307		1,307		1,307	
46	Cathy's Share Draft Account with Dakota Plains Federal Credit Union	28	971	1,070	971		1,070		971	
47	Rick's Share Account with Dakota Plains Federal Credit Union *\$140,000 from joint account was deposited here.	29	155,641	155,641	140,000	15,641	0	155,641	77,821	77,821
48	Rick's Share Draft Account with Dakota Plains Federal Credit Union	29	12,835	12,835		12,835		12,835		12,835
49	Regular Cash Held in Safe		4,200	50,000	4,200		50,000		8,200	
50	LIFE INSURANCE POLICIES									
51	Cathy's Variable Universal Life Insurance with Farm Bureau Surrender Value	30	4,025	4,524	4,025		4,524		4,025	
52	Rick's Life Insurance Policy with Lincoln National Life	31	22,404	0		22,404		0		22,404
53	RETIREMENT									
54	Cathy's Account with SDRS	32	Defined Benefit Plan	47,489	X		47,489		47,489	
55	Rick's Empower 401K with UPS	33	11,894	11,894		11,894		11,894		11,894
56	Cathy's Estimated Monthly Social Security of \$1,224 at 65	41	X		X				Each receive their own. Not subject to division.	
57	Rick's Estimated Monthly Social Security of \$2,191 at 65	41	X			X				Each receive their own. Not subject to division.
58	INVESTMENTS/SECURITIES									

	A	B	C	D	E	F	G	H	I	J
1	DESCRIPTION	Total Exhibit	Assets/Liability Value		Cathy's Proposed Division		Ricky's Proposed Division		Court's Division	
2			Cathy	Rick	Cathy	Rick	Cathy	Rick	Cathy	Rick
59	Investment Account with LPL	31	442,992	0	221,496	221,496		0	221,496	221,496
60	1/3 interest in 160 Acres of Land Outside Faith	35	50,667	0		50,667		0		50,667
61	1/3 interest in Bank Accounts for RVC Ranch, LLC	35	3,833	0		X		0		3,833
62	TOTAL ASSETS AND UNSECURED LIABILITIES		1,438,168	886,202	621,314	813,021	520,810	365,392	571,169	837,167
63	UNSECURED DEBTS (ENTERED AS A NEGATIVE)						195			
64	Discover Credit Card *7452 5-16-23	36	-8,079	-8,079	-8,079		0		-8,079	
65	Cathy's Amazon Credit Card *0756 *Previously 2111 new card issued.	37	0	0	0		0		0	
66	Cathy's Chase Freedom Credit Card *0367	38	-6,408	-6,408	-6,408		0		-6,408	
67	Rick's Cabela's Credit Card *6524		0	0		0		0		0
68	TOTAL UNSECURED DEBTS		-14,487	-14,487	-14,487	0	0	0	-14,487	0
69										
70	NET TOTALS		1,423,681	871,715	606,827	813,021	520,810	365,392	556,682	837,167
71										
72	CASH NEEDED TO EQUALIZE				103,097	-103,097	-77,709	77,709	140,243	-140,243
73										
74	NET AWARDS				709,924	709,924	443,101	443,101	606,925	606,924

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 30953

* * * *

RICK SMITH,

Defendant and
Appellant,

v.

CATHLEEN SMITH,

Plaintiff and Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
MEADE COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE JOHN FITZGERALD
CIRCUIT COURT JUDGE

* * * *

**BRIEF OF PLAINTIFF/APPELLEE
CATHLEEN SMITH**

* * * *

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* * * *

Notice of Appeal filed on January 2, 2025

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PRELIMINARY STATEMENT

For the Court's convenience, Appellant, Rick Smith, is referred to as "Rick." Appellee, Cathleen Smith, is referred to as "Cathy." Documents from the record of the Fourth Judicial Circuit are referred to as "R_." References to the Divorce Trial Transcript are referred to as "DTR" followed by the page number, a colon, and the line number(s) as applicable. Trial Exhibits are referred to as "EX" followed by the number or letter. References to the Joint Property Exhibit are referred to as "JPE" followed by the line (row) or column designation. Appellant's Brief is referred to as "AB_."

JURISDICTIONAL STATEMENT

The Judgment and Decree of Divorce in this matter was entered by Honorable John Fitzgerald, Meade County, Fourth Judicial Circuit, on December 5, 2024, and was filed December 5, 2025. The Notice of Entry was filed December 5, 2024. A Notice of Appeal was filed January 2, 2025.

STATEMENT OF LEGAL ISSUES

1. Did the trial court abuse its discretion when awarding alimony to Cathy?

The trial court considered testimony and evidence received in a three-day trial to the court. After considering the evidence, the trial court awarded alimony in a limited amount for a limited duration. Specifically, the court ordered Rick to assist Cathy in getting back on her feet by providing \$1,000 per month for five years followed by \$500 per month for an additional two years. The court made it clear that the support was designed to assist Cathy while she worked to resume employment in the teaching field after being out of the teaching field for five years and having her licensure lapse.

Fausch v. Fausch, 2005 S. D. 63, 697 N.W.2d 748.

Terca v. Terca, 2008 S.D. 99, 757 N.W.2d 319.

Urban v. Urban, 1998 S.D. 29, ¶7, 576 N.W.2d 873.

SDCL § 25-4-41.

2A. Did the trial court abuse its discretion when including gifted property in the marital estate prior to ordering an equal property division?

The trial court considered testimony and evidence received in a three-day trial to the court and determined that, given the facts of this case, an equitable property division required that all property, including gifted contributions, be included in the marital estate and be divided equally.

Dunham v. Sabers, 2022 S.D. 65, 981 N.W.2d 620.
Anderson v. Anderson, 2015 S.D. 28, 864 N.W.2d 10.
Conti v. Conti, 2021 S.D. 62, 967 N.W.2d 10.
Terca v. Terca, 2008 S.D. 99, 757 N.W.2d 319.

SDCL § 25-4-44.

2B. Did the trial court abuse its discretion when valuing the safe contents?

The trial court considered testimony and evidence received in a three-day trial. Cathy testified as to the contents of the safe when she inventoried them. Rick claimed the safe contained more. The Court judged the credibility of the witnesses and assigned a value matching Cathy's testimony.

Dunham v. Sabers, 2022 S.D. 65, 981 N.W.2d 620.
Conti v. Conti, 2021 S.D. 62, 967 N.W.2d 10.
Grode v. Grode, 1996 S.D. 15, 543 N.W.2d 795.
Evens v. Evens, 2020 S.D. 62, 951 N.W.2d 268.

3. Did the trial court abuse its discretion when awarding Plaintiff a portion of her attorney's fees?

The trial court considered testimony and evidence received in a three-day trial to the Court, completed the two-step analysis set forth in case law, and concluded that the factors supported an award to Plaintiff for a portion of her attorney's fees.

Dunham v. Sabers, 2022 S.D. 65, 981 N.W.2d 620.
Evens v. Evens, 2020 S.D. 62, 951 N.W.2d 268.

SDCL § 15-17-38.

STATEMENT OF THE CASE AND FACTS

CASE HISTORY

This is an action for divorce following a 36.5-year marriage, which produced four children and a marital estate worth \$1,393,850. The divorce action commenced with the service of a Summons and Complaint. An Admission of Service was executed on March 2, 2023. The matter was heard by Honorable John Fitzgerald, Fourth Judicial Circuit, Meade County. The Judgment and Decree of Divorce incorporating Finding of Facts and Conclusions of Law was entered on December 5, 2024. Within the Judgment and Decree, the parties' assets and liabilities were identified, valued, and equitably distributed. The court considered the factors required and awarded spousal support and attorney's fees paid from Rick to Cathy. Rick appealed the Judgment and Decree of Divorce by service and filed a Notice of Appeal on January 2, 2025.

STATEMENT OF FACTS

Cathy and Rick met in 1984 when Cathy was a 14-year-old freshman, attending her high school Christmas dance. Rick was 18. The couple began dating in January 1984. They married on April 30, 1988, during Cathy's senior year of high school. DTR111:23-113:18, FOF10. The parties had been married for 36.5 years at the time of divorce. R1.

After Cathy graduated from high school, the parties moved to Aberdeen, South Dakota, where Cathy earned a degree in elementary education. While Cathy attended college and completed student teaching, the parties welcomed two children. To support their growing family, both parties worked outside of the home. Cathy worked at the library and other miscellaneous locations on campus. Rick worked as a mechanic with John Deere. DTR 113:22-115:4, FOF11-12. Following Cathy's graduation in 1992, the

family returned to their hometown of Faith, South Dakota, where Cathy began teaching and Rick resumed work as a mechanic at the gas station. In March 1994 the parties welcomed their third child. Cathy continued teaching through the end of the school year. At that time, however, daycare costs outweighed Cathy's income, and the couple determined that Cathy would be of greater benefit to the family as a stay-at-home wife and mother. While a full-time homemaker, Cathy continued to contribute financially by selling Mary Kay cosmetics, working as a secretary, cleaning at the church, and assisting community members with daily tasks and cleaning. Cathy and Rick welcomed their fourth child in 1999, and Cathy opened an in-home daycare. DRT43:23-44:1, 71:12-75:2, 117:14-21, FOF 14-15.

Rick worked as a mechanic until 2000, when he approached Cathy about opening his own shop, Rick's Auto. Cathy, who had a newborn baby and had recently left full-time employment, was nervous but believed in and supported her husband. DTR42:7-45:24, 117:22-118:8, FOF16. The new business kept Rick away from Cathy and the children for long hours, but it was successful and provided a good income. DRT54:2-4, 54:18-22, 73:18-23, 91:25-92:6, FOF16-17. Cathy was the primary caregiver for the parties' four children; maintained the home; operated the daycare; and assisted at Rick's Auto by cleaning, running errands, and helping with bookkeeping. DTR41:14-43:18, 76:18-24, 90:22-91:12, 106:20-107:6, 392:1-393:17, FOF16. In 2006, when their youngest child began school, Cathy returned to teaching in Faith, South Dakota, where she continued teaching until their youngest child graduated from school in 2018. Cathy then accepted a teaching position at Dupree School, where she remained until February 2019. While teaching, Cathy continued to care for the children, oversee their education

and medical care, and transported them to and from activities. DTR45:7-47:2, 71:15-75:19, 121:2-13, 195:24-197:7, FOF18.

In 2015, Rick's parents, Tom and Linda Smith, began creating an estate plan to transfer assets to the next generation. Cathy had known Tom and Linda since she was just 15 and had been their daughter-in-law for 27 years. Rick's sister, Christi, testified that she could barely remember a time when Cathy was not part of the family. DTR498:3-14. Cathy considered Tom and Linda her family, and they considered her a daughter. DTR47:11-15, 76:25-4. Rick and Cathy were 27 years into a strong marriage. All who knew them believed they would live happily ever after. DTR507:7-10, FOF 19. Tom and Linda included their children and their children's spouses in their estate planning meetings. DTR 178:8-14, 506:7-507:6, 508:10-509:2, FOF19. By the end of 2015, all of Tom and Linda's assets had been transferred into an entity named RVC Ranch, LLC. The entity was owned in equal one-third shares by Rick and his two sisters. DTR94:10-15, 173:21-177:11, 486:13-47:25, 501:12-502:17, FOF19.

RVC Ranch, LLC, was treated as a family asset. From 2015 forward, RVC Ranch, LLC, assets were sold, and all income generated was distributed to Rick and his sisters in equal shares. Cathy assisted the entity by writing the checks and helping maintain the necessary paperwork. Distributed funds were used both to support Tom and Linda and personally as each sibling deemed fit. Throughout the remainder of their marriage, Rick and Cathy deposited their share of distributed funds into joint accounts and a personal investment account with LPL Investments. All distributions and capital gains were reported on the parties' joint tax returns. DTR178:15-195:23, FOF48-51, 97.

Over the years, the LPL Investments account grew, and land values increased. FOF98-101.

Tom and Linda Smith were involved in a serious car accident in 2018. Linda suffered a broken arm and required surgery. Tom, who was already battling leukemia at the time, was unable to care for Linda. Cathy, despite living two hours away from her in-laws, joined with Rick's sisters and niece to provide care for Linda during her recovery. Tom passed away in May 2018, but Linda continued to require care. Rick got into an argument with Linda following Tom's death and refused to assist her in any way. He urged Cathy to do the same. Cathy, who considered Linda to be her family, continued to help care for Linda until her passing in 2022. DTR47:11-48:6, 77:5-78:3, 122:16-20, 124:1-127:7, 197:8-199:15, 453:3-18, FOF 20-21.

During this time, Cathy experienced some career changes. In 2018, after 13 years, the Faith School District did not renew Cathy's contract. DTR121:12-123:20. Cathy moved to the Dupree District for a year but, again, her contract was not renewed. Recognizing that if Cathy drove farther than Dupree for work, she no longer would be able to support Rick and the family in the way they were accustomed, Rick and Cathy agreed that she would not return to teaching. Cathy began taking on work in other fields. As she was no longer teaching, Cathy and Rick decided she would no longer pay for her to take continuing education or to maintain her teaching license. Cathy initially worked as a receptionist at a law firm and then as a seasonal delivery driver for UPS. DTR127:8-129:24, 149:8-18, 449:1-21, FOF22.

Cathy enjoyed driving for UPS and planned to apply for a full-time position in Faith that opened in 2020. Rick, however, felt it would be better for their family if he

took the full-time position and Cathy remained in the seasonal position. Concerned that she, as a current UPS employee, would have a hiring advantage, Rick asked Cathy not to apply. Cathy agreed, and UPS hired Rick for the full-time position. Two weeks into Rick's training, Cathy learned that Rick's full-time position eliminated the need for seasonal drivers and, again, Cathy became unemployed. With limited options, Cathy began cleaning rooms at the local motel, where she received a significantly lower wage, but the parties were not concerned because Rick's income increased enough to support the family without issue. Cathy maintained the lion's share of the household chores. DTR129:25-133:5, 414:5-417:10, FOF23. In 2021, the UPS driver who ran the Dupree route passed away. Cathy approached Rick about taking the open position. As the Dupree position required driving gravel roads within reservation boundaries, Rick told Cathy not to take the position. At his instruction, Cathy declined the Dupree position, along with its salary and health benefits. DTR449:22-450:15.

In the summer of 2021, Cathy suffered a shoulder injury and began experiencing excruciating pain when she lifted her arm. She continued to work and tried various treatments but was eventually forced to undergo surgery. DTR133:7-134:9. Following surgery, Cathy noticed significant changes in Rick; he left early for work and came home late in the evenings, and when he was home, he treated Cathy differently. He seemed to be constantly angry and began nitpicking. He made it abundantly clear that he resented the time Cathy was required to be off work following her surgery. Cathy gave Rick grace but, in December 2022, after receiving silent treatment for a month, she pushed him to discuss their relationship. Rick responded by telling Cathy that he didn't love her and wanted a divorce. DTR136:2-139:20, FOF25, 26. Soon thereafter, Cathy learned that

Rick was involved in a sexual affair with a local woman. Rick later admitted that the affair began in May 2022. The affair continued at the time of trial. DTR 139:21-141:8, EX12, R268, FOF26.

The parties separated in December 2022. At this time, Cathy was still recovering from surgery and was unable to work. When she returned to work the following winter, the motel was slow, and rooms were limited. DTR145:5-11. Cathy, needing additional income, found work as a substitute mail carrier. She also took on any cleaning jobs she could find. While Cathy is educated as a teacher, she no longer had her teaching credentials, and the lack of available positions prevented her from seeking employment as a teacher. DTR441:4-443:2, 150:22-25.

Cathy remained in the marital residence post-separation, but Rick had access to the home through the garage. DTR556:4-14, 422:18-423:14. The parties had two locked safes in the home. The amount of cash and number of collectible coins held in the bedroom safe was a subject of dispute at trial. In his sworn discovery responses provided on September 11, 2023, Rick claimed that the safe contained \$50,000 and 650 silver coins when he left the home in December 2022. EX57 (3, #12). At trial, Rick testified that there was "at least" \$50,000 in the safe but acknowledged that this was an estimate and he had no way of accounting for the funds or how they got there. DTR 565:3-13, FOF59,61,62. By the time of trial, Rick's coin count had changed from 650 to 1,600. DTR556:18-21, 558:1-2, 619:12-620:14.

Cathy completed a full inventory of the safe that held the cash and collectible coins in March 2023. She provided pictures of the coins and an accounting of \$12,600 for the cash in the safe. DTR252:7-253:18, 542:4-6, EX15, FOF57,58,60. While the divorce

was pending, Cathy lacked the funds needed to support herself and pay marital expenses. She used some of the cash from the safe to pay property taxes and insurance and to assist their son with a small loan. She disclosed to Rick and his counsel the use of the funds. DTR255:1-257:19, 557:11-19, EX47(127-158), FOF60. The parties' 35-year-old son, Randy Smith, also inventoried the safe, and his inventory matched Cathy's coin count and accounting of funds. DTR78:8-79:14.

Rick repeatedly claimed that he had no access to the home and safe contents post-separation. His claim was disputed by Cathy's testimony, their son's testimony and, at times, even his own testimony and discovery responses. For example, Rick denied having unsupervised access to the safe, but then acknowledged that he had access to the garage and, thus, the interior of the home and the safe through an interior garage door to the house. DTR556:4-14, 422:18-423:14. Rick admitted that he had been to the home on multiple occasions without Cathy's knowledge or consent. When there, he was either alone or with his girlfriend. DTR631:2-634:8.

When asked in discovery what he had removed from the parties' safe post-divorce, Rick admitted that in December 2022, he entered the safe and removed a money bag from Rick's Auto. His response insinuated that he could not have removed cash on this occasion by asserting that the parties' son, Randy, watched over him as he removed the money bag. EX 58(2, #73). Rick repeated this assertion at trial. DTR620:19-621:4. During his testimony, however, Randy made it clear that at no time had he been asked to supervise when Rick removed a money bag from the safe. He further testified that he had no way of knowing what Rick removed from the safe in December 2022. DTR81:18-82:15, 86:16-87:1, 105:12-106:2.

Cathy also inventoried Rick's extensive firearm collection and took copious pictures of approximately 125 firearms that were in the home. DTR242:2-243:7, EX 14A. Rick, in his discovery responses of September 11, 2023, confirmed that there were 125 firearms in the home. EX57(pg4, 17). Rick and two of the parties' sons later inventoried the firearms in the home. Their inventory matched the firearms inventory that Cathy completed and photographed. DTR49:13-50:18. By the time of trial, Rick claimed that there were 150 firearms in the home when he left the marital residence. He alleged that Cathy had sold or hidden 25 firearms. Cathy denied having removed, hid or sold any firearms. DTR246:14-249:7. It was noted at trial that the firearms that Rick claimed were "missing" were the ones that he favored. Further, Rick admitted that he had refused to allow his home or vehicles to be searched in the same way that he insisted the marital residence be searched. DTR79:22-81:5, 85:22-86:15, 104:20-105:5. At trial, the parties' son, Randy, was asked if he had ever known Rick to lie. Randy clearly testified "[n]ot before all this happened, but yes, since then I have." DTR92:12-13. The trial court declined to find that Cathy had taken the items. FOF 31, 32, 33.

At the time of trial, nearly all the assets transferred to RVC Ranch, LLC, in 2015 had been distributed. The only assets still owned by RVC Ranch, LLC, were a quarter of land, a few thousand dollars reserved to pay miscellaneous bills, and a home in Faith. Rick purchased the Faith home post-separation using the last \$200,000 due to him, but held in RVC Ranch, LLC. He that ownership of the home be in the name of RVC Ranch, LLC, with the sole purpose of trying to artificially decrease the home's value by two-thirds. DTR210:10-213:3, 213:9-214:10, 482:8-483:7, 502:18-505:17, EX5,35,55, JPE9,60,61. The Court recognized that the home and its value belonged to Rick and

deemed 100% of the value an asset to be considered. FOF77-79. The remaining land and account owned by RVC Ranch, LLC, were both awarded to Rick at one-third of their total value, as ownership of these items was still subject to a two-third reduction. JPE9,60, 61, EX55.

Rick requested that the RVC, Ranch, LLC, assets and the parties' personal investment with LPL Financial be deemed nonmarital and awarded to him at no value. JPE 9,59,60,61. Cathy requested that all assets be included. The trial court, in its findings, determined that equity required that all assets be deemed marital and included in the property division. FOF 99-102.

Cathy's monthly income from the motel averages \$1,161. She also earns \$60 per week from an additional cleaning job. DTR146:13-149:4, EX40, FOF110. Cathy's anticipated monthly budget is \$4,130. This calculation equals her current budget less the monthly payments to credit card debt accumulated during the pendency of this matter due to Cathy's inability to meet her needs using her income alone. Cathy anticipates paying off these liabilities with funds from the property division. Cathy demonstrated a monthly need of \$2,089. DTR 162:24-164:9, 165:19-167:8, EX42, FOF110.

Rick's monthly income at the time of trial was approximately \$9,234.25. DTR153:3-154:23, 158:23-160:9, 443:3-447:15, EX39, FOF111. In his discovery responses, Rick's budget was \$2,648.75. His budget was reduced to \$1,648.75, because he testified that he had no rent or mortgage expense despite listing one previously. DTR160:10-161:9, EX43, FOF113. Rick has \$5,369.28 in excess income each month and is able to assist Cathy via spousal support. DTR167:9-168:2, EX39,41-42, FOF113-114. The trial court awarded Cathy one-half of the LPL Financial assets; thus, her anticipated

income increased by approximately \$829 (pretax) per month. Rick's income decreased by the same amount. DTR446:14-447:15.

At the time of trial, the parties had been married for 36.5 years. Cathy was 51 and in good health but continued to suffer arthritis in her neck, knees, and feet. Rick was 58 and had asthma but had not been prevented from working. He testified that he recently began taking an expensive medication but incurred no out-of-pocket expense because its cost is fully covered by insurance.

Both parties are well versed in their respective fields, with Cathy having a bachelor's degree in education and Rick having a high school diploma and more than 36 years of experience in automotive repair. Cathy gave up years of teaching, along with the experience and income growth that she would have earned, to stay home and raise the parties' children. More recently, she gave up an opportunity for a full-time position with UPS to allow Rick to apply for it. She then passed on another opportunity at UPS at Rick's instruction. DTR75:19-76:24, 170:4-173:20, 448:4-450:15.

During the divorce proceedings, Cathy issued interrogatories and requests for production to Rick. Rick partially complied but refused to supplement timely or provide information related to assets received in 2015 or accounts and investments that resulted therefrom. EX53,54,57,58,59, R42,49,53, R1202,1360,1366,1393,1399,1455,1470. While his counsel advised that the information requested was forthcoming, Rick continually refused to provide the relevant, admissible, and necessary information. Cathy was forced to file a Motion to Compel Discovery. R72. Following the hearing, Rick finally began to provide the requested information, with many items being provided within just days of the commencement of trial. DTR224:10-18, FOF81.

Rick also issued discovery requests to Cathy, who provided timely responses. EX14A, 47,50,51, R43,44,49,52,54,298,1202,1360,1366. Despite Cathy's complete responses being provided and supplemented as needed, Rick relentlessly harassed Cathy with repetitive interrogatories, requests for production, and requests for admissions, and he repeatedly demanded the same documents and responses. Much of the time Cathy had to repeat denials of allegations made and advise that she was unable to provide information that did not exist. On August 13, 2024, Rick issued two different "fourth" sets of discovery. Both again requested information requested and provided in sets one through three. The two sets, despite being issued on the very same day, also requested duplicate information. DTR295:4-332:10, EX47,50. Further, Rick's "fourth" sets were both issued a full month after the court-ordered discovery deadline and both demanded that Cathy explain an alleged refusal to accept a property valuation completed by Artie Gifford. The demand for explanation was made on September 10, 2024. Rick refused to provide the value or a copy of the valuation report until October 11, 2024, when only a portion of the same was released. EX51, R50.

The trial court gave Rick extensive leeway regarding his refusal to provide discovery responses but could not ignore the repetitive and harassing nature of Rick's discovery issued to Cathy and the fact that his actions unnecessarily increased Cathy's attorney's fees, which, by the time of trial, exceeded \$66,277 with \$51,277.22 remaining outstanding. DTR32611-330:21, EX45,47,51, FOF115.

STANDARD OF REVIEW

All issues addressed in this appeal are reviewed under an abuse of discretion standard. "An abuse of discretion occurs when there is a fundamental error of judgement,

a choice outside the range of permissible choices, a decision which on full consideration is arbitrary or unreasonable.” *Conti v. Conti*, 2021 S.D. 62, ¶29, 967 N.W.2d 10, 17 (quoting *State v. Delehoy*, 2019 S.D. 30, ¶¶21-22, 929 N.W.2d 103, 108-09). All factual findings must be found clearly erroneous to be set aside, and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. *Pellegrin v. Pellegrin*, 1998 S.D. 19, ¶9, 574 N.W.2d 644, 646 (citing *Osman v. Keating-Osman*, 521 N.W.2d 655, 657 (S.D. 1994) (citation omitted)).

“To obtain a reversal under the abuse of discretion standard, the appellant must show that no judicial mind could have reached the same conclusion in view of the law and circumstances of the case.” *Anderson v. Anderson*, 2002 S.D. 154, ¶11, 655 N.W.2d 104, 107 (citing *Feldhaus v. Schreiner*, 2002 S.D. 65, ¶9, 646 N.W.2d 753, 755; *Christians v. Christians*, 2001 S.D. 142, ¶8, 637 N.W.2d 377, 380; *Billion v. Billion*, 1996 S.D. 101 ¶14, 553 N.W.2d 226, 230). “The trial court’s conclusions of law are reviewed under the *de novo* standard of review.” *Larson v. Larson*, 2007 S.D. 47, ¶9, 733 N.W.2d 272, 275 (citing *Midzak v. Midzak*, 2005 S.D. 58, ¶14, 697 N.W.2d 733).

LEGAL ARGUMENT

1. Did the trial court abuse its discretion when awarding alimony to Cathy?

Preliminary note: Rick’s argument attempts to distract this Court with a series of red herrings. First, he falsely asserts that Cathy is entitled to an inheritance of land worth “millions” from her family. AB21. Rick makes this statement despite no such evidence is anywhere within the court record. While he directs the court to transcript pages 480-490, the testimony cited includes no discussion of any such entitlement. AB8-9. Further, the

purported testators were in attendance at trial, are very much alive, and maintain all rights to any assets they may have, including the right to dispose of them during their lifetime. The assets owned by Cathy's extended family, whatever they may be, were not discussed in this trial and certainly are not relevant to this property division or award of alimony.

Next, Rick attempts to spin the trial court's election to not specifically classify the alimony awarded to Cathy as restitutional, rehabilitative, or permanent into a claim that the court awarded Cathy "permanent" alimony. AB19-20. Rick makes this claim despite the court expressly terminating the alimony award after seven years, rather than continuing until death of the recipient or some other significant event such as remarriage, as is found in an award of permanent alimony. *Sanford v. Sanford*, 2005 S.D. 34, ¶24, 694 N.W.2d 283, 290. Regardless, this Court has made it clear that although the use of careful and consistent language is urged, "the issue is not the name placed on the alimony, but whether the record supports the award." *Billion v. Billion*, 1996 S.D. 101, 553 N.W.2d 226, ¶35 (citing *Hautala v. Hautala*, 417 N.W.2d 879 at 882 (S.D. 1988); see also *Bradeen v. Bradeen*, 430 N.W.2d 87, 89 (S.D. 1988)).

"SDCL § 25-4-41 gives the court discretion to grant 'suitable allowance' to a spouse, 'as the court may deem just, having regard to the circumstances of the parties represented ...'" *Fausch v. Fausch*, 2005 S.D. 63, ¶17, 697 N.W.2d 748. The trial court is to consider the following factors when exercising its discretion regarding alimony.

- 1) the length of the marriage; (2) their respective earning capacity; (3) their respective financial condition after the property division; (4) their respective age, health and physical condition; (5) their station in life or social standing; and (6) the relative fault of the parties in the termination of the marriage.

Id. (citing *Guidon v. Guidon*, 256 N.W.2d 894, 898 (S.D. 1977)). "...[A]limony is an allowance for support and maintenance, with its sole object the provision of food, clothing, habitation, and other necessities for the support of a spouse." *Id.* (citing *Urban v. Urban*, 1998 S.D. 29, ¶7, 576 N.W.2d 873 (quoting *Wilson v. Wilson*, 434 N.W.2d 742, 744 (S.D. 1989)). "A party requesting such alimony must establish that they have a need for support and that their spouse has sufficient means and abilities to provide for part or all of that need." *Id.* (citing *Urban*, 1998 S.D. 29, ¶7, 576 N.W.2d 873 (quoting *Fox v. Fox*, 467 N.W.2d 762, 767 (S.D. 1991)). "The trial court's decision regarding alimony will not be disturbed absent an abuse of discretion." *Urban*, 1998 S.D. 29, ¶8, 576 N.W.2d 873. Trial courts must "consider the allocation of property and spousal support together." *Terca v. Terca*, 2008 S.D. 99, ¶28, 757 N.W.2d 319 (citing *Evans v. Evans*, 1997 S.D. 16, ¶31, 559 N.W.2d 240, 247) (citing *Kappenmann v. Kappenmann*, 479 N.W.2d 520, 523 (S.D. 1992)); *Ryken v. Ryken*, 461 N.W.2d 122, 127 (S.D. 1990)). "The symbiotic relationship between property division and spousal support requires consideration of the two together, as an award of more assets can eliminate or reduce the need for spousal support and vice versa." *Terca*, 2008 S.D. 99, ¶28 (citing *Heckenlaible v. Heckenlaible*, 1996 S.D. 32, ¶20, 545 N.W.2d 481, 485).

When formulating its alimony award, the trial court considered the duration of the marriage, 36.5 years. COL39(a). The court noted that both parties were in their mid- to late-fifties and that neither was prevented from working due to their health. The court considered the fact that Rick not only had a successful career as a UPS driver but also had the ongoing benefit of the parties' long-established business, Rick's Auto (COL39(b) and (c)), which resulted in his income being approximately nine times that of Cathy's income. Regarding

Cathy's earning capacity, the trial court considered that her assistance to Rick, both in building his business and then in securing employment with UPS, led to a reduction in her own income. The court considered that while Cathy can earn more if she returns to teaching, she is still limited in her earning capacity given her years out of the field, lack of licensure, and rural location. Further, the court noted that in strong contrast to Rick's assertion that Cathy wished to sit idle, Cathy was a hard worker and currently was working multiple jobs in addition to her housekeeping job at the local motel, additional cleaning jobs, and substitute driving for a local mail route. FOF110. The court considered the totality of circumstances and joint decisions designed to support the family and each other, which had placed each party in their current financial position. COL30(d), COL40. The trial court then factored in how its property division would assist the parties in providing for their support post-divorce. Specifically, the court considered the fact that each would receive one-half of their investments, and Rick would move forward with the benefit of Rick's Auto and the associated commercial real estate. COL39(d).

Before awarding alimony, the trial court considered Cathy's budget and detailed historical data provided in support of the costs associated with her food, drink, clothing, habitation, medical care, and other necessities. EX42, FOF112, COL41. The court also considered the budget Rick provided in his sworn discovery responses. EX43, FOF113, COL42. The court acknowledged that Cathy clearly had sacrificed her own career advancement for the benefit of Rick and their children during their 36.5 years of marriage. These sacrifices led to her inability to maintain her basic comforts and standard of living without assistance post-divorce, as well as Rick's ongoing ability to provide her with support

using a small portion of his monthly surplus. COL39(c),40,41,42. Finally, the court considered the fact that Rick's affair was the catalyst for the divorce. COL39(f).

After considering all relevant factors, the trial court determined that alimony in a limited amount and for a limited duration was appropriate "to allow Cathy to get on her feet and work to resume employment consistent with her education." The Court recognized Cathy's immediate need due to being out of the workforce as a teacher but found that by returning to the workforce using her education, she had the ability to increase her wages over time. Thus, the alimony award decreased and then was terminated over time. COL43.

The trial court properly considered the evidence provided at trial and applied it to relevant factors when determining that alimony was necessary and reaching the conclusion that it should terminate over a period of time. The final award is reasonable and is supported by the evidence. Therefore, the trial court's award of alimony was not an abuse of discretion.

2A. Did the trial court abuse its discretion when including gifted property in the marital estate and ordering an equal property division?

"...South Dakota is an all property state, meaning that all property of either or both divorcing parties is subject to division by the court, regardless of title or origin." *Conti v. Conti*, 2021 S.D. 62, ¶30, 967 N.W.2d 10, 18 (internal citations omitted). When a divorce is granted, the circuit court is tasked with formulating an equitable division of all property regardless of whether it belongs to one party or both and regardless of the property being titled in one spouse's name or jointly in both spouses' names. SDCL § 25-4-44. See also *Anderson v. Anderson*, 2015 S.D. 28, ¶6, 864 N.W.2d 10, 14. The court's

first step in formulating an equitable division of property is to place a value on all property held by the parties. That value must be based upon the evidence or within a reasonable range of the values presented to the court. *Farlee v. Farlee*, 2012 S.D. 21, ¶6, 812 N.W.2d 501.

The next step is to classify property as marital or nonmarital. *Farlee*, 2012 S.D. 21, ¶11, 812 N.W.2d 501 (citing *Halbersma v. Halbersma*, 2009 S.D. 98, ¶9, 775 N.W.2d 210, 215) (internal citations omitted). “A circuit court has broad discretion in determining whether property is marital or nonmarital. *Anderson*, 2015 S.D. 28, ¶6, 864 N.W.2d 10 at 14, (citing *Halbersma*, 2009 S.D. 29, ¶10, 775 N.W.2d 210, 215 (*Halbersma II*)).

“[G]ifted or inherited property is not automatically deemed separate and ‘ipso facto excluded from consideration in the overall division of property.’” *Field v. Field*, 2020 S.D. 51, ¶17, 949 N.W.2d at 224-25 (citing *Anderson*, 2015 S.D. 28, ¶7, 864 N.W.2d 10, 14 (quoting *Novak v. Novak*, 2006 S.D. 34, ¶5, 713 N.W.2d 551, 553)). In determining “whether to include the inherited or gifted property, a circuit court may consider ‘other evidence ... including the origin and treatment of ... property and the direct or indirect contributions of each party to the accumulation and maintenance of the property.’” *Id.*, ¶17, 949 N.W.2d at 225 (quoting *Halbersma*, 2009 S.D. 98, ¶12, 775 N.W.2d 210, 215). “Only 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 ‘nonmarital property.’” *Anderson*, 2015 S.D. 28 ¶6, 864 N.W.2d 10, 14 (citing *Novak*, 2006 S.D. 34, ¶5, 713 N.W.2d 551, 552-53).

A circuit court's decision to categorize property as marital or nonmarital and as to the ultimate division of property when granting a divorce are reviewed under an abuse of discretion standard. *Conti v. Conti*, 2021 S.D. 62 at ¶29, 967 N.W.2d 10 (citing *Field v. Field*, 2020 S.D. 51, ¶15, 949 N.W.2d 221, 224).

In dividing property in divorce proceedings, "there is no rigid formula that must be followed, nor any fixed percentage to which either party is entitled." *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶19, 913 N.W.2d 496 (citing *MacKaben v. MacKaben*, 2015 S.D. 86, ¶33, 871 N.W.2d at 628 (quoting *Pellegrin v. Pellegrin*, 1988 S.D. 19, ¶24, 574 N.W.2d 644, 649). "... [T]he law does not require perfection that would approach mathematical certainty." *Id.*, ¶18., (citing *MacKaben*, 2015 S.D. 86, ¶33, 871 N.W.2d at 628 (quoting *Pellegrin*, 1998 S.D. 19, ¶24, 574 N.W.2d 644, 649)).

The circuit court should consider the following factors when classifying and dividing property: (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.

Anderson, 2015 S.D. 28, ¶7, 864 N.W.2d 10 (citing *Novak v. Novak* 2006 S.D. 34, ¶4, 713 N.W.2d at 552); *Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶10, 910 N.W.2d 913 (citing *Terca v. Terca*, 2008 S.D. 99, ¶20, 757 N.W.2d 319, 325).

In evaluating the seven principal factors listed above, a circuit court may consider other evidence to determine whether inherited or gifted property should be excluded from the marital estate, including the origin and treatment of inherited or gifted property and the direct or indirect

contributions of each party to the accumulation and maintenance of the property.

Anderson, 2015 S.D. 28, ¶7, 864 N.W.2d 10 (quoting *Halbersma v. Halsberma*, 2009 S.D. 98, ¶12, 775 N.W.2d at 215). Receipt of a family gift late in a long-term marriage weighs in favor of its inclusion in the marital estate. *Terca v. Terca*, 2008 S.D. 99, ¶23, 757 N.W.2d at 325. See also *Novak v. Novak*, 2006 S.D. 34, ¶10, 713 N.W.2d 551, 552-53).

In the present appeal, Rick asserts that the trial court abused its discretion by categorizing property gifted to him 27 years into a 36.5-year marriage as “marital” and including it in an equitable property division. His objection is based in large part upon the claim that the Court considered Rick’s affair to be a primary factor when determining whether to include property that was gifted in origin. AB26. He asserts that there was no evidence that Cathy contributed to the receipt or maintenance of any gifted property and that there was no intent on the part of the donor for her to share in the gifted property. AB25,26,27.

Regarding the allegation that the trial court improperly considered Rick’s affair when formulating an equitable property division, it is notable that the Court entered 10 findings of fact specifically related to the gifts received during marriage. FOF48-51, 97-102. The Court further set forth 21 conclusions of law outlining the basis for its property division. COL13-33. At no point in the court’s findings or legal analysis regarding property division was there any reference to adultery, nor was there any indication whatsoever that acts of adultery were a factor in the court’s equitable division. On the contrary, the trial court, when creating an equitable division of property, considered the

parties' testimony and made the following findings regarding the seven factors required by *Conti* and its predecessors:

- (1) The parties have been married for 36.5 years.
- (2) The parties' assets have a combined total of \$1,423,681.
- (3) Cathy is 54 years old. Rick is 58 years old.
- (4) Cathy has recovered from a significant shoulder surgery completed just prior to separation and is in good health. Rick suffers from an asthma-related breathing disorder which requires expensive medication (currently covered by his UPS health insurance) and arthritis. His ability to work, however, has not been compromised.
- (5) Both parties came into the marriage at a very young age, Cathy, not even out of high school, and Rick in his early 20s. The advancement of their careers and therefore their earning capacity, however, was deeply impacted by decisions made during marriage.

Throughout the marriage, Cathy paused her career on a number of occasions. First, she did so in order to stay home and raise the parties' four children. In the later years she selected multiple odd jobs to ensure her availability to the family, including Rick's then aging parents.

Rick is a self-educated hard worker. His work ethic allowed him to build a very successful car repair business in the Fatih community. Due to joint efforts, the parties were able to build a successful business, raise wonderful children and live a comfortable life for their family.

Later, in marriage, Cathy's connection to UPS allowed Rick an opportunity to learn of a full-time position with the company. This now provides him with a steady income and good insurance.

(6) The parties began dating when Cathy was just 14 years old. Cathy was still in high school when the parties initially married. Rick too was very young. They worked as a team to grow their assets. Cathy achieved her education as a teacher during the marriage but put her career on hold for many years to support Rick's career and raise the children. Both parties grew up as part of the other's family. When Rick received the gifted assets 27 years into the marriage they were comingled with other assets as the parties historically combined all assets and shared equally in the fruits of their efforts. This remained true until Rick began an adulterous affair and decided that he no longer wished to be married.

(7) Rick has a significantly greater earning capacity both now and into retirement.

After considering these factors, a trial court has the option to consider "the origin and treatment of inherited or gifted property and the direct or indirect contributions of each party to the accumulation and maintenance of the property." *Anderson v. Anderson*, 2015 S.D. 28, ¶7, 864 N.W.2d 10, 14. (citing *Halbersma v. Halbersma*, 2009 S.D. 98, ¶12, 775 N.W.2d at 215). If one spouse's indirect contribution "allows the other spouse to maintain inherited property separately and avoid commingling assets that otherwise would be required for the support and maintenance of the family[.]" the trial court can consider those contributions in the property division. *Terca v. Terca*, 2008 S.D. 99, ¶25, 757 N.W.2d 319, (citing *Halbersma v. Halbersma*, 2007 S.D. 91, ¶¶16-17, 738 N.W.2d 545, 549-50). These cases address gifted property in the same manner as inherited property. The South Dakota Supreme Court "has consistently held that a homemaker's contributions to the family's upkeep is valuable and must be considered as no less significant and substantial to the accumulation of marital property than the other spouse's

labor outside the home.” *Terca*, 2008 S.D.99, ¶25 (citing *Billion v. Billion*, 1996 S.D. 101, 553 N.W.2d at 233. See also *Garnos v. Garnos*, 376 N.W.2d 571, 573 (S.D. 1985).

In this case, the trial court’s findings of fact and conclusions of law are supported by the testimony of Cathy and the parties’ children, which made it clear that Cathy contributed to the family both within the home as a stay-at-home wife and mother for many years and by contributing the income she generated outside the home. Additionally, Cathy directly contributed to the family business. All these contributions assisted the family in growing and maintaining the assets received.

Regarding her contributions to the actual receipt of the assets, the testimony was clear that Cathy had a strong relationship with Tom and Linda Smith. She grew up with Rick’s family, having met them at the age of 15 early in the parties’ relationship. Cathy officially joined the family before she graduated from high school. FOF10. Cathy and Rick were together for so long that Rick’s youngest sister testified that she had very little memory of life prior to Cathy being in it. DTR498:3-12. When Tom and Linda began their estate planning, they thought enough of Cathy to involve her in a meeting to discuss the plans. DTR 178:8-14,506:4-507:6,508:10-509:2, FOF19. As Tom and Linda grew older and needed assistance, Cathy provided direct care for Linda (administering medications and assisting with showers, meals, etc.), which helped Linda remain in her home rather than going into assisted living, and by taking on a greater share of the household obligations when Rick was needed to assist on his parents’ property. DTR47:11-48:6,77:5-78:3,122:16-20,124:1-127:7,197:8-197:15,453:3:18, FOF 20-21. Cathy’s actions allowed Rick and his sisters to avoid the costs associated with long-term care and allowed for increased value of the ranch prior to sale. Thus, Cathy’s

contributions increased the value of the gifts received by Rick and his siblings. COL26. After the gifts were received, Cathy continued to contribute to Rick and the marital estate. Her contributions allowed the funds to grow without the need to liquidate them to pay marital expenses, pay for remodeling the marital residence, etc.

Regarding the investment account and remaining acreage, the trial court considered the origin of the assets and the parties' respective contributions to maintenance of the assets and found that while the assets were received via family gifts, they were received 15 years into a 36.5-year marriage. Further, the parties were a financial team throughout their marriage, and Cathy's contributions were more than de minimis, because her work outside the home and as a homemaker made it possible to leave the funds and land untouched, allowing both to grow substantially in value and to remain available to the parties in their retirement. FOF97-102, COL26,27.

After considering the evidence presented and applying it to the law as set forth herein, the trial court equitably divided the parties' assets and split them equally, including those originating from family gifts. COL26. The trial court reasoned that the marriage was long-term and that "[b]oth parties contributed physically and financially throughout the marriage, which allowed them to acquire and maintain the assets that are here to be divided." COL13-33.

This Court has repeatedly held that the exclusion of premarital property is proper only when the other spouse has made no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support. See *Novak v. Novak*, 2006 S.D. 34 ¶5, 713 N.W.2d 551, 553 (citing *Billion v. Billion*, 1996 S.D. 101, ¶20, 553 N.W.2d at 232); *Terca v. Terca*, 2008 S.D. 99, ¶5, 757 N.W.2d 319 at ¶21. Neither

condition can be fully satisfied in this matter, as Cathy contributed to the acquisition and the maintenance of the gifted assets and was unable to fully support herself when denied access to Rick's income post-separation. The trial court's inclusion of gifted assets when completing an equitable division of debts and assets was proper.

2B. Did the trial court abuse its discretion when valuing the safe contents?

Valuation of an asset "is a task for the trial court as the trier of fact." *Dunham v. Sabers*, 2022 S.D. 65, ¶63, 981 N.W.2d 620, 642 (citing *Giesen v. Giesen*, 2018 S.D. 36, ¶26, 911 N.W.2d at 757 (citation omitted)). "The circuit court's valuation of assets does not have to be exact. However, it must fall within a reasonable range of figures, based on the evidence presented at trial." *Id.* (citing *Conti*, 2021 S.D. 62, ¶26, 967 N.W.2d at 17.) (internal quotation marks and citation omitted). "The trial court's findings of fact are presumptively correct and the burden is upon appellant to show error." *Id.* (citing *Taylor v. Taylor*, 2019 S.D. 27 at ¶15, 928 N.W.2d at 465) (quoting *Grode v. Grode*, 1996 S.D. 15, ¶19, 543 N.W.2d 795. "Any doubts about whether the evidence supports the circuit court's findings of fact are to be resolved in favor of the successful party's version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's action." *Evens v. Evens*, 2020 S.D. 62, ¶37, 951 N.W. 268, 280 (internal quotations omitted).

"Trial courts are also required to determine the credibility of witnesses that testify at trial." *Grode*, 1996 S.D. 15, ¶21, 543 N.W.2d 795 (citing *Kost v. Kost*, 515 N.W.2d at 213 (citations omitted)). "... [T]he credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the circuit court,"

who has had the opportunity to observe the witnesses and the evidence. *Hiller v. Hiller*, 2018 S.D. 74, ¶22, 919 N.W.2d 548; *McCollam v. Cahill*, 2009 S.D. 34, ¶6, 766 N.W.2d 171, 174).

As set forth more fully above, the parties' testimony differed relating to many items in the home and as to Rick's access to the home. Rick's testimony was found on multiple occasions to be inconsistent at best. In his sworn responses to discovery dated September 11, 2023, Rick claimed that the safe contained \$50,000 (for which he had no accounting), FOF59,61,62, and 650 silver coins as of December 2022. EX57(3,#12). At trial, Rick's coin count increased to from 650 to 1,600. DTR556:18-21,558:1-2,565:3-565:13,619:12-620:14.

Rick maintained that he did not have access to the safe or its contents. However, his testimony was disputed by the testimony of other witnesses and by his own discovery responses. For example, Rick denied having unsupervised access to the safe but then acknowledged that he had access to house via an interior door in the garage, which gave him access to the safe. DTR556:4-556:14, 422:18-423:14. Further, his discovery responses confirmed that he had been to the home on multiple occasions, either alone or with his girlfriend, without Cathy's knowledge or consent. DTR631:2-634:8. Rick's credibility was further challenged when he claimed in his sworn discovery responses that in December 2022, that he entered the safe and removed a money bag from Rick's Auto while being closely supervised by the parties' son, Randy, to ensure that he did not remove any cash, etc. EX 58(2,#73). Rick repeated this assertion at trial. DTR620:19-621:4. Randy testified that he had not supervised Rick when he entered the safe in

December 2022 and made it clear that he had no way of knowing what, if anything, Rick removed from the safe on that date. DTR81:18-82:15,86:16-87:1,105:12-106:2.

Cathy inventoried the parties' safe in March 2023 and provided pictures of the coins and an accounting of \$12,600 cash that she found in the safe. DTR252:7-253:18,452:4-6, EX15, FOF57,58,60. While the matter was pending, Cathy, who lacked access to the income needed to support herself while paying the parties' property taxes and insurance and assisting their son with a loan, had to use some of the cash from the safe, which she disclosed to Rick and his counsel. DTR255:1-257:19, 557:11-19, EX47, FOF60. The parties' son, Randy, completed a second inventory of the coins and cash, which matched Cathy's coin count and accounting of funds used. DTR78:11-79:2.

Likewise, Cathy inventoried Rick's approximately 125 firearms in the home. DTR242:2-243:7, EX 14A. Rick, in his September 11, 2023, discovery responses, confirmed that there were 125 firearms in the home. EX57(4, #17). The same firearms that Cathy photographed were accounted for when Rick and the children later inventoried the firearms in the home. DTR49:13-50:18. By the time of trial, however, Rick claimed that there were 150 firearms in the home when he left the marital residence. DTR647:24-25, EX14. It was noted at trial that the firearms Rick claimed to be "missing" were those he favored, and that Rick had not allowed his home or vehicles to be searched in the same way that he insisted the marital residence be searched. DTR79:22-81:5, 85:22-86:15, 104:20-105:5, 246:14-247:1, 650:4-14. At trial, the parties' son, Randy, was asked if he had ever known Rick to lie. Randy clearly testified, "[n]ot before all this happened, but yes, since then I have." DTR92:12-13.

The Court considered the testimony and inconsistencies in testimony and made a determination as to the credibility of the witnesses. The court then valued the property within the range of values offered. There is no basis for a finding that the trial court erred in the valuation of the contents of the marital safe.

3. Did the trial court abuse its discretion when awarding Plaintiff a portion of her attorney's fees?

A circuit court may award attorney fees in a divorce action. SDCL § 15-17-38. When awarding attorney's fees, the circuit court is required to apply a two-step analysis:

First, the court must determine what constitutes a reasonable attorney's fee. This requires consideration of: (1) the amount and value of the property involved; (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.

Dunham v. Sabers, 2022 S.D. 65, ¶68, 981 N.W.2d 620, 644 (citing *Evens v. Evens*, 2020 S.D. 62, ¶44, 951 N.W.2d 268, 282 (internal citation omitted)).

In the present matter, the trial court began its analysis by considering the property division and the parties' relative incomes. The court recognized that the parties' debts and assets were being divided equally with each receiving one half of the liquid investment accounts. The court further noted that Rick would leave

the marriage with a significantly higher earning capacity, allowing him greater ease in covering any attorney's fees to be addressed. COL47. The court then examined the intricacy of the litigation and determined that while the property division was relatively straightforward with limited more complicated issues, including the categorization and treatment of the gifted property, the matter required extensive preparation, organization, and thorough presentation as noted by 80 exhibits entered at trial. COL48,51. The court then considered whether the actions of either party had unnecessarily increased attorney's fees incurred by either party. The circuit court noted that Rick "increased the cost of the action by sending excessive discovery requests times two different sets on the same day and by sending discovery requests (many again duplicative) more than a month after the discovery deadline established by [the] court." FOF115, COL49-52. The court further noted that Rick's "refusal to comply with discovery requirements and provide information related to assets that were only within his control post - separation unnecessarily increased the costs of trial preparations in this matter." DTR326:11-330:21, EX45,47,51, FOF115, EX47, FOF115, COL49,50,51.

As required by the law of this State, the trial court also reviewed the attorney's fees charged and rates of counsel. The court received and considered EX45, which included a detailed account of the hours spent, the activities completed, and the resulting fees charged to Cathy. The court further considered counsel's hourly rate as compared to other attorneys of similar experience, reputation, and location to determine that the fees charged were reasonable. COL50.

The circuit court entered detailed findings of fact and conclusions of law, considering the appropriate factors supporting the \$10,000 award of attorney's fees to Cathy. The court found that each party would receive an equal portion of the marital estate and, to effectuate the division, Cathy was awarded a cash equalization payment of \$140,243. Rick was awarded the income-producing assets, and his income was substantially higher than Cathy's income. The court considered the work and time spent by counsel throughout the litigation and found that Rick unreasonably increased the time needed to complete his discovery responses by refusing to provide information to which only he had access and by utilizing discovery requests as a tool of harassment. The circuit court's findings were supported by the evidence in the record including income, account statements, real estate documents, and examples of the harassing discovery utilized by Rick. The circuit court did not abuse its discretion in awarding Cathy \$10,000 for attorney's fees.

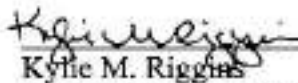
CONCLUSION

Based upon the forgoing arguments and the authority set forth herein, Appellee, Cathleen Smith, respectfully requests that this Court affirm the trial court's ruling in the underlying action.

NOTICE OF REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellee Cathleen Smith respectfully requests oral argument.

Respectfully submitted this 16th day of May 2025.



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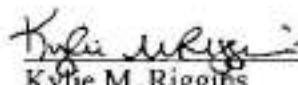
CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing document, Brief of Plaintiff/Appellee Cathleen Smith, on the person herein next designated, on the date shown below, by Odyssey File and Serve and Electronic Mail to

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL No. 30953

CATHLEEN SMITH,

Plaintiff/Appellee,

v.

RICK SMITH,

Defendant/Appellant.

**APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT,
MEADE COUNTY, SOUTH DAKOTA**

HON. JOHN FITZGERALD

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED JANUARY 2, 2025

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PRELIMINARY STATEMENT

References

Citations and references herein made to the parties and to persons and witnesses, as well as to the trial transcript and the record, remain the same as in Appellant's Brief.

Discussion of Issues

An appellant's Reply Brief is not to be a rehash of the arguments made in the Appellant's Brief. Rather, by statute, "The reply brief must be confined to new matter raised in the brief of the appellee . . ." SDCL § 15-26A-62. Thus, unless the issue is "new matter raised in the brief of the appellee," within this Reply Brief Rick will not discuss an issue he has raised in his Appellant's Brief. This should not be misunderstood as a waiver of that non-discussed matter or issue, but instead compliance with the mandate of § 15-26A-62.

Response to Cathy's Ancillary Points

At various places within Cathy's Brief she improperly makes reference to unfairly prejudicial and irrelevant assertions regarding Rick's parents' Estate Planning effort, made through an attorney who is the husband of Cathy's present counsel. A compelling purpose of the Plan was to protect the passage of their valuable real property or the cash equivalent so that Rick and his siblings would receive their shares without a third-party's claim to a portion of it. (TR 495-496). Such assertions are immaterial, and seek to confuse the straightforward issue of the intent behind the Estate Plan. See SDCL § 25-4-44; *Novak v. Novak*, 2006 SD 34, ¶8, 713 N.W.2d 551, 554.

ARGUMENT

ISSUE I. Cathy asserts an offensive and inaccurate allegation against Rick concerning her eventual inheritance.

At Page 14 of Cathy's Brief she hurls a powerfully offensive and inaccurate allegation at Rick: She contends that he "falsely" presented information regarding the valuable character of her parents' ranch land which she will likely eventually receive a share of as an inheritance. Her argument is properly characterized as being excessive, as well as inaccurate under both fact and law. Removing the offending word, Cathy seems to contend that a litigant is required to ensure that an actual dollar sum for the proffered contention is established in the record, and that Rick was seeking to have the circuit court specify a particular sum within the marital estate as representing her eventual inheritance.

Instead, Rick's point concerning the property is that Cathy would likely inherit a significant value of money or land, and that this eventuality would affect in a positive way her financial needs. Thus, her purported "need" is illusory.

Also, it is important to recognize that a reasonable inference is all that is required under applicable law to permit a circumstantial determination to suffice as evidentiary foundation. In other words, a specific dollar sum is "gravy" where at least a proper inference of a quality and range of value can be arrived at circumstantially.

This rule can be found when one considers the body of two stock Jury Instructions. Instruction Number 1-10-30 expresses allowance for a fact-finder to use common sense and the experiences of life in making factual determinations: "In weighing

the evidence, you may consider the common knowledge you all possess. You may also use common sense gained from your life experiences ...” The same allowance is set forth in Jury Instruction Number 1-30-20: “[Y]ou have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.”

Jury Instructions must set forth accurately the controlling rules of law. Of course, a divorce trial does not use a jury to find the facts, but a judge. However, this is a distinction without a difference. This insight was expressed in *Gross v. Continental Mut. Ins. Co.*, 361 N.W.2d 259 (S.D. 1985). In *Gross*, this Court stated, “A circuit judge, likened unto a juror, may take into consideration ‘[m]atters of common knowledge and experience ... in arriving at [a judgment] and in drawing inferences and reaching conclusions from the evidence.’ 89 C.J.S. Trial § 463(b), at 99 (1955).” *Gross*, at 270.

Cathy’s brief argues Rick’s inherited property was properly included in the marital estate, emphasizing her indirect support. However, South Dakota law clarifies that inherited property is not automatically marital. It requires significant contribution or demonstrated need for support to justify inclusion. *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250, 258 (S.D. 1984); *Kolbach v. Kolbach*, 877 N.W.2d 822, 826 (S.D. 2016).

Here, Cathy’s participation in occasional family events does not constitute material contributions sufficient to alter the non-marital classification. See *Cook v. Cook*, 983 N.W.2d 180, 185 (S.D. 2022). Rick’s parents clearly intended the property exclusively for Rick and his siblings, as evidenced by the explicit exclusion of Cathy from the ownership of RVC Ranch, LLC (TR496-505).

Further, the trial court improperly allowed marital fault—Rick’s extramarital relationship—to influence property division. South Dakota explicitly prohibits consideration of marital fault unrelated to property acquisition. *Kanta v. Kanta*, 479 N.W.2d 505, 510 (S.D. 1991). Thus, the court’s classification of gifted property warrants reversal and reclassification.

ISSUE II. There is an insufficient “symbiotic relation” between the property division and the spousal support award.

Although at Page 16 of Cathy’s Brief she mentions that a “symbiotic relationship” is required to exist between a property division and an award of spousal support, what she does is pay mere passing lip-service to the mandate. Otherwise, what she does is simply breeze past attempting to make an in-depth analysis of whether the circuit court’s award constituted a sufficient “symbiotic relationship” between the two. What discussion she does make is an example of this kind of unpersuasive logic: “The circuit court should be determined to have decided properly because the circuit court decided properly.” Perhaps that is because, as Rick shows in his Appellant’s Brief, the circuit court’s award is anything but “symbiotic.” *Terca*, at ¶28, 757 N.W.2d at 326, quoting *Heckenlaible v. Heckenlaible*, 1996 SD 32, ¶20, 545 N.W.2d 481, 485.

ISSUE III. Alimony Award

Cathy argues that the circuit court’s spousal support award is equitable and properly within the bounds of discretion. In this regard, she emphasizes Rick’s inheritance in comparison to her alleged dire financial need. Contrarily, what the record demonstrates is that Cathy was awarded a substantial value of marital assets that puts her

in a better position in life than Rick. This includes Cathy's immediately liquid assets totaling \$140,243 (CI 129).

Cathy is healthier than Rick, far more educated than Rick, and is experienced at working within her field of education, but "underemployed" yet readily employable (OR 15).

Meanwhile, Cathy has overstated her financial vulnerability. (TR 373). At the same time, she has ignored Rick's documented medical condition — a respiratory problem called "EoE" [*Eosinophilic esophagitis*, an inflammation of the esophagus caused by an overabundance of certain white blood cells] by medical practitioners (TR 547-548). The malady imposes significant ongoing expenditures. Although Rick presently has health insurance provided via his employment with UPS, when he no longer has this coverage assistance, he will have to pay these enormous sums himself, severely limiting his earning capacity (TR 561-564).

Cathy's Brief corresponds with the circuit court's failure to properly recognize the ever-looming disastrous effect that Rick's potential loss health coverage assistance will have on his ability to withstand his ability to pay Cathy or weather the present division of the marital estate, along with the present order that he pay Cathy a six-figure spousal support award.

Cathy's reliance on Rick's current health insurance coverage does not negate his ongoing health challenges or future financial uncertainty. The trial court improperly awarded alimony without adequately considering Rick's limited ability to pay, warranting reversal or modification.

ISSUE IV. Category of spousal support awarded

At Page 15 of Cathy's Brief she states, "Next, Rick attempts to spin the trial court's election to not specifically classify the alimony awarded to Cathy as restitutional, rehabilitative, or permanent . . ." For the broad general legal proposition that a circuit court has no obligation to specify a particular category of spousal support awarded she cites to *Billion v. Billion*, 1996 SD 101, ¶ 35, 553 N.W.2d 226, 234.

However, *Billion* does not state such a rule. A close reading of the circuit court's award of alimony in *Billion* showed that it had indeed specified that the award was rehabilitative alimony, but this Court found sufficient grounds in the Findings and Conclusions to refashion the designation to "general alimony." *Id.*

Similarly, the citation Cathy made to *Hautala v. Hautala*, 417 N.W.2d 879 (S.D. 1988) neglects to note that in *Hautala* within the Judgment the circuit court had characterized its alimony award as being "reimbursement" or "restitutional" spousal support. *Id.* at 882. In its holding this Court stated, "we urge the use of careful and consistent language" on spousal support awards (*Id.*), although "the issue is not the name placed on alimony, but whether the record supports the award." *Id.*

If the rule of law were henceforth as Cathy characterized it to be, i.e., that it was entirely impertinent what label — if any — the circuit court happened to slap onto the type of spousal support it had awarded — there would be no need for this Court in *Hautala* to emphasize the contrary: "we urge the use of careful and consistent language" on the identification of what type of spousal support award it had made. Neither *Hautala*

nor *Billion* had overturned the precedent that directed circuit courts to specify with particularity in its Findings and Conclusions the type of alimony that was awarded.

ISSUE V. Gifted and Inherited Property

In her Brief, Cathy argues that Rick's share of his parents' Estate was appropriately included within the marital estate, emphasizing the "direct support" she contends she herself added to it. Her contention ought to be rejected. Within the grand scheme of things her efforts were neither directed to gaining ownership of Rick's parents' Estate assets, nor increasing the value of their Estate, nor remedying any alleged deterioration of it. Her mere participation in occasional family events ought not be considered a material contribution sufficient to alter the classification of Rick's receipt of an inheritance share from shifting from "non-marital" to "marital." See generally a similar application of law to fact in *Halbersma v. Halbersma*, 2007 S.D. 91, ¶11, 738 N.W.2d 545.

ISSUE VI. Cash in the safe

At Page 28 of her Brief, Cathy defends the circuit court's oral declaration that she had not improperly taken funds that were in their safe during the pendency of the divorce. As Rick pointed out in his Brief, the court had announced at his oral pronouncement of the content of his Findings and Conclusions, at some point during the hearing the circuit court ventured off the undisputed testimony and used his "broad discretion" to determine what he wanted to determine.

An example of this was the circuit court's initial finding that no evidence existed that Cathy had taken any money out of the safe (OR 18-19). The circuit court had to be

corrected then and there (Id.). This was confirmed by Cathy at trial when she testified that she had taken \$8,400 from the safe (FOF 60; TR 252-257). Additionally, at Page 28 of her Brief she repeated her confession that she had taken thousands of dollars of cash from the safe.

The fact that the circuit court's oral announcement was contrary to the record was otherwise ignored by Cathy in her Brief. As Rick argued in his Brief, the circuit court's flub was a window to its litany of abuses of discretion. The circuit court's valuation of the marital estate was in part based on flawed credibility assessments and erroneous factual findings.

Cathy's brief minimizes her admissions regarding cash withdrawals from the marital safe. Initially denying any knowledge, Cathy later conceded withdrawing \$8,400 (FoF60; TR252-257). Rick's credible and consistent testimony regarding the safe's value was disregarded by the trial court without adequate justification.

South Dakota law requires factual determinations be supported by credible evidence. *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 14, 790 N.W.2d 52, 59. Here, the court's valuation relies on flawed credibility assessments and erroneous factual findings, necessitating reversal.

ISSUE VII. Attorney's fees awarded to Cathy as a discovery sanction against Rick.

Cathy defends the circuit court's award of attorney's fees to her as a sanction against Rick for alleged discovery abuses. However, not only did the circuit court fail to apply the mandated two-step analysis outlined in *Schieffer v. Schieffer*, 2013 SD 11, ¶55, 826 N.W.2d 627, 633, and *Green v. Green*, 2019 SD 5, ¶13, 922 N.W.2d 283, 287. This

analysis demands specific findings regarding the reasonableness of requested attorney's fees — including intricacy, necessity, and the degree to which each party increased litigation costs — and a clear connection to alleged misconduct. *See Urbaniak v. Urbaniak*, 2011 SD 83, ¶31, 807 N.W.2d 626.

The circuit court reduced the attorney's fees issue to merely stating "discovery abuses," without providing specific details or sufficiently particular Findings required for any meaningful appellate review to take place. *See, e.g., Nickles v. Nickles*, 2015 SD 40, ¶27, 865 N.W.2d 142, 150; *Goff v. Goff*, 2024 SD 60, ¶28, 12 N.W.3d 139, 144.

A marital dissolution whose anticipated marital estate value is anticipated as being in the "significant" or "substantial" range will necessarily involve a more complex and comprehensive panorama of written (i.e., one or more sets of Interrogatories) and oral (i.e., one or more depositions) discovery than that of a divorce of a husband and wife with low financial means. Wealthy litigants are entitled to use both written and oral discovery methods within the divorce action. Indeed, the couple are naive if they are surprised that such discovery will occur. In short, a party in a divorce action that warrants a robust pre-trial discovery phase ought not be punished by the circuit court for taking advantage of discovery measures.

Here, Rick was sanctioned — in other words, punished — for having utilized comprehensive written discovery tools. His offense was inadvertently duplicating transmittal of certain discovery documents. This error should have been ignored by Cathy, or easily overcome by simply re-printing her initial responses. However, the circuit court punished Rick as if it were fining him for committing a criminal offense. It is readily apparent that the circuit court did not make a computational correlation

between the time consumed by Cathy's attorney to prepare responses to the "discovery abuses" to arrive at a sustainable determination that would survive an earnest appellate review. The circuit court seems to have merely sky-hooked the result.

The circuit court's Findings and Conclusions provide this Court an insufficient explanation or calculation to make a meaningful appellate review of this issue. As such either this Court should outright reverse on this issue, or remand the matter to the circuit court for a cogent calculation.

CONCLUSION


Rick respectfully requests that this Court grant the relief he seeks, and grant him such other and further relief as is just and proper under the circumstances.

RICK'S WAIVER OF ATTORNEY'S FEES

Whereas Cathy is seeking an award of appellate attorney's fees (which Rick resists for the reasons specified above and in his Appellant's Brief), he waives any claim for reimbursement from Cathy of his own appellate attorney's fees.

Dated this 16th day of June, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellant's Reply Brief complies with the type volume limitation provided for the South Dakota Codified Laws. This Brief contains 2518 words. I have relied on the word and character count of our word processing system used to prepare this brief.

Dated this 16th day of June, 2025.

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I certify that on the 16th day of June, 2025, I caused to be served via electronic service a true and correct copy of *Appellant's Reply Brief* to:

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