

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29660

JOSEPH D. LEFORS,

Plaintiff and Appellant

vs.

KRISTA M. LEFORS,

Defendant and Appellee

Appeal from the

Fourth Judicial Circuit

Meade County, South Dakota

The Honorable Kevin Krull, Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant-Plaintiff, Joseph LeFors, will be referred to as a “Joseph;” Appellee-Defendant, Krista LeFors, will be referred to as “Krista;” documents from the record of the Fourth Circuit Clerk of Court are cited as “R. ____;” the Appendix is cited as “App. ____;” the Transcript of the Divorce Trial held June 17-18, 2020 is referred to as “DT ____;” the Transcript of the Motions Hearing held on May 25, 2021 is referred to as “MT ____;” the Findings of Fact and Conclusions of Law entered on April 6, 2021 by the Honorable Kevin Krull, Circuit Court Judge, is referred to as “Findings;” and the Decree of Separate Maintenance entered on April 6, 2021 by the Honorable Kevin Krull is referred to as “Decree.” All references will be followed by appropriate page and paragraph designations.

JURISDICTIONAL STATEMENT

Joseph respectfully appeals the Honorable Kevin Krull’s Decree that was signed on April 6, 2021 and filed on April 8, 2021, along with the Findings signed on April 6, 2021 and filed on April 8, 2021. Notice of Entry of Findings of Fact and Conclusions of Law, and Decree of Separate Maintenance was filed on April 28, 2021. Joseph timely served the Notice of Appeal on May 27, 2021. The Decree is appealable pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether The Circuit Court Erred In Issuing A Decree Of Separate Maintenance Instead Of A Divorce.

Hill v. Hill, No. M2007-00471-COA-R3-CV, 2008 Tenn. App. LEXIS 238, at *1 (Ct. App. Apr. 23, 2008)

II. Whether The Circuit Court Erred In Permanently Dividing The Marital Estate Upon Issuance Of The Decree Of Separate Maintenance.

SDCL 25-4-40

III. Whether The Circuit Court Erred In Awarding Permanent Alimony.

Terca v. Terca, 2008 S.D. 99, ¶ 28, 757 N.W.2d 319, 326.

Zepeda v. Zepeda, 2001 S.D. 101, ¶ 25, 632 N.W.2d 48, 56

STATEMENT OF THE CASE

This appeal stems from a divorce action initiated by Joseph on January 23, 2019. Krista filed an Answer to the Complaint on February 12, 2019 and a Counterclaim on March 29, 2019. Krista moved to amend her Counterclaim to allege Separate Maintenance instead of a Divorce, which the Circuit Court granted on January 16, 2020. Krista then filed an Amended Counterclaim for Separate Maintenance on January 16, 2020. A divorce trial was held on June 17 and 18, 2020. Joseph, while awaiting a decision from the Circuit Court, filed a Motion to Readdress Interim Finances on October 30, 2020. The Honorable Kevin Krull issued an Order following the December 8, 2020 hearing regarding the interim finances. On April 8, 2021, Judge Krull filed Findings of Fact and Conclusions of Law, and in denying Joseph's request for a divorce, issued a Separate Maintenance Decree, awarding Krista permanent alimony and permanently dividing the marital estate. On May 11, 2021, Joseph filed a Verified Motion to Clarify Courts Findings and Motion for Reconsideration, which was heard on May 25, 2021. Joseph's Notice of Appeal followed and was filed on May 27, 2021. On August 17, 2021, Judge Krull issued an Order on Motion to Reconsider Alimony Award based upon the Circuit Court's lack of jurisdiction after the Notice of Appeal was filed. Although the Order on Motion to Reconsider Alimony Award is not the Order subject to this appeal, it is important to note that the Court denied Joseph's request based upon the Court's error

of certain filing dates. The Order stated that Joseph filed a Motion to Reconsider the alimony award on June 14, 2021. The Court went on to state that “[b]y filing the *Notice of Appeal before the Motion to Reconsider*, the Plaintiff has stripped this Court of jurisdiction to hear issues material to the case.” App. 27-28. Joseph’s Motion for Reconsideration, reflected by the record, was, in fact, filed May 11, 2021 (heard on May 25, 2021) prior to Joseph filing his Notice of Appeal.

STATEMENT OF THE FACTS

The parties were married on June 4, 2002 and separated on or about January 7, 2019. R. 7, Complaint, p. 1. At the time of this appeal, the parties are still legally married. Krista and Joseph had two (2) children during the marriage, Kyden Michael Lefors (DOB: 7/2/2006; age 15) and Kaelyn Mae Lefors (DOB: 5/29/2009; age 12). *Id.* Although the issue of custody and visitation were heavily litigated at trial, custody is not subject to this appeal.

Both Joseph and Krista were 36 years old at the time of the trial. R. 813, p. 10, (App. 15). Joseph currently serves in the United States Airforce as a master sergeant and has served for 19 years, all of which were served during the parties’ marriage. In June 2022, the parties will have been married for 20 years of Joseph’s military career. Krista, for many years of the marriage, was a stay-at-home mom, while Joseph was the primary wage earner. *Id.* At the time of trial, Krista worked as a substitute teacher at Douglas School District in Box Elder, South Dakota. *Id.*, p. 8.

After a two-day trial in June 2020, the parties’ counsel submitted proposed Findings of Fact and Conclusions of Law. In April 2021, the Circuit Court issued the Decree, denying Joseph’s request for a divorce. R. 813, p. 2, (App. 007). The Circuit Court granted Krista a Decree of Separate Maintenance for a period of two (2) years

wherein the Circuit Court divided the marital estate and adjudicated all of the parties' property interest. *Id.* The Circuit Court decided that the Court would enter a Divorce Decree on or about June 30, 2022, after Joseph would attain 20 years of military service, so Krista could receive lifetime Tricare benefits. *Id.*, pp. 2-3. The Circuit Court instructed Joseph that he could not do anything to prevent Krista from receiving the 20-20-20 benefits, which would include premature discharge from the Air Force before reaching his retirement eligibility. *Id.*, p. 13. The parties were largely part of the lower middle class wherein their marital estate consisted of more debt than assets and, towards the end of their marriage, the parties seemed to be in a precarious financial situation where basic necessities for themselves and the children were of main focus. *Id.*, pp. 9-10. The Circuit Court adopted a Joint Property Exhibit that reflected an unequal division of assets, with Joseph receiving majority of the parties' marital debt, with a liability of \$38,606 and Krista receiving assets valued at \$10,657. The Joint Property Exhibit also awarded Krista Joseph's Thrift Savings Plan from the Air Force and 50% of Joseph's military retirement pay with no value assigned. App. 025-026. The Circuit Court awarded Krista the 2019 Chevy Traverse and required Joseph to pay the monthly payments and insurance until the loan was paid in full. *Id.*; R. 813, p. 9, (App. 014). Joseph was required to sell the motorcycle and award Krista the proceeds from the same. *Id.*, p. 15. The Circuit Court then awarded Krista \$750.00 per month in permanent alimony. *Id.* Including child support, permanent alimony, and the vehicle and insurance payments, Joseph is required to pay \$2,501 per month for Krista's benefit *Id.*, pp. 12-16.

Following the Circuit Court's issuance of the Decree, on May 11, 2021, Joseph filed his Verified Motion to Clarify Courts Findings Dated April 6, 2021 and Motion for

Reconsideration regarding the alimony payments, child support and a renewed request for a divorce. R. 899. The Circuit Court denied Joseph's renewed request for a divorce after argument from his counsel on the incidental effects of a separate maintenance upon Joseph as a service member and the lack of statutory authority to divide the marital estate MT 33:15-22, (App. 033). As to the issue of alimony, the Circuit Court took the matter under advisement and requested additional briefings from the parties. Joseph then filed his Notice of Appeal and the Circuit Court thereafter issued its Order on Motion to Reconsider Alimony Award on August 27, 2021, denying the reconsideration of alimony based upon the Circuit Court's lack of jurisdiction¹. App. 027-028.

STANDARD OF REVIEW

Conclusions of law are reviewed under a *de novo* standard, giving no deference to the circuit court's conclusions of law." *City of Deadwood*, 2000 SD 29, P9, 607 NW2d at 25; *Parsley v. Parsley*, 2007 S.D. 58, ¶ 15, 734 N.W.2d 813, 817.

The standard of review for alimony determinations in divorce cases is abuse of discretion. *Dejong v. Dejong*, 2003 S.D. 77, ¶ 5, 666 N.W.2d 464, 467; *Voelker v. Voelker*, 520 N.W.2d 903, 908 (S.D. 1994) (citing *Ryken v. Ryken*, 461 N.W.2d 122, 128 (S.D. 1990); *Garnos v. Garnos*, 376 N.W.2d 571, 574 (S.D. 1985)).

ARGUMENT

I. The Circuit Court Erred In Issuing A Decree Of Separate Maintenance Instead Of A Divorce.

A. To Compel Joseph To Remain Married Restricts His Right As To Employment As A Service Member And Infringes On His Ability To Re-Marry Or Be In A Relationship During the Term of the Decree.

¹ Given the circumstances of the case and the prejudice shown, Joseph requests an expedited decision by this Supreme Court consistent with SDCL 15-26A-2.

The Circuit Court granted Krista a Decree of Separate Maintenance for two (2) years denying Joseph's request for a divorce. R. 813, pp. 2-3, (App. 007-008). The Circuit Courts decision to grant the separate maintenance instead of a divorce was driven by the financial benefit of Krista to receive lifetime healthcare benefits, a full 50% of Joseph's military retirement, and access to the Air Force base for reduced costs of goods. *Id.*, pp. 2-16.

The Circuit Court further determined that Joseph was not to take any action to prevent Krista from being eligible for the 20-20-20 military benefits. *Id.*, p. 13. This, in effect, requires Joseph to continue to be employed by the Air Force during the term of the Decree of Separate Maintenance as there would be no other avenue for Krista to receive the 20-20-20 benefits if Joseph did not retire with 20 year's service from the Air Force as required by the Decree. As a result, in order to comply with the Circuit Court's Order, Joseph is unable to have a relationship outside of the marriage, as any acts of adultery would be cause for discharge, despite the parties being separated since 2019. The United States Air Force does not permit any married person, regardless of a Separate Maintenance Order, from being in a relationship with another person as adultery is prosecutable under Article 134, UCMJ, and would be cause for discharge. App. 029 - 031. Article 134 is a catch-all provision for offenses not listed in specific Articles elsewhere in the UCMJ. *Id.*, p. 9. Article 134 covers disorders and neglects that adversely affect good order and discipline or that could bring discredit upon the armed forces *Id.*

Joseph recognizes that public policy demands that the institution of marriage be sheltered and safeguarded. Nevertheless, there is a flipside to the coin of public policy,

and consideration must be given to the fact that a spouse is ill-served by a legally commanded continuance of a marriage². In effect, the existing Decree infringes on Joseph's right to re-marry and further restricts his ability to voluntarily leave the service or pursue alternate employment opportunities outside of the military. If Joseph chose to do either, such actions would be cause for contempt under the existing Decree, which further shows the Circuit Court's abuse of discretion.

B. Pure Financial Reasons Are Not Sufficient Enough To Grant A Separate Maintenance Decree Instead Of A Divorce.

A spouse in South Dakota has not directly appealed this issue, but it appears that other jurisdictions have found that pure financial reasons are not sufficient to justify an award of separation instead of a divorce. In *Farrar*, the court found that "[f]inancial reasons alone, however, will rarely justify a legally commanded continuation of a marriage which exists in name only." *Farrar v. Farrar*, 553 S.W.2d 741, 744-45 (Tenn. 1977).

Likewise in *Hill*, the Court stated:

There was little hope that the parties would reconcile. The trial court's decision to grant a legal separation instead of divorce was driven by the financial benefit of keeping the wife covered under the husband's health insurance policy. Purely financial reasons were simply not sufficient to justify an award of legal separation instead of divorce.

Hill v. Hill, No. M2007-00471-COA-R3-CV, 2008 Tenn. App. LEXIS 238, at *1 (Ct. App. Apr. 23, 2008).

² While much of the caselaw in the U.S. refers explicitly to a "right to marry," none imply that once the right to marry is exercised, the constitutional treatment of the marital relationship changes. The language used in the right to marry doctrine is often broad. Therefore, it is arguably not just the right to enter a marriage that is constitutionally protected, but also the personal relationship itself, which would implicitly include the right to end it. We assume for purposes of argument that the right to divorce is part of, and entitled to, the same degree of protection as the right to marry. *McGinley & McGinley*, 19 P.3d 954, 966 (Or. Ct. App. 2001); See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (implying that HN17 the right to divorce is part of the fundamental right to marry).

Instead of issuing the Decree for Separate Maintenance and requiring Joseph to continue to stay married for the pure financial benefit of Krista, the proper avenue for the Circuit Court should have been to a Divorce Decree and provide Krista spousal support at a value equivalent to what the Tricare benefits would have been.

Interestingly, the Circuit Court indicated at the May 25, 2021 hearing that the primary reason for issuing the Decree was so the children would have Tricare benefits.

THE COURT: ...you know, basically my intention in granting separate maintenance as opposed to a divorce was to protect these children's rights to TriCare.

MT 34:7-10, (App. 035).

Yet, consistent with the record, the children receive Tricare benefits regardless of whether the parties are legally married for 20 years or divorced at 18 years. The children are Joseph's dependents, so they will continue to be under his Tricare plan until they reach at least 21 years of age, and will continue to have their military identification cards. DT 233:13-17, (App. 041); DT 36:25, (App. 043); DT 37:1-23 (App. 044). This is also consistent with the Circuit Court's Decree that provided that Joseph maintain the children on his health benefits. R. 813, p. 15, (App. 020). The Circuit Court further found that the justification for the Decree included Krista receiving "a Base ID allowing her access to medical facilities *for the children*." (emphasis added). R. 813, p. 13, (App. 018). However, undisputed trial testimony shows that Krista and the children, with the children's independent military identification, will have access to the Air Force base until they reach the age of 21, including all medical facilities and the commissary. DT 37:3-23, (App. 044). In sum, the justification for the Decree of separation was error.

Accordingly, the Circuit Court abused its discretion in issuing the Decree instead of a divorce.

II. The Court Erred In Dividing The Marital Estate Upon Issuance Of The Decree Of Separate Maintenance.

Upon issuing the Decree, the Circuit Court divided the entirety of the marital estate and found that the division of the property under the Decree was final. R. 813, p.15, (App. 020). South Dakota law does not provide the Court with specific statutory authority to permanently divide the parties' marital assets before a divorce is granted. The authority of the Court outlined in the separate maintenance statutes is strictly limited to awarding alimony and support for the children. SDCL 25-4-39 and 25-4-40 provide:

Though judgment of divorce is denied, the court may in an action for divorce *provide for maintenance of a spouse and the children of the parties*, or any of them, by the other spouse.

SDCL 25-4-39

An action for separate maintenance may be maintained without request for divorce, upon any grounds which would be grounds for divorce, and in such cases *the court shall have power to award temporary alimony, suit money, and permanent support for a spouse and the children of the parties*, or any of them, by the other spouse.

SDCL 25-4-40.

A decree of separate maintenance does not dissolve the marital bond. *Klinger v. Klinger*, 79 S.D. 182, 184, 109 N.W.2d 633, 634 (1961). The primary purpose of obtaining separate maintenance is to enforce the husband's duty of support. *Id.*

The South Dakota statutes provide the courts with only one avenue when dividing property as husband and wife, which is at the time a divorce is granted.

When a divorce is granted, the courts may make an equitable division of the property belonging to either or both, whether the title to such property is in the name of the husband or the wife. In making such division of the

property, the court shall have regard for equity and the circumstances of the parties.

SDCL 25-4-44.

The Circuit Court, for support of a final property division in the Decree, cited to the above statute for its authority. There are no statutes or case law that give the Circuit Court the ability to divide marital assets as the parties are still legally married³.

The Supreme Court has not directly addressed this issue. Majority of other jurisdictions have found that in the absence of express statutory authority, "separate maintenance" contemplates only "alimony" and not property rights. In *Clawson*, "Appellee wife filed an action for separate maintenance and division of property. An order was entered dividing the property and appointing a receiver with respect to the property. The order provided that the receiver would continue to manage the parties' property as long as the parties remained married. The court held that the receivership was improper because the parties were not divorcing. There was no need for the trial court to appoint a receiver to preserve the property until the time when it would adjudicate the parties' rights in a divorce action because there was no divorce action filed. Further, the court found that there was no need for the trial court to divide the parties' property interests. The parties' property only had to be divided when the marriage relationship had ended, and the parties' marital relationship continued." *Clawson v. Clawson*, 54 So. 2d 161, 161 (Fla. 1951). In *Naurison*, the Florida appellate court stated:

Such an action [for separate maintenance] does not contemplate or permit a resolution of their interests in jointly held property or property held by

³ The South Dakota State Bar Website lists: SEPARATE MAINTENANCE: There is no such thing as a "legal separation" in South Dakota. South Dakota does have a proceeding for separate maintenance. The procedure for such an action is the same as that for a divorce. The only difference between a separate maintenance and a divorce action is that separate maintenance does not dissolve the marriage, nor does the court make a final decision regarding property. <https://www.statebarofsouthdakota.com/p/cm/ld/fid=30>

the husband in which the wife claims an interest. The Supreme Court of Florida, in our opinion, placed at rest any question theretofore existing as to the authority of a chancellor to adjudicate such property rights between a husband and wife in an action such as this when, in *Bredin v. Bredin*, Fla.1956, 89 So.2d 353, 356, 61 A.L.R.2d 942, it said:

While a divorce decree brings about a termination and final disposition of the marriage relationship, a separate maintenance decree recognizes the continuation of the marriage relationship, the continuing right of the wife to participate in her husband's estate on his death, as well as the possibility of a reconciliation that will end the necessity for the separate maintenance award.

Naurison v. Naurison, 108 So. 2d 510 (Fla. Dist. Ct. App. 1959).

Other jurisdictions have likewise held that the courts do not have the authority to permanently divide the parties' marital property during a separation decree absent statutory direction⁴. *McWilliams v. McWilliams*, 216 Ala. 16, 18, 112 So. 318, 319-20 (1927) (in a divorce action, the court held that the language of the statute required the spouse an "allowance" from the estate, but determined that it not likewise require a division of property between the husband and wife); *Cohn v. Cohn*, 4 Wash. 2d 322, 323, 103 P.2d 366, 366 (1940) (holding that, in an action for separate maintenance, a court may not divide the community property, nor determine the ownership of the future earnings of either the husband or wife).

Accordingly, and following the majority of other jurisdictions, without any statutory or otherwise binding authority, the Circuit Court in this case erred in adjudicating the respective property rights and dividing the marital estate upon issuing

⁴ Other jurisdictions have allowed termination or division of property interests upon separation where authorized by statute and, in most instances, have recognized that no such authority existed at common law. Nebraska: *Shomaker v. Shomaker*, 166 Neb. 164, 88 N.W.2d 221 (1958), but only insofar as necessary, *Sanford v. Sanford*, 173 Neb. 835, 115 N.W.2d 451 (1962). New Jersey: *Lavino v. Lavino*, 23 N.J. 635, 130 A.2d 369 (1957); *Rudin v. Rudin*, 104 N.J. Eq. 524, 146 A. 351 (1929). Virginia: *Gum v. Gum*, 122 Va. 32, 94 S.E. 177 (1917). Oregon: *Kelley v. Kelley*, 183 Ore. 169, 191 P.2d 656 (1948).

the Decree. It is Joseph's position that this Court vacate the Decree and declare the parties divorced *nunc pro tunc* as to the date of the Decree or, in the alternative, remand the matter to the Circuit Court to determine an equitable division of property at the time of a divorce decree.

III. The Circuit Court Erred In Awarding Krista Permanent Alimony.

A. The Circuit Court Failed to Consider The Alimony Award In Light Of The Property Division.

The Circuit Court awarded Krista permanent alimony in the amount of \$750.00 per month to "provide Krista with the necessities of housing, utilities, health insurance and food⁵." R. 813, p.9, (App. 012). The Circuit court erred in dividing the marital estate upon the Decree, but in doing so, also failed to consider the alimony award in light of property division.

The Court is to determine an appropriate alimony award "based upon the respective financial conditions of the parties *after* the property division and their standard of living." *Krage v. Krage*, 329 N.W.2d 878, 879 (S.D. 1983) (emphasis added). A circuit court is required to consider the allocation of property and spousal support together. *Evans v. Evans*, 1997 SD 16, P31, 559 NW2d 240, 247 (citing *Kappenmann v. Kappenmann*, 479 NW2d 520, 523 (SD 1992); *Ryken v. Ryken*, 461 NW2d 122, 127 (SD 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. *Heckenlaible v. Heckenlaible*, 1996 SD 32, P20, 545 NW2d 481, 485. *Terca v. Terca*, 2008 S.D. 99, ¶ 28, 757 N.W.2d 319, 326.

⁵ The Circuit Court did not provide for when the alimony payments were to begin.

When considering the financial conditions of both parties after the property division, along with the division of the same, Krista is leaving the marriage with assets valued at \$10,657. App. 025-026. In contrast, Joseph is left with a *liability* of \$38,606 *Id.* Consistent with South Dakota law, the Circuit Court should have taken into consideration Joseph's financial condition, after the property division, which leaves him with no income producing assets and, more importantly, with a negative net worth, none of which were specifically outlined in the Court's Findings, justifying the permanent alimony award. Joseph is also taking on close to \$80,000 in marital debt, \$30,000 of which is the obligation on Krista's Chevy Traverse⁶. App. 025-026. The Circuit Court awarded Krista the 2019 Chevy Traverse, but required Joseph to continue to make the monthly car payments until paid in full and pay the vehicle insurance. In addition to the \$750.00 alimony award, the Chevy Traverse payments that Joseph is required to pay were \$694-\$800 per month at the time of trial⁷. DT 209:5-6; R. 813, P.9 (App. 14). The monthly amount of Krista's car payment alone was almost equal to what she made total each month in income⁸ DT p. 209:2-, (App. 040). As Joseph's prior counsel pointed out at the trial, given the financial despair that the parties were in, it was unreasonable for Krista to be driving a brand-new vehicle with payments exceeding her monthly income. DT 209:7, (App.040).

The Court also erred in not considering that Krista would receive 50% of Joseph's TSP and 50% of his military retiree pay upon his retirement in 2022. Krista's portion of

⁶Joseph also questions the Court's authority to award Krista the Chevy Traverse, but continue to make Joseph responsible for the loan until paid in full. The Decree did not specify what would occur in the event of a sale or loss by Krista, and whether Joseph would have to pay a lump sum payment upon either of those events.

⁷ Krista was also awarded \$1,057.00 per month in child support from Joseph.

⁸ Krista testified that she made on average \$829.00 per month in wages.

Joseph's military retirement, based upon Joseph's base pay at the time of trial, would be an estimated \$1,000 per month, beginning in 2022. DT 175:24, (App. 038). The Circuit Court also failed to consider Joseph's earning capacity when he retires from the Air Force and is no longer receiving a base salary. According to Joseph's testimony, his total monthly payment from retirement if Krista receives 50%, would leave him with \$1,000 of his tired pay. DT 178:24, (App. 039).

B. The Circuit Court's Findings For Justifying The Permanent Alimony Award Were Flawed And Further Failed To Consider Krista's Ability For Rehabilitation.

The Court made a finding for the alimony to assist Krista in her *health insurance costs*, but later acknowledged that issuing the Decree for two (2) years would allow her to have Tricare health benefits for life, which would eliminate her need to pay for any health insurance costs as outlined in the Court's Findings. R, 813, p. 8, (App. 013). The issuing of the Decree already triggered Krista's ability to receive lifetime Tricare benefits as outlined above and, therefore, cannot also be used to justify the award for permanent alimony.

"Rehabilitative alimony is awarded to enable a former spouse to refresh or enhance the job skills she needs to earn a living. The purpose of rehabilitative alimony is to put a spouse in a position to upgrade his or her economic marketability." *Nickles v. Nickles*, 2015 S.D. 40, ¶ 1, 865 N.W.2d 142, 146. "An essential prerequisite to recovering rehabilitative alimony is proof of an educational need and a plan to meet that need." *Zepeda v. Zepeda*, 2001 S.D. 101, ¶ 25, 632 N.W.2d 48, 56.

The Circuit Court, consistent with *Zepeda*, above, found that Krista would have the ability to return to college to obtain a degree in teaching, which would improve her

income and provide financially for herself. R. 813, p. 8, (App. 13). The Courts Findings, along with the record, are indicative of a rehabilitative alimony award and not consistent with evidence that Krista would require permanent alimony. Krista testified that she is not disabled. DT 254:9-10, (App. 046). Since trial, Krista has obtained full-time employment with the Douglas School District, and is eligible for full benefits. R. 899, p. 2.

The Circuit Court also found that Krista has health issues with her knees and arm, but did not indicate that such health issues would render her incapable of full-time employment or incapable of rehabilitation. R. 813, p. 8, (App. 013).

Much of the Findings by the Circuit Court fixated on Krista's need for alimony to care and support the children's needs and supervision. However, once the youngest child reaches the age of majority in six (6) years, Krista would be 44 years old, capable of having an established career, and obtain the skills necessary to be financially independent. There are sufficient Findings in this case to support an award of rehabilitative alimony and, therefore, the Circuit Court abused its discretion in awarding Krista permanent alimony.

C. Joseph Does Not Have Sufficient Means and Ability To Pay Permanent Alimony.

"Permanent alimony, as distinguished from restitution and rehabilitative alimony, is an allowance for support and maintenance (i.e. the provision of food, clothing, habitation, and other necessities) of the dependent/obligee spouse." *Wilson v. Wilson*, 434 N.W.2d 742 (S.D. 1989); *Price v. Price*, 278 N.W.2d 455 (S.D. 1979). "It therefore follows that when a party requests permanent alimony they 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 the need.” Fox v. Fox, 467 N.W.2d 762, 767 (S.D. 1991) (emphasis added).
”Alimony (spousal support) is intended to assist in providing necessities. *Lovejoy v. Lovejoy*, 2010 S.D. 39, ¶ 7, 782 N.W.2d 669, 672 (citing *Zepeda v. Zepeda*, 2001 S.D. 101, ¶ 21, 632 N.W.2d 48, 55). ”The purpose of alimony is not to equalize incomes but rather to support the needs and standard of living of the spouse.” *Haanen v. Haanen*, 2009 S.D. 60, ¶ 18, 769 N.W.2d 836, 842. “Therefore, the party seeking spousal support must establish the need for support and ability of the other spouse to pay.” *Lovejoy*, 2010 S.D. 39, ¶ 7, 782 N.W.2d at 672 (citing *Zepeda*, 2001 S.D. 101, ¶ 21, 632 N.W.2d at 55). *Havlik v. Havlik*, 2014 S.D. 84, ¶ 14, 857 N.W.2d 422, 426.

Consistent with the South Dakota law above, the Circuit Court must find that Joseph has “sufficient means” and abilities to provide for part or all of Krista’s need. Joseph’s budget at trial indicated monthly expenses of \$6,216 and monthly income of \$6,664, approximately \$450 in excess. DT p. 170:2-8, (App. 037). The law provides that there must be a showing of a spouse’s ability to pay the awarded alimony amount, which, based upon the record and considering the amount of debt Joseph was required to assume on the Chevy Traverse and his child support obligation, was simply not present here. The Circuit Court even acknowledged that access to the Air Force Base for Krista would reduce her costs for groceries, clothing, and other necessities, which Joseph is otherwise unable to pay or would result in substantial financial strain. R. 813, p. 2, (App. 007).

CONCLUSION

In sum, Joseph respectfully requests that the Court reverse the Separate Maintenance Decree and, instead, declare the parties divorced and vacate the award of permanent alimony.

REQUEST FOR ORAL ARGUMENT

Joseph hereby requests oral argument.

Dated this 20th day of September, 2021.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Hollie L. Smith

HOLLIE L. SMITH

Attorneys for the Appellant/Plaintiff

2834 Jackson Blvd., Suite 201

PO Box 9129

Rapid City, SD 57709-9129

(605) 721-1517

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of September, 2021, she electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed and mailed via U.S. Mail, postage prepaid thereon, to:

DEBRA WATSON
Watson Law Office
804 West Boulevard
Rapid City, SD 57701

The undersigned further certifies that the original and two (2) copies of the Appellant's Brief in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class, postage thereon prepaid, on the date written above.

/s/ Hollie L. Smith

HOLLIE L. SMITH

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Hollie L. Smith, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 16 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 4,814 words, and 24,179 characters (no spaces) in the body of the Brief.

/s/ Hollie L. Smith

HOLLIE L. SMITH

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A

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF MEADE) FOURTH JUDICIAL CIRCUIT

JOSEPH DANIEL LeFORS,)
)
 Plaintiff,)
)
 vs.) **DECREE OF SEPARATE MAINTENANCE**
)
 KRISTA MAE LeFORS,)
)
 Defendant,)

A Court Trial was held on June 17 & 18, 2020 before the Honorable Kevin J. Krull, Circuit Court Judge, in Courtroom No. 1 of the Meade County Courthouse in Sturgis, South Dakota. Plaintiff Joseph Daniel LeFors [hereafter "Joseph"] appeared in person together with his attorney, Eric M. Schlimgen. Defendant Krista Mae LeFors [hereafter "Krista"] appeared in person together with her attorney, Debra D. Watson. The Court considered the Court file, the testimony of the parties and their witnesses as well as the exhibits received into evidence and made and entered formal Findings of Fact and Conclusions of Law. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That Krista Mae LeFors is awarded a Decree of Separate Maintenance from Plaintiff Joseph Daniel LeFors on the grounds of extreme cruelty;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph and Krista shall share joint legal custody of their children, Kyden Michael LeFors, age 13, born July 2, 2006 and Kaelyn Mae LeFors, age 11, born May 29, 2009. Krista is designated by the Court to make decisions regarding the children's education and health care to avoid conflict between the parties;

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4TH CIRCUIT CLERK OF COURT**

By _____

however, Joseph shall be promptly notified of all decisions via text message or Email. Both parents are entitled to all education and health care records and access to the school and medical portals;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Krista shall continue as the children's primary physical custodian, subject to Joseph's reasonable parenting time;

IT IS FURTHER ORDERED That Joseph shall continue the family counseling with Tamara Ulmer at Scovel Psychological at the frequency requested by the therapist and the children shall be made available for those sessions. Future parenting time shall be subject to recommendations from the children's counselor, the family therapist or court order. The intention of the Court is to create a process whereby Joseph will enjoy a healthy relationship with his children and to gradually increase parenting time to unsupervised Guideline Parenting Time with the assistance of the professionals;

IT IS FURTHER ORDERED That the children shall continue their individual therapy with Adria Hagg at the frequency requested by the therapist and both parents shall cooperate with the counseling as requested by the therapist;

IT IS FURTHER ORDERED That the children may call a parent at any time. Either parent can contact the children between 7:00 p.m. and 8:00 p.m. on Sunday, Wednesday and Friday of each week. Each parent may also have contact with the children via text-message or social media at reasonable times and with reasonable frequency;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph shall pay child support for Kyden and Kaelyn in the sum of One Thousand Fifty-Seven Dollars (\$1057) per month on the 1st day of each month until each child attains 18 years of age or, if still a full-time

high school student, until age 19 or high school graduation, whichever occurs first. The children's extracurricular activity costs or any extraordinary cost agreed upon by the parties shall be split proportionately by the parents based on their incomes for child support purposes;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph shall pay child support arrearages for February of 2019 through August of 2019 (\$600 per month) for a total of \$4,200 (7 months at \$600 per month). The child support arrearages shall constitute a judgment against Joseph and in favor of Krista;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph shall continue to provide Tricare benefits for the children's health care, as it is a benefit of his military employment at minimal cost. Krista shall pay the first \$250 per child per calendar year of the children's non-covered health care costs. Any non-covered health care costs above the \$250 per child per calendar year deductible shall be paid by the parties consistent with their incomes for child support purposes;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph shall pay alimony to Krista in the sum of \$750 per month on the first day of each month during her lifetime to help her meet her reasonable and necessary expenses for lodging, food and other necessities, which alimony shall terminate on the death of either party or Krista's remarriage;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph shall continue to make Krista's vehicle payment and the auto insurance payment until the vehicle is paid in full so that she and the children have reliable transportation;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the property shall be divided as set forth on the attached Court's Joint Property Exhibit attached hereto and

incorporated herein by this reference. Each party shall transfer title to the property awarded to the other party within 15 days hereafter. Each party shall assume responsibility for the debt assigned to them and hold harmless and indemnify the other party with regard thereto. With the sole exception of the military retirement, the division of property and debt in the Separate Maintenance action is final. Any property purchased by a party or debt incurred by a party after the entry of the Decree of Separate Maintenance shall be the property and debt of the party purchasing the item or incurring the debt. A debt assumed by a party shall be put in the name of the party assuming the debt so it does not impact the credit of the non-responsible party;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Krista shall receive 50% of Joseph's Thrift Savings Plan as of the date of the Decree of Separate Maintenance. A Qualified Domestic Relations Order shall be entered by the Court to effectuate this transfer;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That Joseph shall take no action to reduce Krista's share of the military retirement benefits and, if he does so, he shall be required to pay Krista the difference each month by military allotment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That should Krista desire in the future to be restored to her maiden surname of "Knudson," this Court will honor that request in this proceeding;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That if Joseph has not already done so, he shall report the vehicle damage on Krista's 2019 Chevrolet Traverse in the sum of \$2,140.23 to USAA insurance company and promptly provide her the insurance reimbursement upon receipt so that she is able to repair the vehicle; and

IT IS FURTHER ORDERED That this Court shall retain jurisdiction to ensure compliance herewith and to enter the Judgment and Decree of Divorce.

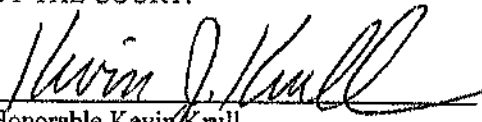
LET JUDGMENT ENTER ACCORDINGLY.

Dated this 6th day of April, 2021.

Attest:
Adams, Denise
Clerk/Deputy



BY THE COURT:


Honorable Kevin Krull
Circuit Court Judge

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APR 08 2021
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4TH CIRCUIT CLERK OF COURT
By _____

B

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF MEADE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JOSEPH DANIEL LeFORS,)
)
 Plaintiff,)
)
 vs.)
)
KRISTA MAE LeFORS,)
)
 Defendant.)

FILE #46DIV19-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

A Court Trial was held on June 17 & 18, 2020 before the Honorable Kevin J. Krull, Circuit Court Judge, in Courtroom No. 1 of the Meade County Courthouse in Sturgis, South Dakota. Plaintiff Joseph Daniel LeFors [hereafter "Joseph"] appeared in person together with his attorney, Eric M. Schlimgen. Defendant Krista Mae LeFors [hereafter "Krista"] appeared in person together with her attorney, Debra D. Watson. The Court considered the Court file, the testimony of the parties and their witnesses as well as the exhibits received into evidence and now makes and enters the following:

FINDINGS OF FACT:

1.

Jurisdiction and Venue: This is a Separate Maintenance/Divorce action involving minor children. Joseph resides in Mountainview Village Apartments, Northern Lights Boulevard, Box Elder, Meade County, South Dakota. Krista resides in military housing at 473 Jefferson Drive on Ellsworth AFB, Meade County, South Dakota. Both parties voluntarily submitted to the jurisdiction of this Court.

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By _____

2.

Marriage: The parties were married on June 4, 2002 and have been husband and wife for 18 years. They separated on January 7, 2019. Joseph filed a Complaint with Minor Children on January 2, 2019. Krista was served on January 25, 2019. Krista filed an Answer on February 13, 2019 and a Counterclaim on March 29, 2019. Krista moved to amend her Counterclaim to allege Separate Maintenance, which the Court granted via the Court Order Granting Defendant's Motion to Amend Counterclaim filed January 16, 2020. Krista filed an Amended Counterclaim for Separate Maintenance on January 16, 2020, which was served on Joseph through legal counsel on January 17, 2020. More than 60 days have expired since the commencement of this action.

3.

Separate Maintenance: SDCL § 25-4-17.2 allows a party to file for a legal separation in lieu of a divorce. Krista seeks this option as it would allow her to have lifetime Tricare health care coverage for a minimal fee as well as access to the Base Exchange and Commissary resulting in decreased costs for groceries, clothing and other necessities plus retain her DOD military ID card allowing her access to the base to obtain health care services for the children. On June 12, 2022, the parties will have been married for 20 years during Joseph's military service. This Court finds good cause to grant Krista a Decree of Separate Maintenance for a period of two years in order to provide her with affordable medical benefits, access to the base for the children's health care and reduced cost for groceries, clothing and other necessities which Joseph is otherwise unable to pay or would result in substantial financial strain. Granting a separate maintenance will also allow Krista the benefit of the Servicemember's Civil Relief Act

resulting in lower interest on her credit cards making it easier for her to manage the debt. This result is in the best interests of the parties and of their children due to their precarious financial situation so that each has an improved ability to meet essential needs for themselves and their two minor children. Granting Separate Maintenance would also allow Krista to continue to pay the cost of family counseling through Tricare.

4.

Grounds for Divorce: Joseph filed for divorce on the grounds of irreconcilable differences. Krista did not consent to a no-fault divorce. Krista filed for Separate Maintenance on the grounds of extreme cruelty. The Court finds that the testimony regarding Joseph's abuse of alcohol during the marriage to be credible and a cause of the marital conflict. The Court further finds the sworn testimony of Krista regarding several instances of domestic abuse by Joseph resulting in bruising, red marks and damage to the residence, which was supported by photographs, to be credible, despite the fact that Krista never filed a report with any law enforcement agency. Joseph's abuse of alcohol and domestic violence was witnessed by the children and constitutes wrongful parental misconduct. Joseph acknowledged his failings as a spouse in notes and cards apologizing to Krista for his wrongful behavior. The Court finds that Joseph has inflicted emotional and physical abuse on Krista during the marriage constituting extreme cruelty as defined in SDCL § 25-4-4.

5.

Joint Legal Custody: The parties agreed to share joint legal custody of their minor children. Based on the court proceedings and the testimony in this case, this Court finds this to be a high-conflict situation. In an attempt to defuse the conflict for the sake of the children, this

Court is giving Krista the ultimate responsibility over the children's education and health care; however, she is to promptly notify Joseph via Email or text-message of any decision made pursuant to this granted power. The Court finds that this is in the best interests of the children by taking them out of the middle of the conflict. Both parents shall retain full parental rights and responsibilities, and both shall have access to all records relating to the children, including academic and medical.

6.

Primary Physical Custody: Both parties are seeking primary physical custody of the children. The Court finds that the Fuerstenberg factors favor Krista continuing in the role of primary physical custodian. Neither parent has a physical health condition that interferes with parenting the children. Krista is in good mental health. Joseph's alcohol use and anger issues have negatively impacted his relationship with the children. Krista has been a stay-at-home mother for much of the marriage and has been the parent who primarily provides the children with protection, food, clothing, medical care and met their basic needs. Joseph has been the breadwinner providing the finances to meet the family's needs. Both parents love the children. Krista has been more involved in their education especially meeting with experts to address Kyden's special needs.

The children have resisted visits with their father. Krista has engaged the children in individual therapy with Adria Hagg to help them adjust to the changes in their young lives and family therapy with Tamara Ulmer to improve their relationship with their father. Despite the Interim Visitation Order, the children continue to refuse to get in the car with their father although their mother has dropped them off at the police department and left the area. Despite

Joseph's claim, the children represent that their mother has encouraged them to go with their father, but they fear for their safety due to past physical abuse and alcohol abuse. Adria Hagg, the children's counselor, confirms the children's statements and recommends supervised parenting time. Joseph and the children are currently participating in family counseling with Tamara Ulmer to assist in the process of reintegrating him in the children's lives in a healthy way. The parties' son, Kyden, has special needs due to his autism and ADHD and requires structure and is on an Individualized Education Plan at School. At one point, Kyden was institutionalized for several hours at Behavioral Health. Joseph's relationship with Kyden is strained. It is important that the children build a healthy relationship with their father. The family counseling at Scovel Psychological which provides weekly parenting time has been helpful. COVID-19 has slowed the children's progress as therapy was stalled for several months and is now being provided by Telehealth which is not as effective. A graduated parenting plan with continued counseling would best meet the needs of the children. Future parenting time is subject to recommendations from the children's counselor, the family therapist and this court. It is the intention of this Court to gradually increase Joseph's parenting time to unsupervised Guideline Parenting Time with the assistance of the professionals.

Both parents appear committed to preparing the children for responsible adulthood and to ensure that the children experience a fulfilling childhood. Joseph has a good career in the military and his military service serves as a positive role-model for the children. Neither parent has a criminal history. The Court finds that Krista is more fit to parent the children and has provided them with a stable and consistent home environment. Krista is more committed and involved in parenting the children than Joseph and has been their primary caretaker. The

children are too young to express a preference as to their placement. The Court finds that Joseph's alcohol abuse and physical abuse witnessed by the children constitutes harmful parental misconduct.

7.

Child Support: At this time, Joseph's monthly child support obligation is \$900 per month. Based on Joseph's Leave and Earnings Statement and imputing minimum wage to Krista, the South Dakota child support calculator determines child support for Kyden and Kaelyn to be \$1057 per month if Krista receives monthly spousal support of \$750. A copy of the Child Support Worksheet is attached hereto and incorporated herein by this reference. The child support shall be paid on the 1st day of each month beginning July 1, 2020 until each child attains 18 years of age or, if still a full-time high school student, until age 19 or high school graduation, whichever occurs first. The children's extracurricular activity costs and any extraordinary costs such as a vehicle or vehicle insurance shall be split proportionately by the parents based on the parties' incomes for child support purposes.

8.

Child Support Arrearage: The Court finds that Joseph did not pay child support to Krista from February of 2019 through August of 2019. At that time, the Court determined Joseph's child support obligation to be \$600 per month considering that Krista had the benefit of BAH. Joseph had a duty to support his children after he left the marital home and the children were entitled to his financial assistance pursuant to SDCL § 25-7-6.1. The Court finds that Joseph owes Krista the sum of \$4,200 for the past due child support for the months of February through August 2019, inclusive.

2.

Equitable Division of Property: South Dakota is an all-property state meaning that all property of the divorcing parties is subject to division. Halbersma v. Halbersma, 775 N.W.2d 545 (SD 2007). SDCL § 25-4-44 provides: "When a divorce is granted, the courts may make an equitable division of the property belonging to either or both, whether the title to such property is in the name of the husband or wife. In making such division of the property, the court shall have regard for equity and the circumstances of the parties." The trial court considers the following factors in equitably dividing marital property: the duration of the marriage, the value of the property owned by the parties, the age of the parties, the competency of the parties to earn a living, the contribution of each party to the accumulation of the property and the income-producing capacity of the property owned by the parties. Huffaker v. Huffaker, 823 N.W.2d 787 (SD 2012).

10.

Value of Mother and Homemaker: The duties of mother and homemaker constitute a valuable contribution to marital property. Muenster v. Muenster, 764 N.W.2d 712 (SD 2009). The Court finds that during the 18-year marriage, Krista was primarily a wife, homemaker and mother. During the early years of the marriage, she was employed by the IRS. In more recent years, she has taught school as a substitute teacher on average of three times per week. Further, that Krista married at age 18 and sacrificed her education and employment to support Joseph's military career. Additionally, Kyden's special needs require Krista to be available to foster his education and living skills.

11.

Alimony: Joseph is an active duty member of the armed forces of the United States with a rank of E7 Master Sergeant earning a monthly gross income of \$6,664.31, including Base Pay, BAS and BAH. Krista works as a substitute teacher at Douglas School District earning between \$10 to \$12 per hour, with an average of 21 to 28 hours per week averaging gross income of \$829 per month during the school year. The Court finds that Joseph has the ability to pay spousal support as he has been paying Krista's housing and utilities of \$1,539 through BAH since their separation. The Court finds Krista's budget to be reasonable. Krista has a need for alimony as reflected in her substantial budget shortage. The Court finds that Krista made sacrifices during the marriage to further Joseph's career, including accompanying him to military functions, socializing with military families, encouraging his further education, taking care of the home and caring for the children. Krista also worked part-time to supplement the family income.

The Court finds that Krista's returning to college to obtain a degree in teaching would allow her to improve her income and provide financially for herself and the children. Krista will lose her health insurance if a divorce is granted which will render her unable to afford health care estimated at \$600 per month. Krista has health issues with her knees and arm which require medical care. Due to the substantial debts and her inability to pay, Krista's credit rating is poor making it difficult for her to obtain housing for her and the children. Krista's decision to continue working at the school is understandable due to Kyden's autism and the prior issue at the school where he was committed to Regional West. Finding other employment during the pandemic is difficult. During the Summer, the children require supervision. If Krista worked, the children would need child care.

This Court finds that permanent alimony is warranted in the sum of \$750 per month to

provide Krista with the necessities of housing, utilities, health insurance and food. The alimony will terminate upon the death of either party or Krista's remarriage.

12.

Equitable Division of Property and Debts: The parties own no land. Their personal property with values and debts with balances are contained on the Joint Property Exhibit, together with each party's position on the equitable distribution of property and equitable allocation of debts. Excluding Joseph's military retirement, the parties have more debts than assets. Each party shall retain the firearms, accessories and ammunition in his/her custody. Joseph initially voluntarily paid Krista's vehicle payment and insurance and when he stopped paying, he was court-ordered to do so. Joseph shall continue to pay for Krista's vehicle until the loan is paid in full and pay the vehicle insurance so that she and the children have reliable transportation. The vehicle was purchased by the parties during their marriage. The vehicle cannot be sold without a deficiency judgment. Krista has neither the credit nor funds to buy another vehicle. The initial vehicle payment of \$694 per month was increased due to Joseph's failure to make the payment in September, October and November of 2019 and his dropping of the vehicle insurance.

The Court's division of property and debts is attached hereto and incorporated herein by this reference. Each of the parties is living in rented housing. The parties have minimal personal property with substantial debt. The Court specifically finds that Krista has been adversely impacted by COVID-19 as a substitute teacher while Joseph has been able to continue his employment during the pandemic. Due to the substantial disparity in income, the Court has given Krista more value in property and Joseph more debt in order to make an equitable division

of the assets and liabilities considering the parties' financial circumstances.

13.

Parties: Joseph LeFors is 36 years of age having been born on November 1, 1983.

Krista LeFors is 36 years of age having been born on June 27, 1983. As to physical health, Krista suffers chronic pain in both lower arms and knees as well as stress and tension headaches. As to mental health, Krista is hyper vigilant from the trauma of the physical abuse and experiences anxiety, emotional upheavals and low self-esteem due to the conflict arising out of the separation and litigation. Joseph is in good physical health.

The parties lived a lower middle-class lifestyle. The parties had a traditional marriage where Joseph was the breadwinner and Krista was the wife and mother. The Court finds that Krista's contribution as a wife and mother raising the parties' two minor children during the 18-year marriage was equal to Joseph's financial contribution to the marriage while serving in the United States Air Force.

14.

Retirement: Joseph has a Thrift Savings Plan and will receive military retirement. All of Joseph's military service was during the marriage. Retirement is deemed received in lieu of higher earnings and is divisible as property. The Court finds that Krista is entitled to 50% of Joseph's TSP as of the date of the Decree of Separate Maintenance and an Order transferring one-half of the proceeds to her shall be entered by this Court. The Court further finds that Krista is entitled to 50% of the marital portion of Joseph's military retirement which shall be transferred to her via a Military Qualifying Order following the granting of the divorce on or about June 30,

2022. Joseph shall not take any action to reduce Krista's military benefits and, if he does so by transferring it to VA disability or a civil retirement plan, he shall pay her the difference. To ensure receipt of the retirement benefits by Krista in the event of Joseph's untimely death, he shall be required to enroll in the Spousal Benefit Plan (SBP) within one year following the divorce and pay the cost therefor so that Krista's military benefits will continue during her lifetime in the event of his untimely death.

15.

Maiden Name: Krista assumed Joseph's surname of LeFors upon her marriage to Joseph. While the children are minors, Krista desires to continue to use the same surname as the children but desires to reserve the right to have her maiden name of "Knudson" restored to her in this proceeding. Krista was born on June 27, 1983 in Devils Lake, Ramsey County, North Dakota.

16.

Vehicle Damage: Krista's vehicle suffered property damage during the marriage in the sum of \$2,140.23, as estimated by Denny Menholt Chevrolet. Joseph had insurance with USAA to cover the property damage, less the deductible. The vehicle has not been repaired. If Joseph has not done so, he shall report the incident to the insurance company, receive the insurance check and provide it to Krista so that she can repair her vehicle.

17.

Attorney's Fees: SDCL § 15-17-1 provides that: The court may allow attorney's fees as costs for or against a party to an action only in cases where it is specifically provided by statute, but nothing herein abridges the power of the court to order payment of attorney's fees in all cases of divorce, annulment of marriage, determination of paternity or for separate maintenance and

alimony, if the allowance of the same before or after judgment is warranted. The trial court must follow a two-step analysis when awarding attorney's fees. Lien v. Lien, 278 N.W.2d 436 (SD 1979). The Court must first determine what constitutes a reasonable 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 trial, and (8) whether briefs were required." Ryken v. Ryken, 461 N.W.2d (SD 1990).

18.

The parties are in a dispute with the IRS as they filed separately in 2020, both claiming one or both of the children. Any refund check not already received shall be made payable to both parties and sent to Joseph's attorney's law office to ensure proper notification of receipt by Krista. The parties shall complete any paperwork necessary to carry out this directive.

19.

Krista has requested reimbursement for attorney's fees. Both parties' actions and behavior contributed to the volume of litigation in this matter. Neither party shall be required to reimburse the other for attorney fees.

Based on the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW:

I.

Jurisdiction/Venue: This Court has jurisdiction over the subject matter of this action and of the parties to this proceeding. Venue in the 4th Judicial Circuit (Meade County) is proper.

2.

Findings/Conclusions: Any Finding of Fact or Conclusion of Law which more appropriately belongs in the other category shall be inserted therein by this reference.

3.

Decree of Separate Maintenance: The Court awards Krista a Decree of Separate Maintenance pursuant to SDCL § 25-4-40 so that she receives lifetime Tricare health insurance coverage at minimal cost, Commissary and Base Exchange privileges and a Base ID allowing her access to medical facilities for the children. This Court intends to enter a Decree of Divorce on or about June 30, 2022 after Joseph has attained 20 years of military service. Joseph shall not take any action to prevent Krista from being eligible for the 20-20-20 benefits.

4.

Joint Legal Custody: By agreement of the parties, Joseph and Krista shall share joint legal custody of their children, Kyden Michael LeFors, age 13, born July 2, 2006 and Kaelyn Mae LeFors, age 11, born May 29, 2009. Krista is designated by the Court to make decisions regarding the children's education and health care to avoid conflict between the parties; however, Joseph shall be promptly notified of all decisions via text message or Email. Both parents are entitled to all education and health care records and access to the school and medical portals.

5.

Primary Physical Custody: Krista shall continue as the children's primary physical custodian, subject to Joseph's reasonable parenting time.

6.

Joseph's Parenting Time: Joseph shall continue the family counseling with Tamara

Ulmer at Scovel Psychological during which he has parenting time. Future parenting time shall be subject to recommendations from the children's counselor, the family therapist or court order. The intention of the Court is to create a process whereby Joseph will enjoy a healthy relationship with his children and to gradually increase parenting time to unsupervised Guideline Parenting Time with the assistance of the professionals.

7.

Communication with Children: The children may call a parent at any time. Either parent can contact the children between 7:00 p.m. and 8:00 p.m. on Sunday, Wednesday and Friday of each week. Each parent may also have contact with the children via text-message or social media at reasonable times and with reasonable frequency.

8.

Child Support: Joseph shall pay child support for Kyden and Kaelyn in the amount of One Thousand Fifty-Seven Dollars (\$1057) per month on the 1st day of each month until each child attains 18 years of age or, if still a full-time high school student, until age 19 or high school graduation, whichever occurs first. The children's extracurricular activity costs or any extraordinary cost agreed upon by the parties shall be split proportionately by the parents based on their incomes for child support purposes.

9.

Child Support Arrearages: Joseph shall pay child support arrearages for February of 2019 through August of 2019 (\$600 per month) for a total of \$4,200 (7 months at \$600 per month). The child support arrearages shall constitute a judgment against Joseph and in favor of Krista.

10.

Children's Health Insurance Coverage: Joseph shall continue to provide Tricare benefits for the children's health care, as it is a benefit of his military employment at minimal cost. Krista shall pay the first \$250 per child per calendar year of the children's non-covered health care costs. Any non-covered health care costs above the \$250 per child per calendar year deductible shall be paid by the parties consistent with their incomes for child support purposes.

11.

Alimony: Krista shall receive alimony in the sum of \$750 per month on the first day of each month during her lifetime, until the death of either party or Krista's remarriage.

12.

Equitable Division of Property and Debts: The parties have no interest in land. The property shall be divided as set forth on the Court's Joint Property Exhibit attached hereto and incorporated herein by this reference. Joseph shall continue to make the vehicle payment and carry the auto insurance on Krista's vehicle until it is paid in full. Joseph shall sell the motorcycle and provide the proceeds to Krista. Each party shall transfer title to the property awarded to the other party within 15 days hereafter. Each party shall assume responsibility for the debt assigned to them and hold harmless and indemnify the other party with regard thereto. With the sole exception of the military retirement, the division of property and debt in the Separate Maintenance action is final. Any property purchased by a party or debt incurred by a party after the entry of the Decree of Separate Maintenance shall be the property and debt of the party purchasing the item or incurring the debt.

13.

Retirement: Krista shall receive 50% of Joseph's Thrift Savings Plan as of the date of

the Decree of Separate Maintenance. A Qualified Domestic Relations Order shall be entered by the Court to effectuate this transfer. Krista shall also receive 50% of the marital portion of Joseph's military retirement benefits at the time of the granting of the Decree of Divorce on or about June 30, 2022. Joseph shall be required to enroll in the Spousal Benefit Plan within one year following the granting of the divorce to ensure that Krista continues to receive these benefits in the event of his untimely death and Joseph shall pay the cost therefor. A Military Qualifying Order following the Decree of Divorce would need to be entered to facilitate the military retirement allocation to Krista. In the meantime, Joseph shall take no action to reduce the amount of military retirement pay to Krista and, if he does, he shall pay her the difference.

14.

Maiden Name: Should Krista desire in the future to be restored to her maiden surname of "Knudson," this Court will honor that request in this proceeding.

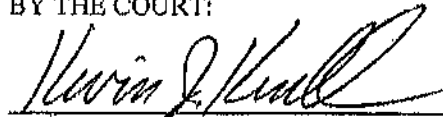
15.

Insurance Check for Car Damage: If he has not already done so, Joseph shall report the vehicle damage on Krista's 2019 Chevrolet Traverse in the sum of \$2,140.23 to USAA insurance company and promptly provide her the insurance reimbursement upon receipt so that she is able to repair the vehicle.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 6th day of April, 2021.

BY THE COURT:



Hon. Kevin J. Krull
Circuit Court Judge

FILED

APR 08 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Attest:
Adams, Denlee
Clerk/Deputy



JOSEPH DANIEL LeFORS vs. KRISTA MAE LeFORS
File #40DIV10-8
JOINT PROPERTY EXHIBIT

	ASSETS/LIABILITIES	COURT'S PROPERTY DIVISION	
		JOSEPH	KRISTA
	VEHICLES		
1	2019 Chevy Traverse		\$28,100
2	2012 Chevy Silverado	\$24,000	
3	2006 Yamaha YZF R6	SELL	
	HOUSEHOLD PROPERTY		
4	Computer desk		\$25
5	Ottoman		\$5
6	Brown TV stand		\$50
7	TV		\$50
8	Couch	\$50	
9	Lularoe	\$325	\$325
10	Book shelves		
11	End table		\$5
12	Table		\$50
13	Cabinet		\$20
14	Washer	\$50	
15	Dryer		\$50
16	Candle/Smellies	\$12	\$13
17	Endtable	\$5	
18	Cube shelf	\$5	
19	Blankets	\$13	\$12
20	Towels	\$12	\$13
21	Scrapbooking	\$150	\$150
22	Dresser	\$25	
23	Chair		\$25
24	Black TV stand	\$50	
25	Gun safe	\$200	\$200
26	Ammo	\$1,255	\$1,255
27	Tactical vests	\$250	\$250
28	Misc. gun pieces	\$1,500	\$1,500
29	Survival gear	\$1,250	\$1,250
30	Deadpool items	\$500	\$500
31	Fridge	\$25	
32	Freezer		\$25
33	Tools	\$1,000	\$1,000
34	Appliances/Misc.	\$25	\$25
35	Pots & pans/utensils	\$12	\$13
36	Silverware/plates, cups	\$13	\$12
37	Shelves	\$12	\$13
38	Guns	\$5,000	\$5,000
39	Motorcycle add on	\$500	\$500
40	Motorcycle gear	\$250	\$250
41	Grill	\$50	
42	Christmas stuff	\$25	\$25
43	Misc. Holiday stuff	\$13	\$12
44	Jewelry	\$250	\$250
45	Bed (Joe)	\$300	
46	Bed (Joe)	\$200	
47	Couch/bed (Joe)	\$500	
48	Portable grill	\$10	
49	Joseph's household property	\$450	
	BANK ACCOUNTS		
49	Black Hills Federal Credit Union (Krista)		\$27
50	America First Credit Union (Joint)	X	X
51	Sentinel Credit Union (Joseph)	X	

Data prepared: 4/8/2021

Joint Exhibit: _____

JOSEPH DANIEL LeFORS vs. KRISTA MAE LeFORS
 File #48DIV19-8
 JOINT PROPERTY EXHIBIT

	ASSETS/LIABILITIES	EQUITY PROPERTY DIVISION	
		Joseph	Krista
	RETIREMENT		
52	TSP (50% as of date of Decree of Separate Maintenance)	X	X
53	Military Retirement (50% of marital portion to Krista)	X	X
	TOTAL ASSETS		
54		\$38,287	\$41,000
	DEBTS		
55	Loan for Chevy Traverse	\$30,913	
56	Visa Platinum (Joint)	\$10,133	
57	Cabela's (Joseph)	\$2,012	
58	Chase Freedom Unlimited (Joseph)	\$1,513	
59	Toys R Us/Synchrony (Krista)		\$1,770
60	Disney/Chase (Krista) (Collections)	\$9,446	
61	OM card/Capitol One (Joint)	\$1,068	
62	Discover (Krista)		\$495
63	Kohls (Krista)		\$522
64	Target Card (Krista)		\$2,646
65	Sears (Krista) (Collections)	\$9,060	
66	Personal Loan by Joseph (Joint)	\$4,400	
67	Star Card (Joseph)	\$8,348	
68	Personal Loan - (Krista)		\$25,000
	TOTAL DEBTS		
69		\$76,893	\$30,433
70	NET VALUE	\$38,606	\$10,567
71	CASH EQUALIZATION PAYMENT	\$0	\$0
72	NET EQUITY TO EACH PARTY		

Child Support Obligation Calculator

This child support obligation calculator is based on the South Dakota Child Support Guideline laws and is intended to provide the basic support obligation for child support for combined monthly Net Income to \$30,000. Deviations and adjustments (for child care, visitation, or other factors) the court may allow are not included in the calculation of the basic support obligation. All amounts listed must be monthly.

Select the number of children for this obligation calculation. 02 ▼ children.

Gross Monthly Income: (For Reemployment Assistance or less than minimum wage, use \$1,433 for gross income. If disabled, use actual amount of benefits.) * Required Field.	Parent 1 Non-Custodial	Parent 2 Custodial
	\$ 5125 *	\$ 2161 *

Deductions to Gross Income: The FTT, Social Security and Medicare deductions will automatically formulate when you click on calculate.

FTT (Federal Income Tax Withheld)	\$ 544	\$ 118
Social Security	\$ 318	\$ 134
Medicare	\$ 74	\$ 31
Retirement	\$ 0	\$ 0

Other Allowable Deductions See SDCL 25-7-6.7

Comments:	\$ 0	\$ 0
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Comments:	\$ 0	\$ 0
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Monthly Net Income	\$ 4189	\$ 1878
Combined Monthly Net Income	\$ 6067	
% Combined Income	69%	31%
Total Support Obligation	\$ 1540	
Individual Parent Support Obligation	\$ 1063	\$ 477
Non-Custodial Parent Net Income Only	\$ 1331	
Monthly Child Support Obligation	\$ 1063	

Monthly Medical Insurance Payment	\$ 19	\$ 0
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Amount Adjusted for Medical	\$ 6	\$ 0
Adjusted Monthly Child Support Obligation	\$ 1057	

Medical insurance is considered reasonable in cost if the cost attributable to the child is equal to or less than 8% of the net income, after proportionate medical support credit is applied, of the parent ordered to maintain insurance, and the amount is specified in the order. (SDCL 25-7-6.16)

Parent 1 8% Limit	\$ 335
Parent 2 8% Limit	\$ 150

The calculator provides only an estimate and is not a guarantee of the amount of child support that may be ordered by the court. Other factors may affect the amount of child support awarded.

FILED

APR 08 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

C

JOSEPH DANIEL LoFORS vs. KRISTA MAE LoFORS
File #48DIV19-8
JOINT PROPERTY EXHIBIT

	ASSETS/LIABILITIES	PROPERTY DIVISION	
		JOE	KRISTA
	VEHICLE		
1	2019 Chevy Traverse		\$28,100
2	2012 Chevy Silverado	\$24,000	
3	2006 Yamaha YZF R6	SELL	
	HOUSEHOLD PROPERTY		
4	Computer desk		\$25
5	Ottoman		\$5
6	Brown TV stand		\$50
7	TV		\$50
8	Couch	\$50	
9	Lutaro	\$325	\$325
10	Book shelves		
11	End table		\$5
12	Table		\$50
13	Cabinet		\$20
14	Washer	\$50	
15	Dryer		\$50
16	Candle/Smellies	\$12	\$13
17	Endtable	\$5	
18	Cube shelf	\$5	
19	Blankets	\$13	\$12
20	Towels	\$12	\$13
21	Seraphocking	\$150	\$150
22	Dresser	\$25	
23	Chair		\$25
24	Black TV stand	\$50	
25	Gun safe	\$200	\$200
26	Ammo	\$1,255	\$1,255
27	Tactical vest	\$250	\$250
28	Misc. gun pieces	\$1,500	\$1,500
29	Survival gear	\$1,250	\$1,250
30	Deadpool items	\$500	\$500
31	Fridge	\$25	
32	Freezer		\$25
33	Tools	\$1,000	\$1,000
34	Appliances/Misc.	\$25	\$25
35	Pots & pans/utensils	\$12	\$13
36	Silverware/plates, cups	\$13	\$12
37	Shelves	\$12	\$13
38	Guns	\$5,000	\$5,000
39	Motorcycle add on	\$500	\$500
40	Motorcycle gear	\$250	\$250
41	Grill	\$50	
42	Christmas stuff	\$25	\$25
43	Misc. Holiday stuff	\$13	\$12
44	Jewelry	\$250	\$250
45	Bed (Joe)	\$200	
46	Bed (Joe)	\$200	
47	Couch/bed (Joe)	\$500	
48	Portable grill	\$10	
49	Joseph's household property	\$450	
	BANK ACCOUNTS		
49	Black Hills Federal Credit Union (Krista)		\$27
50	American First Credit Union (Joint)	X	X
51	Sentinel Credit Union (Joseph)	X	

Date prepared: 4/6/2021

Joint Exhibit: _____

JOSEPH DANIEL LeFORS vs. KRISTA MAE LeFORS
File #48DIV19-8
JOINT PROPERTY EXHIBIT

ASSETS/LIABILITIES		COURT'S PROPERTY DIVISION	
		Krista	
RETIREMENT			
52	TSP (50% as of date of Decree of Separate Maintenance)	X	X
53	Military Retirement (50% of marital portion to Krista)	X	X
TOTAL ASSETS			
54		\$38,287	\$41,000
DEBTS			
55	Loan for Chevy Traverse	\$30,913	
56	Visa Platinum (Joint)	\$10,133	
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60	Disney/Chase (Krista) (Collections)	\$9,446	
61	GM card/Capitol One (Joint)	\$1,068	
62	Discover (Krista)		\$495
63	Kohls (Krista)		\$522
64	Target Card (Krista)		\$2,646
65	Sears (Krista) (Collections)	\$9,060	
66	Personal Loan by Joseph (Joint)	\$4,400	
67	Star Card (Joseph)	\$8,348	
68	Personal Loan - (Krista)		\$25,000
TOTAL DEBTS			
69		\$76,893	\$30,433
70	NET VALUE	\$38,606	\$10,567
71	CASH EQUALIZATION PAYMENT	\$0	\$0
72	NET EQUITY TO EACH PARTY		

D

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF MEADE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JOSEPH DANIEL LEFORS,

46DIV19-000008

Plaintiff,

v.

ORDER ON MOTION TO
RECONSIDER ALIMONY AWARD

KRISTA MAE LEFORS,

Defendant.

FILED

AUG 17 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

On June 14, 2021, the Plaintiff in the above-titled action filed a Motion to Reconsider this Court's decision regarding alimony. Prior to filing the Motion to Reconsider, Plaintiff filed a Notice of Appeal to the South Dakota Supreme Court. The Court, having reviewed the Motion to Reconsider and attendant briefs from both parties, being fully apprised of the premises, with good cause showing, it is hereby:

ORDERED that the Plaintiff's Motion to Reconsider the Court's alimony award is **DENIED**. By filing the Notice of Appeal before the Motion to Reconsider, the Plaintiff has stripped this Court of jurisdiction to hear issues material to the case. "An appeal from a judgment or order strips the circuit court's jurisdiction over the subject matter of the judgment or order *except as to certain trivial matters...*" *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 34, 876 N.W.2d 486, 499 (citations and quotations omitted) (emphasis in original). "In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal." *Id.* 2016 S.D. 15, ¶ 35, 876 N.W. 486, 499. "The right to appeal is by law limited to final decrees." *Id.* 2016 S.D. 15, ¶ 35, 876 N.W.2d 486, 500. (quotations and citations omitted). The South Dakota Supreme Court has held

that "[i]t is exceedingly important...that the circuit courts, in framing their interlocutory orders, and in carrying them into execution, should abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order." *Id.* 2016 S.D. 15, ¶ 35, 876 N.W.2d 486, 500. (quotations and citations omitted). For these reasons, the Plaintiff's Motion to Reconsider this Court's alimony award is denied. <

LET THE JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 17 day of August, 2021.

Attest: LINDA KESZLER
Clerk
By [Signature]
Deputy



BY THE COURT:

[Signature]
Hon. Kevin J. Krull
Circuit Court Judge

FILED

AUG 17 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

E

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction), on or about _____ 20 __, with intent to (promote (disloyalty) (disaffection) (disloyalty and disaffection)) ((Interfere with) (impair) the (loyalty) (good order and discipline)) of any member of the armed forces of the United States communicate to _____, a statement, to wit: "_____" or words to that effect, which statement was disloyal to the United States, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

98. Article 134—(Disorderly conduct, drunkenness)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and

(2) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Drunkenness.* See subparagraph 49.c.(1)(a) for a discussion of drunk.

(2) *Disorderly.* Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

(3) *Service discrediting.* Conduct of a nature to bring discredit upon the armed forces must be included in the specification and proved in order to authorize the higher maximum punishment when the offense is Service discrediting.

d. *Maximum punishment.*

(1) *Disorderly conduct.*

(a) Under such circumstances as to bring discredit upon the military Service. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

(b) Other cases. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Drunkenness.*

(a) Aboard ship or under such circumstances as to bring discredit upon the military Service. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) Other cases. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(3) *Drunk and disorderly.*

(a) Aboard ship. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) Under such circumstances as to bring discredit upon the military Service. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) Other cases. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (drunk) (disorderly) (drunk and disorderly) (which conduct was of a nature to bring discredit upon the armed forces), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

99. Article 134—(Extramarital sexual conduct)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused wrongfully engaged in extramarital conduct as described in subparagraph c.(2) with a certain person;

(2) That, at the time, the accused knew that the accused or the other person was married to someone else; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, the extramarital conduct must either be directly prejudicial to good order and discipline or service discrediting or both. Extramarital conduct that is directly prejudicial to good order and discipline includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a Servicemember, or both. Extramarital conduct may be Service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. "Discredit" means to injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem. While extramarital conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether extramarital conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, or both:

- (a) The accused's marital status, military rank, grade, or position
- (b) The co-actor's marital status, military rank, grade, and position, or relationship to the armed forces
- (c) The military status of the accused's spouse or the spouse of the co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the extramarital conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;

(e) The misuse, if any, of Government time and resources to facilitate the commission of the conduct;

(f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the extramarital conduct was accompanied by other violations of the UCMJ;

(g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;

(h) Whether the accused's or co-actor's marriage was pending legal dissolution, which is defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce; and

(i) Whether the extramarital conduct involves an ongoing or recent relationship or is remote in time.

(2) *Extramarital conduct.* The conduct covered under this paragraph means any of the following acts engaged in by persons of the same or opposite sex:

- (a) genital to genital sexual intercourse;
- (b) oral to genital sexual intercourse;
- (c) anal to genital sexual intercourse; and
- (d) oral to anal sexual intercourse.

(3) *Marriage.* A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) *Legal Separation.* It is an affirmative defense to the offense of Extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conduct are either legally separated or unmarried at the time of the conduct.

(5) *Mistake of fact.* A defense of mistake of fact exists if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried or legally separated, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest.

d. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. Sample specification.

In that _____ (personal jurisdiction data), (a married person), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about

_____, 20 _____, wrongfully engage in extramarital conduct, (to wit: _____) with _____, (a person the accused knew was married to a person other than the accused) (a person the accused knew was not the accused's spouse), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

100. Article 134—(Firearm, discharging—through negligence)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused discharged a firearm;

(2) That such discharge was caused by the negligence of the accused; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* For a discussion of negligence, see subparagraph 103.c.(2).

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, through negligence, discharge a (service rifle) _____ in the (squadron) (tent) (barracks) _____ of _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

101. Article 134—(Fraternalization)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's Service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) *Regulations.* Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a Service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. See paragraph 18.

d. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, knowingly fraternize with _____, an enlisted person, on

officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the Service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

(3) *Examples of offenses.* Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

d. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.

c. *Sample specifications.*

(1) *Copying or using examination paper.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction

data, if required), on or about _____ 20 __, while undergoing a written examination on the subject of _____, wrongfully and dishonorably (receive) (request) unauthorized aid by ((using) (copying) the examination paper of _____).

(2) *Drunk or disorderly.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, in a public place, to wit: _____, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

91. Article 134 (10 U.S.C. 934)—General article

a. *Text of statute.*

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court. As used in the preceding sentence, the term "crimes and offenses not capital" includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.

Discussion

The terminal element is merely the expression of one of the clauses under Article 134. See subparagraph c. for an explanation of the clauses and rules for drafting specifications. More than one clause may be alleged and proven; however, proof of only one clause will satisfy the terminal element. For clause 3 offenses, the military judge may judicially notice whether an offense is capital. See Mil. R. Evid. 202.

b. *Elements.* The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. All offenses under Article 134 require proof of a single terminal element.

F

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF MEADE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

3
4 _____)
5 JOSEPH D. LEFORS,)
6 Plaintiff,)
7 vs.)
8 KRISTA M. LEFORS,)
9 Defendant.)

Motion Hearing
46DIV19-8

10
11 BEFORE: THE HONORABLE KEVIN J. KRULL
12 Circuit Court Judge
13 Sturgis, South Dakota
May 25, 2021 at 2:30 p.m.

14 APPEARANCES:

15
16 For the Plaintiff: Hollie L. Smith
17 Attorney at Law
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18 Rapid City, South Dakota 57709

19 For the Defendant: Debra D. Watson
20 Attorney at Law
804 West Boulevard
21 Rapid City, South Dakota 57701
22
23
24
25

1 and under the statute, divide property based thereon, and I
2 have copies of the statute and these cases if the Court
3 would like me to leave those with you.

4 THE COURT: I've got the citations that you gave me, so
5 that's all right. Ms. Smith, any reply to that or --

6 MS. SMITH: I don't. The case law is pretty clear. The
7 biggest concern, my client obviously wants divorced and the
8 whole purpose of the separate maintenance decree was so
9 that Ms. Lefors could receive the 2020 TriCare benefits.
10 She's already receiving his military retirement. The
11 children will continue to have TriCare benefits and are
12 allowed to go to the PX with their military ID. She also
13 has the opportunity to receive full benefits through the
14 school system now that she's employed full-time.

15 As you may be aware, prior military, the military has
16 their separate rules and regulations. Because the Court is
17 keeping him married, it's restricting his ability to have
18 normal relationships, and if he would, it would jeopardize
19 his career at this point, so obviously my client's position
20 is still, you know, overarching that the parties -- that
21 the Court order the parties divorced and divide the marital
22 property, but this issue in my motion, the fact that the
23 Court cannot divide property or the marital estate before a
24 divorce is entered, and I believe, you know, my client has
25 not -- he may be appealing this issue, and unfortunately we

1 weren't able to get on the Court's calendar until today and
2 I think that that time to appeal is in a couple of days,
3 and I understand the Court's busy schedule with getting a
4 decision out on this, but I wanted to make the Court aware
5 of those things.

6 THE COURT: Sure. Well, I don't want to infringe on
7 anybody's right to appeal. First of all, Ms. Watson, you
8 know, basically my intention in granting separate
9 maintenance as opposed to a divorce was to protect these
10 children's rights to TriCare. At what point does that
11 become moot, not until the youngest child is 18? What
12 point does that become moot, I mean?

13 MS. WATSON: Well, the 20 years are up in June of next
14 year, so there's 12 months left roughly.

15 THE COURT: Yeah, I mean, that was kind of -- that's what I
16 thought. I didn't know the exact date. But at that time,
17 just for your client's edification, if he asked for it, I
18 would have granted a divorce, or I will grant a divorce,
19 you know, all things being the same.

20 You know, I hate to make this decision on this without
21 having done a little research on it. When do you believe
22 that your time to appeal runs?

23 MS. SMITH: I believe it's Thursday.

24 THE COURT: Really?

25 MS. SMITH: Yeah, I know. This is the soonest I could get

G

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF MEADE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

3
4
5 JOSEPH D. LEFORS,
6 Plaintiff,
7 vs.
8 KRISTA M. LEFORS,
9 Defendant.

(Day one)
Trial to the Court
DIV File No. 19-08

10
11 BEFORE: THE HONORABLE KEVIN J. KRULL
12 Circuit Court Judge
13 Sturgis, South Dakota
14 June 17, 2019, at 8:30 a.m.

15 APPEARANCES:

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Spearfish, SD 57783

19 For the Defendant: MS. DEBRA D. WATSON
20 Attorney at Law
21 804 West Boulevard
22 Rapid City, SD 57701
23
24
25

- 1 **A** Yes.
- 2 **Q** With the pay increase, your monthly budget -- or your
3 monthly income will be \$6,664; is that correct?
- 4 **A** Yes.
- 5 **Q** So with your monthly income being \$6,664 and your monthly
6 budget being \$6,216, you have about \$400 extra a month;
7 correct?
- 8 **A** Correct.
- 9 **Q** Are you putting anything away in a separate retirement
10 account?
- 11 **A** No.
- 12 **Q** Have you ever?
- 13 **A** The TSP account, it comes out of the middle column there.
- 14 **Q** How, to your knowledge, is TSP calculated?
- 15 **A** It's not -- it's based off the individuals in the divorce
16 proceeding.
- 17 **Q** So would it be accurate to say you have to serve at least
18 20 years in the military?
- 19 **A** No, TSP's actually done -- you have to be 65 before you
20 pull it out or you're penalized. It's kind of like a 401
21 or a --
- 22 **Q** Like a retirement plan, an IRA or something?
- 23 **A** Yeah, kind of like that..
- 24 **Q** I'll have you turn now to Exhibit 14, please. Oh, I
25 apologize. Too many books in front of me. Exhibit O.

- 1 Q I'll flip to the second page under debts. Loan for Chevy
2 Traverse is 30,000; correct?
- 3 A Correct.
- 4 Q You agreed earlier value is likely 28,000?
- 5 A Correct.
- 6 Q Under debts in your category, it's negative 2,000, meaning
7 you'd take the debt of that vehicle; correct?
- 8 A Correct.
- 9 Q 2012 Chevy Silverado. Is that number of 14,000 correct?
- 10 A No, it's actually only valued at 12,000 per GMC.
- 11 Q Nothing owing on that; correct?
- 12 A No, nothing owing on this.
- 13 Q 2006 Yamaha. Do you believe it's 3,000?
- 14 A To the best of my knowledge, yes.
- 15 Q What do you want to do with that piece of property?
- 16 A We can sell it.
- 17 Q Joseph, on Number 9, the LuLa Roe business you value at
18 \$11,000. What reaches you to come up with that number?
- 19 A The 2019 taxes where she admitted there was \$11,000 in
20 assets in there.
- 21 Q Would you potentially agree there's an amount of \$4,000 in
22 assets from the tax return of 2019?
- 23 A According to that, yes.
- 24 Q We'll skip down to the gun safe, ammo, tactical vest,
25 miscellaneous guns and survival gear. On the last page on

- 1 **A** Thrift savings plan. That was the 401 we're speaking of.
- 2 **Q** So that's essentially the military IRA; correct?
- 3 **A** Yes.
- 4 **Q** And to your knowledge, there's 5,000 in there?
- 5 **A** Yes.
- 6 **Q** When, if ever, can you withdraw that without penalty?
- 7 **A** Age of 65.
- 8 **Q** Are you still contributing?
- 9 **A** Yes.
- 10 **Q** How much a paycheck?
- 11 **A** \$40 dollars -- \$47.
- 12 **Q** Military retirement. How is your military retirement
- 13 calculated?
- 14 **A** It's calculated based off of -- when you go to retire, it's
- 15 50 percent of your base pay times 1.5 times -- I'm not
- 16 hundred percent certain of the calculation, but I did do it
- 17 off percentage wise.
- 18 **Q** Is that where off you've served 20 years in the military
- 19 you'll be eligible to receive that amount each month?
- 20 **A** Yes.
- 21 **Q** Might that -- you don't know exactly what that number might
- 22 be, but it might be somewhere between the 3,000 to 3500
- 23 range?
- 24 **A** No, it'd be closer to 2,000.
- 25 **Q** And that's for life; correct?

1 **A** I'm willing to continue what the order says.

2 **Q** Now, your monthly budget is 6,216 just for you; right?

3 **A** Yes.

4 **Q** And you saw Krista's budget for her and the kids was \$3,549

5 right now?

6 **A** Correct.

7 **Q** And you understand that if the divorce is granted

8 immediately, she'll lose her health insurance?

9 **A** That's incorrect.

10 **Q** So how long can Krista continue with TRICARE insurance?

11 **A** She has the benefit to keep it up for three months and then

12 buy into it to keep TRICARE.

13 **Q** What does it cost to buy into it?

14 **A** That I'm not aware of.

15 **Q** So for the next three months, what is the cost for it?

16 **A** She doesn't have to pay anything for it.

17 **Q** For three months?

18 **A** For three months.

19 **Q** And then after the three months, what is the cost?

20 **A** I answered that, and I'm not sure what that is.

21 **Q** Now, looking at your bank statement from Sentinel Credit

22 Union, it appears there's a number of cash withdrawals. Do

23 you recall that?

24 **MR. SCHLIMGEN:** Can I ask what exhibit you're referring to?

25 **MS. WATSON:** I'm sorry. Defendant's Exhibit U.

- 1 **A** I filed as head of household. Married.
- 2 **Q** And tax return thing's kind of been an ongoing issue during
3 this divorce; correct?
- 4 **A** Correct.
- 5 **Q** Was Krista gonna file and you ended up filing, or how did
6 that go?
- 7 **A** I wasn't gonna wait another year and a half for the next
8 taxes to be filed.
- 9 **Q** So you filed them?
- 10 **A** Correct.
- 11 **Q** You haven't seen the tax return?
- 12 **A** No.
- 13 **Q** Okay. TRICARE. Are the kids eligible to stay on your
14 insurance after this divorce?
- 15 **A** They'll be covered until the age of 21.
- 16 **Q** And you intend to keep them on?
- 17 **A** Yes.
- 18 **Q** And you don't know what could easily ascertain the cost to
19 buy in?
- 20 **A** No.
- 21 **Q** We couldn't --
- 22 **A** We could probably get that information.
- 23 **Q** You don't know off the top of your head?
- 24 **A** No.
- 25 **Q** She'll be covered three months, and that's an option down

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF MEADE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

3
4 _____)
5 JOSEPH D. LEFORS,)
6 Plaintiff,)
7 vs.)
8 KRISTA M. LEFORS,)
9 Defendant.)

(Day Two)
Trial to the Court
DIV File No. 19-08

10
11 BEFORE: THE HONORABLE KEVIN J. KRULL
12 Circuit Court Judge
13 Sturgis, South Dakota
June 18, 2019, at 8:30 a.m.

14 APPEARANCES:

15
16 For the Plaintiff: MR. ERIC M. SCHLIMGEN
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19 For the Defendant: MS. DEBRA D. WATSON
20 Attorney at Law
21 804 West Boulevard
22 Rapid City, SD 57701
23
24
25

1 qualified as an employment expert.

2 **THE COURT:** Overruled.

3 **Q (BY MR. SCHLINGEN, continuing)** If you know. If you don't,
4 that's fine.

5 **A** I don't know. I mean, I'm sure anybody can get a job.

6 Well, maybe not now during the Corona.

7 **Q** You talked a bit about TRICARE. Is that something you deal
8 with in your line of work as a professional or just your
9 experience as a military spouse?

10 **A** Just my experience as a spouse.

11 **Q** You'd agree with me that if this divorce was granted after
12 18 years of marriage, she'd have an ability still to buy
13 in --

14 **A** No, that is not true.

15 **THE COURT:** Ma'am --

16 **THE WITNESS:** Sorry.

17 **THE COURT:** -- wait until he's done with his question
18 before you answer. Okay?

19 **THE WITNESS:** I'm sorry.

20 **THE COURT:** That's okay. Go ahead, Mr. Schlingen.

21 **Q (BY MR. SCHLINGEN, continuing)** You'd agree with me that
22 after this divorce is granted she'll still have a
23 three-month period of being on TRICARE?

24 **A** No. It ends the day the divorce is final.

25 **Q** You'd agree that the children still could be covered under

1 TRICARE from Joseph?

2 **A** Correct.

3 **Q** Would you agree with me that if the children have their

4 military ID cards, she could still go on the base and enjoy

5 all the benefits that you described earlier in your direct

6 testimony?

7 **A** At this time, no, she cannot.

8 **Q** What do you mean "at this time"?

9 **A** At this time, no visitors are allowed on Ellsworth Air

10 Force Base.

11 **Q** Is that just due to --

12 **A** The Corona, yes.

13 **Q** But after any of those restrictions are lifted, if the

14 child has a military ID --

15 **A** Yes.

16 **Q** -- she could still get all those benefits from the

17 commissary?

18 **A** They have to be with her. She cannot just go to the base,

19 no. The children have to be physically with her.

20 **Q** And when the children are with her, she still gets the

21 deals and discounts if she goes there with them; correct?

22 **A** As far as I know, yes. I've not ever done that, but as far

23 as I know, yes.

24 **Q** Okay. You think Krista's happy right now?

25 **A** To get divorced, no. I don't think she's happy.

1 Q Would you be able to afford health insurance at all?

2 A No, ma'am.

3 Q And is it something that you can get as a substitute
4 teacher -- health insurance?

5 A No, ma'am.

6 Q Now, what other benefits would there be? You know, you
7 talked about TRICARE and you talked about the access to the
8 base for appointments and prescriptions for the children.
9 What other benefits would there be if the Court would grant
10 the separate maintenance?

11 A I could shop at commissary. The kids will lose their ID
12 cards at the age of 21 unless they're going to school. So
13 even if Kyden needed to live at home over the age of 21, he
14 would not be able to retain an ID card, so therefore I
15 could not shop at the commissary to buy groceries or
16 anything else.

17 Q Now, do you have any concerns about Kyden's ability to live
18 on his own?

19 A I think he will be able to live on his own. I think it
20 will be a lot of learning on his part. But I do think
21 that, yes, he will be able to. Will he go to college? I
22 don't know.

23 Q Now, you talked about shopping at the commissary. Why is
24 that an advantage for you?

25 A The food is a lot cheaper. I can go there and get more

REDIRECT EXAMINATION

BY MS. WATSON:

Q Mrs. LeFors, Mr. Schlingen asked you about your answers to interrogatories. My question to you is: Why did you say in your answers that you were in good physical health?

A Because I feel that I am in good physical health. I have a few issues with me. But to me, not being -- I can still work. And I can still take care of the kids.

Q You're not disabled?

A I am not disabled.

Q But you have some health issues?

A I do.

Q And then going to the 2019 Chevy Traverse, was that purchased during the marriage?

A It was.

Q Was that something you and your husband were both involved in?

A Yes. It was a replacement vehicle for the 2018 Chevy Traverse that we had gotten in a car accident on our way to Disney World. My husband was driving and hit a deer and we totaled it, so it was a replacement for the '18.

Q And are you able to sell the 2019 Chevy Traverse without having a deficiency judgment?

A No.

Q If you sold it, would you get any money?

H

15-26A-2. Suspension of rules.

In the interest of expediting decision in cases of pressing concern to the public or to litigants, or for other good cause shown, the Supreme Court, except as otherwise provided in § 15-26A-92, may suspend the requirement or provision of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

Source: Supreme Court Rule 79-1, Rule 2.

15-26A-2.1. Repealed by SL 2014, ch 253 (Supreme Court Rule 13-11), eff. Jan. 1, 2014.

15-26A-3. Judgments and orders of circuit courts from which appeal may be taken.

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

- (1) A judgment;
- (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (3) An order granting a new trial;
- (4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;
- (5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;
- (6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or
- (7) An order entered on a motion pursuant to § 15-6-11.

Source: SDC 1939 & Supp 1960, § 33.0701; SDCL, § 15-26-1; SL 1971, ch 151, § 2; SL 1986, ch 160, § 2.

25-4-39. Separate maintenance granted on denial of divorce.

Though judgment of divorce is denied, the court may in an action for divorce provide for maintenance of a spouse and the children of the parties, or any of them, by the other spouse.

Source: SDC 1939, § 14.0727; SL 1979, ch 165, § 2.

25-4-40. Action for separate maintenance without divorce--Alimony and support.

An action for separate maintenance may be maintained without request for divorce, upon any grounds which would be grounds for divorce, and in such cases the court shall have power to award temporary alimony, suit money, and permanent support for a spouse and the children of the parties, or any of them, by the other spouse.

Source: SDC 1939, § 14.0727; SL 1979, ch 165, § 3.

25-4-44. Division of property between parties.

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

Source: SDC 1939, § 14.0726; SL 1988, ch 203.

Appeal No. 29660

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

JOSEPH DANIEL LeFORS,

Plaintiff and Appellant,

vs.

KRISTA MAE LeFORS,

Defendant and Appellee.

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

THE HONORABLE KEVIN J. KRULL
CIRCUIT COURT JUDGE PRESIDING

APPELLEE’S BRIEF

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Notice of Appeal Filed: May 27, 2021

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<u>Godfrey v. Godfrey</u> , 705 N.W.2d 77 (SD 2005).....	4

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<u>Henrichs v. Henrichs</u> , 426 N.W.2d 569 (SD 1988)	13
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<u>Johnson v. Johnson</u> , 734 N.W.2d 801 (SD 2007).....	11
<u>Kost v. Kost</u> , 515 N.W.2d 209 (SD 1994)	4
<u>Langdeau v. Langdeau</u> , 751 N.W.2d 722 (SD 2008).....	5
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<u>McGinley v. McGinley</u> , 19 P.3d 954 (Or. Ct. App. 2001).....	7
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<u>Novak v. Novak</u> , 553N.W.2d 226 (SD 1996).....	4
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<u>Pieper v. Pieper</u> , 841 N.W.2d 781 (SD 2013).....	2, 4, 11
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<u>Wilson v. Wilson</u> , 434 N.W.2d 742 (SD 1989).....	2, 13

<u>Zepeda v. Zepeda</u> , 632 N.W.2d 48 (SD 2001).....	5
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REFERENCES:

Plaintiff/Appellant Joseph Daniel LeFors shall be referred to herein as “Joseph.” Defendant/Appellee Krista Mae LeFors shall be referred to herein as “Krista.” Reference to the Clerk’s “Alphabetical Index” shall be by the abbreviation “CI” followed by the assigned number. Reference to Day 1 of the Trial Transcript shall be by the abbreviation “TR1” followed by the pertinent page number(s). Reference to Day 2 of the Trial Transcript shall be by the abbreviation “TR2” followed by the pertinent page number(s). Reference to the Motion Hearing held May 25, 2021 shall be by “MH” followed by the pertinent page number(s). Reference to an Exhibit shall be by the abbreviation “EX” followed by the assigned number or letter. Reference to a Session Law shall be by the abbreviation “SL” followed by the year. Reference to the parties’ minor son will be referred to by the initials “KL.”

JURISDICTIONAL STATEMENT:

Krista adopts the Jurisdictional Statement contained in Joseph’s Brief.

LEGAL ISSUES:

1. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A DECREE OF SEPARATE MAINTENANCE INSTEAD OF A DIVORCE.

Trial Court: Granted Krista a Decree of Separate Maintenance.

Most relevant statutory provisions:

- A. SDCL § 25-4-39; and
- B. SDCL § 25-4-40.

2. WHETHER SOUTH DAKOTA LAW ALLOWS FOR THE FINAL DIVISION OF PROPERTY IN A DECREE OF SEPARATE MAINTENANCE.

Trial Court: Held in the Affirmative.

Most relevant statutory provisions:

- A. SDCL § 25-4-79;
- B. SDCL § 25-4-80; and
- C. SDCL § 43-4-22 (17).

Most relevant cases:

- A. Ahrendt v. Chamberlain, 910 N.W.2d 913 (SD 2018);
- B. Giesen v. Giesen, 911 N.W.2d 750 (SD 2018); and
- C. Pieper v. Pieper, 841 N.W.2d 781 (SD 2013).

3. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING KRISTA PERMANENT ALIMONY.

Trial Court: Granted Krista Permanent Alimony of \$750 per month, Terminable Upon Her Earlier Death or Remarriage.

Most relevant statutory provisions:

- A. SDCL § 25-4-39;
- B. SDCL § 25-4-40; and
- C. SDCL § 25-4-41.

Most relevant cases:

- A. Baltzer v. Baltzer, 422 N.W.2d 584 (SD 1988);
- B. Fox v. Fox, 467 N.W.2d 762, 767 (SD 1991); and
- C. Wilson v. Wilson, 434 N.W.2d 742 (SD 1989).

STATEMENT OF THE CASE:

Joseph initiated the divorce action with a Summons and Complaint filed on January 24, 2019. (CI 7, 12). Krista filed an Answer to the Complaint on February 13, 2019 and a Counterclaim for Divorce on March 29, 2019. (CI 27, 41). Krista moved to amend her Counterclaim to allege separate maintenance instead of a divorce, which the trial court granted on January 16, 2020. (CI 174, 195). Krista served and filed Defendant's Amended Counterclaim for Separate Maintenance. (CI 180, 191). A two-day divorce trial was held on June 17 and 18, 2020. (TR1; TR2). Judge Krull entered Findings of Fact and Conclusions of Law on April 6, 2021 and a Decree of Separate Maintenance on April 8, 2021 awarding Krista permanent alimony and dividing the marital estate. (CI 813, 832). Joseph filed a Verified Motion to Clarify Court's Findings and Motion for Reconsideration on May 11, 2021, which was heard on May 25, 2021. (CI 899, MH). Joseph filed a Notice of Appeal on May 27, 2021. (CI 966). Although litigated, custody and child support are not part of this appeal. (CI 970). On August 17, 2021, Judge Krull entered an Order denying Joseph's Verified Motion to Clarify Court's Findings and Motion for Reconsideration based upon lack of jurisdiction due to the pending appeal, which stripped the trial court of jurisdiction to determine issues material to the case. (CI 1662).

STATEMENT OF THE FACTS:

Joseph's Statement of the Facts are generally accurate and accepted by Krista, with the following exceptions: Krista's Amended Counterclaim for Separate Maintenance was filed December 2, 2019 and January 15, 2020. (CI 180,191). Krista

was awarded only 50% of Joseph's Thrift Savings Plan. (CI 813; EX R). Additional facts, where applicable, may be found in the "Argument and Authorities" section of Appellee's Brief.

ARGUMENT AND AUTHORITIES:

1. STANDARD OF REVIEW.

The "abuse of discretion" standard is the most deferential of appellate review standards, but it does not mean that the trial court's decision will remain undisturbed. Stavig v. Stavig, 774 N.W.2d 454 (SD 2009). It is not for the Appellate Court, but rather for the trial court, to gauge the credibility of the witnesses and to weigh the significance of their testimony. Kost v. Kost, 515 N.W.2d 209 (SD 1994). The Appellate Court gives due regard to the trial court as a fundamental recognition that the trial judge has a better opportunity to judge the credibility of witnesses and the weight afforded their testimony. Severson v. Hutchinson, 838 N.W.2d 72 (SD 2013). An abuse of discretion refers to discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. Schieffer v. Schieffer, 826 N.W.2d 627 (SD 2013); Godfrey v. Godfrey, 705 N.W.2d 77 (SD 2005); Novak v. Novak, 553 N.W.2d 226 (SD 1996). Discretion imports wide latitude, but it also imposes solemn responsibility. Michelson v. United States, 335 U.S. 469, 480; 69 S.Ct. 213, 221; 93 L.Ed. 168 (1948).

The abuse of discretion standard on appellate review requires a determination that the discretion was not guided by erroneous legal conclusions. Pieper v. Pieper, 841 N.W.2d 781 (SD 2013). When applying the abuse of discretion standard, the Appellate Court does not inquire whether it would have made the same decision as the trial judge,

rather it decides only whether the trial court could have reasonably reached the conclusion it did in view of the applicable law and the circumstances of the case. Maxner v. Maxner, 730 N.W.2d 619 (SD 2007); Zepeda v. Zepeda, 632 N.W.2d 48 (SD 2001). The Appellate Court upholds trial court's findings of fact unless they are clearly erroneous. Osborn v. Kelley-Osborn, 913 N.W.2d 496 (SD 2018); Anderson v. Anderson, 472 N.W.2d 519 (SD 1991).

The Appellate Court reviews a trial judge's decision for error in incorrectly choosing, interpreting or applying the law; for clear mistakes in fact findings; and for undue emphasis on matters not materially related to the subject matter. Berens v. Berens, 689 N.W.2d 207 (SD 2004). The Appellate Court only overturns the trial court's findings of fact on appeal when a complete review of the evidence leaves the Appellate Court with a definite and firm conviction that a mistake has been made. Miller v. Jacobsen, 714 N.W.2d 69 (SD 2006).

The Appellate Court reviews questions of law, including statutory construction, under the de novo standard as they are primarily matters of statutory interpretation. Green v. Green, 922 N.W.2d 283 (SD 2019); Langdeau v. Langdeau, 751 N.W.2d 722 (SD 2008); Terca v. Terca, 757 N.W.2d 319 (SD 2008). The trial court's legal conclusions are also reviewed de novo, giving no deference to the trial court's conclusions of law. Huston v. Martin, 919 N.W.2d 356 (SD 2018); Parsley v. Parsley, 734 N.W.2d 813 (SD 2007).

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A DECREE OF SEPARATE MAINTENANCE.

In this action, Joseph filed a Complaint for divorce, while Krista filed a

Counterclaim seeking separate maintenance. (CI 7, 180). SDCL § 25-4-39 provides that: “Though judgment of divorce is denied, the court may in an action for divorce provide for maintenance of a spouse and the children of the parties, or any of them, by the other spouse.” SDCL § 25-4-40 provides: “An action for separate maintenance may be maintained without regard for divorce, upon any grounds which would be grounds for divorce, and in such cases the court shall have power to award temporary alimony, suit money, and permanent support for a spouse and the children of the parties, or any of them, by the other spouse.”

As to Krista’s request for separate maintenance, she testified that by continuing the marriage through June of 2022, she would be meeting the 20 year military requirement, allowing her to get Tricare benefits for the rest of her life. (TR2, p. 80). The cost for Krista’s Tricare is a little over \$300 per year, a substantial benefit. (TR2, p. 80). Krista would also be able to cover the children under her Tricare plan, if Joseph chose not to do so. (TR2, p. 80). Krista would also be able to cover the children past their majority, if Joseph elected not to, consistent with the Affordable Care Act. The cost to cover the children under Tricare is a little over \$600 per year. (T2, p. 80). The parties’ son, KL, has autism, ADHD, and a tick disorder, making continued healthcare coverage essential. (T2, p. 81). Krista could also utilize the facilities on the military base, including the medical clinic, counseling center, Base Exchange for discounted goods, and Base Commissary for discounted groceries for the rest of her life. (TR2, p. 80). Krista would also be able to qualify for a military ID card which would allow her to have access to the base to take the children to medical appointments and to complete travel vouchers

for the children's health care referrals off base. (TR2, p. 80).

In justifying its granting of separate maintenance, the trial court stated:

“Krista seeks this option as it would allow her to have lifetime Tricare health care coverage for a minimal fee as well as access to the Base Exchange and Commissary resulting in decreased costs for groceries, clothing and other necessities plus retain her DOD military ID card allowing her access to the base to obtain health care services for the children. On June 12, 2022, the parties will have been married for 20 years during Joseph's military service. This Court finds good cause to grant Krista a Decree of Separate Maintenance for a period of two years in order to provide her with affordable medical benefits, access to the base for the children's health care and reduced cost of groceries, clothing and other necessities which Joseph is otherwise unable to pay or would result in substantial financial strain. Granting a separate maintenance will also allow Krista the benefit of the Servicemember's Civil Relief Act resulting in lower interest on her credit cards making it easier for her to manage the debt. This result is in the best interests of the parties and of their children due to their precarious financial situation so that each has an improved ability to meet essential needs for themselves and their two minor children. Granting Separate Maintenance would also allow Krista to continue to pay the cost of family counseling through Tricare.” (CI 813).

Thereafter, the trial court entered a Decree of Separate Maintenance to Krista on the grounds of extreme cruelty. (CI 832). South Dakota law authorizes the trial court the option of granting separate maintenance in lieu of a divorce. SDCL § 25-4-40. The trial court's basis for doing so is solidly based in the evidence consistent with its Finding of Fact 3.

Joseph claims that the Decree of Separate Maintenance infringes upon his right to marry; however, he is married with two minor children. Joseph further claims that he has a constitutional right to a divorce based upon the Equal Protection Clause. Such claim is misplaced as McGinley v. McGinley, 19 P.3d 954 (Or. Ct. App. 2001) upheld the trial court concluding that neither the state nor federal constitutional guarantee of equal

treatment were violated and the trial court's decision did not substantially interfere with the fundamental right to marry. Joseph relied upon Boddie v. Connecticut, 401 U.S. 371 (1971), which held that due process required the state to waive filing fees for indigent persons in divorce actions, not at all synonymous with the present factual situation. Unlike the right to marry, there is no absolute right to divorce as it is governed by state law. South Dakota, like other states, requires an order of the court to obtain a divorce.

Joseph claims that he is compelled to continue with his military service for the next two years (now eight months) or be held in contempt. While it is true that if Joseph decides to quit in the next eight months before his 20 years of military service are attained, Krista could request that he be held in contempt. Nevertheless, a finding of contempt is not automatic but requires judicial review. The trial court would have to find that Joseph's employment termination was not justified but rather was willful and contumacious. Streier v. Pike, 886 N.W.2d 573 (SD 2016). The trial court simply held that Joseph can't quit his job between now and obtainment of his 20 years of service in June of 2022 in order to prevent Krista from receiving the benefits accruing to her as a military spouse. It is, similarly, in Joseph's best interests to complete his 20 years of military service as he retains the same benefits as Krista.

Family law is a court of equity requiring the trial court to balance the equities and decide what is fair under the facts and circumstances of the case. Family law is fact-based and likely no two marital situations are identical. Clearly, the benefits to Krista of lifetime medical and base privileges outweigh Joseph's claimed sacrifice of being unable to engage in an intimate relationship or remarry in the two years following the Decree.

When looking at the big picture, the trial court reached a compromise granting each party the relief they sought, to-wit: Krista a legal separation for two years and Joseph a divorce thereafter.

Joseph suggests that instead of separate maintenance, the trial court should have paid Krista the value she would have lost in the divorce. However, the parties were mired in debt that they could not pay. Adding additional debt was not an option. Joseph is claiming in this appeal that he can't afford the alimony in one argument, which is then incongruent with his later argument that the trial court should have awarded Krista more money to offset what she would have lost had a divorce been granted. Contrary to Joseph's claim, there is no constitutional right to divorce. The trial court's decision in granting Krista separate maintenance for a period of two years was both rational, limited in time, and consistent with South Dakota law. Joseph has failed to establish any violation of the Equal Protection Clause of the U.S. Constitution. Krista asserts that the trial court's decision in granting her a Decree of Separate Maintenance was reasonable and justified in light of South Dakota law and the circumstances of this case.

**3. SOUTH DAKOTA LAW LENDS CREDENCE TO A FINAL
PROPERTY DIVISION PURSUANT TO A DECREE OF
SEPARATE MAINTENANCE.**

The parties prepared a Joint Property Exhibit listing their assets and liabilities as well as each party's proposal for an equitable division of the assets and an equitable allocation of the liabilities. (EX R). The trial court divided the parties' property and debt in the Decree of Separate Maintenance. (CI 832). Finding of Fact 12 states:

"Equitable Division of Property and Debts: The parties own no land. Their personal property with values and debts with balances are

contained on the Joint Property Exhibit, together with each party's position on the equitable distribution of property and equitable allocation of debts. Excluding Joseph's military retirement, the parties have more debts than assets. Each party shall retain the firearms, accessories and ammunition in his/her custody. Joseph initially voluntarily paid Krista's vehicle payment and insurance and when he stopped paying, he was court-ordered to do so. Joseph shall continue to pay Krista's vehicle until the loan is paid in full and pay the vehicle insurance so that she and the children have reliable transportation. The vehicle was purchased by the parties during their marriage. The vehicle cannot be sold without a deficiency judgment. Krista has neither the credit nor funds to buy another vehicle. The initial vehicle payment of \$694 per month was increased due to Joseph's failure to make the payment in September, October and November 2019 and his dropping of the vehicle insurance.

The Court's division of property and debts is attached hereto and incorporated herein by this reference. Each of the parties is living in rented housing. The parties have minimal personal property with substantial debt. The Court specifically finds that Krista has been adversely impacted by COVID-19 as a substitute teacher while Joseph has been able to continue his employment during the pandemic. Due to the substantial disparity in income, the Court has given Krista more value in property and Joseph more debt in order to make an equitable division of the assets and liabilities considering the parties' financial circumstances."

The parties had substantially more debt than assets. The trial court awarded Krista \$10,567 in value and Joseph -\$38,606 in value based on the parties' respective circumstances and the large disparity in incomes. (EX R). Joseph had gross monthly income of \$6,664.31 while Krista had gross monthly income of \$1,081.58 in January of 2020. (EX X, Y).

South Dakota law appears inconsistent on the issue of division of property in a separate maintenance action. SDCL §§ 25-4-39 and SDCL 25-4-40 (SL 1979) do not reference division of property or allocation of debt but rather maintenance or permanent support for the spouse and children of the parties in separate maintenance actions.

However, SDCL §§ 25-4-79 and 25-4-80 provide for the trial court's jurisdiction over motions for omitted assets in a legal separation. (SL 2013). SDCL § 43-4-22 (17) provides an exemption from the real estate transfer fee on real property transferred in a separate maintenance action. (SL 1994). While the earlier statutes limit separate maintenance actions to the determination of spousal and child support, the latter statutes presume a division of property in a separate maintenance action.

Absent special circumstances, assets and liabilities are valued at the time of trial rather than at the time of separation. Ahrendt v. Chamberlain, 910 N.W.2d 913 (SD 2018); Johnson v. Johnson, 734 N.W.2d 801 (SD 2007). However, a different date may be used if special circumstances are present. Pieper v. Pieper, 841 N.W.2d 781 (SD 2013); Duran v. Duran, 657 N.W.2d 692 (SD 2003); Geraets v. Geraets, 554 N.W.2d 198 (SD 1996). Krista asserts that separate maintenance is a special circumstance warranting an earlier valuation and division of the assets and liabilities. Especially where, as here, the parties had more debt than assets. To require a trial in two years to determine a division of the property and debts would not be realistic. Moreover, additional litigation is not affordable given the parties' precarious financial condition. Dividing assets purchased and liabilities incurred during the two year period between the legal separation and the divorce would not be fair to either party. Putting a freeze on the property for a period of two years is similarly not realistic. A decision has to be made regarding liabilities as debts need to be paid. The trial court's decision to divide property and allocate debts in the separate maintenance action was not clearly erroneous but rather made sense so each party could enjoy what little property they had and each party could

ensure that debts of the marriage were paid.

The Appellate Court does not interfere with the trial court's valuation unless it is clearly erroneous. Giesen v. Giesen, 911 N.W.2d 750 (SD 2018). Delaying the division of property and allocation of debts for a period of two years until the divorce was granted would place the property and debts in limbo and not be in the best interests of either party. The trial court's decision to divide the property and debts at the time of the Decree of Separate Maintenance rather than two years later in the divorce action is not clearly erroneous.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING KRISTA ALIMONY OF \$750 PER MONTH PLUS REQUIRING JOSEPH TO PAY FOR HER VEHICLE AND AUTOMOBILE INSURANCE.

South Dakota Law allows the trial court to grant alimony or spousal support in a separate maintenance action. SDCL § 25-4-39 and SDCL 25-4-40. "Permanent alimony is among several types of alimony recognized in South Dakota. . . Although the specifics of permanent alimony are determined by the facts of each case, common to it are payments until death of the recipient or other significant event such as remarriage, which terminates the need for continuing support." Sanford v. Sanford, 694 N.W.2d 283, 290 (SD 2005). "Permanent alimony is distinguishable from other forms of alimony in that it is intended as an allowance for support and maintenance for such things as food, clothing, habitation, and other necessities." Fox v. Fox, 467 N.W.2d 762, 767 (SD 1991).

The factors considered by a trial court in making a general award of alimony are the length of the marriage, earning capacity of the parties, financial condition after the property division, age, health and physical condition of the parties, the parties' station in

life or social standing and fault. Wilson v. Wilson, 434 N.W.2d 742 (SD 1989); Henrichs v. Henrichs, 426 N.W.2d 569 (SD 1988).

Krista requested permanent alimony of \$1,539 per month. (EX Q). Relating to the factors, Krista's alimony request states:

1. Length of Marriage: 18 years.
2. Earning Capacity of the Parties: Joseph \$6,664.31 (current Leave and Earnings Statement); Krista \$829 (average of 2018 and 2019 earnings).
3. Financial Condition After the Property Division: The marital estate was in the red. Neither party will receive any property of any value.
4. Age: Both parties are 36 years old.
5. Health and Physical Condition: As to physical health, Krista suffers chronic pain in both lower arms and knees as well as stress and tension headaches. As to mental health, Krista is hyper vigilant from the trauma of the physical abuse and experiences anxiety, emotional upheavals and low self-esteem due to the conflict arising out of the separation and divorce. It is believed that Joseph is in good physical and mental health. Krista asserts that he abuses alcohol and has anger management issues.
6. Parties' Station in Life or Social Standing: Lower middle class.
7. Fault: During the marriage, Joseph inflicted grievous bodily injury and grievous mental suffering upon Krista as well as alcohol abuse constituting extreme cruelty as fault for the divorce.

Krista was primarily a mother and homemaker during their 18 year marriage. The trial court in Finding of Fact 10 stated:

The duties of mother and homemaker constitute a valuable contribution to marital property. Muenster v. Muenster, 764 N.W.2d 712 (SD 2009). The Court finds that during the 18-year marriage, Krista was primarily a wife, homemaker and mother. During the early years of the marriage, she was employed by the IRS. In more recent years, she has taught school as a substitute teacher on average of three times per week. Further, that Krista married at age 18 and sacrificed her education and employment to support Joseph's military career. Additionally, KL's special needs require Krista

to be available to foster his education and living skills. (CI 813).

Joseph does not appear to contest fault. In Finding of Fact 4, the trial court stated:

“The Court finds that the testimony regarding Joseph’s abuse of alcohol during the marriage to be credible and a cause of the marital conflict. The Court further finds the sworn testimony of Krista regarding several instances of domestic abuse by Joseph resulting in bruising, red marks and damage to the residence, which was supported by photographs, to be credible, despite the fact that Krista never filed a report with any law enforcement agency. Joseph’s abuse of alcohol and domestic violence were witnessed by the children and constitutes wrongful parental misconduct. Joseph acknowledged his failings as a spouse in notes and cards apologizing to Krista for his wrongful behavior. The Court finds that Joseph has inflicted emotional and physical abuse on Krista during the marriage constituting extreme cruelty as defined in SDCL § 25-4-4.”

As to the award of alimony, the trial court in Finding of Fact 11 found:

Joseph is an active duty member of the armed forces of the United States with a rank of E7 Master Sergeant earning a monthly gross income of \$6,664.31, including Base Pay, BAS and BAH. Krista works as a substitute teacher at Douglas School District earning between \$10 and \$12 per hour, with an average of 21 to 28 hours per week averaging gross income of \$829 per month during the school year. The Court finds that Joseph has the ability to pay spousal support as he has been paying Krista’s housing and utilities of \$1,539 through BAH since their separation. The Court finds Krista’s budget to be reasonable. Krista has a need for alimony as reflected in her substantial budget shortage. The Court finds that Krista has made sacrifices during the marriage to further Joseph’s career, including accompanying him to military functions, socializing with military families, encouraging his further education, taking care of the home and caring for the children. Krista also worked part-time to supplement the family income.

The Court finds that Krista’s returning to college to obtain a degree in teaching would allow her to improve her income and provide financially for herself and the children. Krista will lose her health insurance if a divorce is granted which will render her unable to afford health care estimated at \$600 per month. Krista has health issues with her knees and arm which require medical care. Due to the substantial debts and her inability to pay, Krista’s credit rating is poor making it difficult for her to obtain housing for her and the children. Krista’s decision to continue working at the school is understandable due to KL’s autism and the prior

issue at the school where he was committed to Regional West. Finding other employment during the pandemic is difficult. During the summer, the children require supervision. If Krista worked, the children would need child care.

This Court finds that permanent alimony is warranted in the sum of \$750 per month to provide Krista with the necessities of housing, utilities, health insurance and food. The alimony will terminate upon the death of either party or Krista's remarriage."

It is interesting to note that under South Dakota law, the trial court in determining alimony or spousal support, is required to factor in the financial condition after the property division, which also seems incongruent with Joseph's position that the trial court can't divide property and debts in a separate maintenance action as such an analysis is required by our case law.

Krista's budget showed average income of \$829 (not including child support) against future anticipated monthly living expenses of \$4,641. (EX O). Clearly, Krista has a need for alimony. At a monthly income of \$6,664.31, Joseph has the ability to pay alimony. (EX X). The \$750 per month alimony awarded by the trial court is 11% of Joseph's gross income. Adding in the vehicle payment and insurance of roughly \$1,000 per month results in 26% of Joseph's gross income going to help Krista financially. Joseph suggests that Krista sell the vehicle, however, she is upside down on the vehicle and has no credit. Selling it would leave her and the children without any reliable transportation.

Joseph claims that the trial court failed to consider the alimony award in light of the property division while at the same time arguing the court should not have divided the property. Joseph further claims that the alimony should have been rehabilitative rather

than permanent based on possible future events. If circumstances change in the future, Joseph can request modification of the alimony. SDCL § 25-4-41.

As a result of the separation, neither party is in good financial shape but each are able to survive. Clearly Krista has a need for support and Joseph has the ability to provide for his wife of 18 years. The Appellate Court will not disturb an award of alimony unless it clearly appears that the trial court abused its discretion. Baltzer v. Baltzer, 422 N.W.2d 584 (SD 1988). Krista asserts that the trial court appropriately awarded permanent alimony to her in this separate maintenance action based on the facts and circumstances of the case.

On May 11, 2020, Joseph filed a Verified Motion to Clarify Courts Findings dated April 6, 2021 and Motion for Reconsideration of the alimony award. (CI 899). A hearing was held on May 25, 2021. (MH p. 1-55). The trial court took the motion under advisement. (MH, p. 54). Two days later, Joseph filed his Notice of Appeal, which encompassed the trial court's initial decision on alimony. (CI 966). The trial court denied Joseph's Motion to Reconsider the Court's alimony award. (CI 1662). In denying the Motion, the trial court held that Joseph's filing of the Notice of Appeal before the trial court's decision on his Motion to Reconsider the alimony award stripped the circuit court's jurisdiction over the subject matter of the judgment or order. In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit and to have the whole case and every matter in controversy in it decided in a single appeal. O'Neill v. O'Neill, 876 N.W.2d 486, 499 (SD 2016). The trial court's decision not to reconsider its alimony

ruling after the appeal was filed is consistent with South Dakota statutes and Supreme Court precedent.

CONCLUSION:

Krista respectfully requests that this Court affirm the trial court's decision on all issues.

WAIVER OF ORAL ARGUMENT:

Krista waives oral argument in this Appeal.

CERTIFICATE OF COMPLIANCE:

The undersigned attorney hereby certifies that the Appellee's Brief is submitted in compliance with the type volume limitations of SDCL § 15-26A-66(b)(4). The font used is Times New Roman 12. There are 5190 words and 32,111 characters in the brief.

Dated this_____ day of November, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served and filed the original and two (2) true and correct hard copies of the foregoing Appellee's Brief in the above-captioned action upon the person herein next designated, all on the date below shown by depositing the original and said copies thereof in the United States Mail at Rapid City, South Dakota, postage prepaid, in an enclosed package addressed to said addressee, to-wit:

Attn: Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070

which address is the last known address of the addressee known to the subscriber; that she filed an electronic copy in portable document format (pdf) of the Appellee's Brief upon the Clerk of the South Dakota Supreme Court by Email attachment to SCClerkBriefs@ujs.state.sd.us with the number of the case appearing in the subject line of the Email; and further that she served copies of the foregoing Appellee's Brief in the above-captioned action upon the person herein next designated all on the date below shown by E-mail and U.S. Mail, to-wit:

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DATED at Rapid City, South Dakota, this ____ day of November, 2021.

WATSON LAW OFFICE, P.C.

Debra D. Watson

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29660

JOSEPH D. LEFORS,

Plaintiff and Appellant

vs.

KRISTA M. LEFORS,

Defendant and Appellee

Appeal from the

Fourth Judicial Circuit

Meade County, South Dakota

The Honorable Kevin Krull, Circuit Court Judge

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant-Plaintiff, Joseph LeFors, will be referred to as a “Joseph;” Appellee-Defendant, Krista LeFors, will be referred to as “Krista;” documents from the record of the Fourth Circuit Clerk of Court are cited as “R. ____;” the Appendix is cited as “App. ____;” the Transcript of the Divorce Trial held June 17-18, 2020 is referred to as “DT ____;” the Transcript of the Motions Hearing held on May 25, 2021 is referred to as “MT ____;” the Findings of Fact and Conclusions of Law entered on April 6, 2021 by the Honorable Kevin Krull, Circuit Court Judge, is referred to as “Findings;” and the Decree of Separate Maintenance entered on April 6, 2021 by the Honorable Kevin Krull is referred to as “Decree.” All references will be followed by appropriate page and paragraph designations.

ARGUMENT

I. Compelling Joseph to Remain Married Outweighs Any Financial Benefits Received By Krista.

Joseph, based upon the Circuit Court Order, is compelled to continue service in the military until he reaches 20 years of active service. The benefits (other than health insurance), which Krista outlines, are discounted groceries and access to the base, which Joseph has shown in the record that Krista would have access to for the children’s services, and such privileges are not outweighed by the sacrifices and infringements upon Joseph’s ability to re-marry and seek alternative employment. Krista did not address in her brief or provide any authority that would support an issuance of a Separate Maintenance Decree on pure financial reasons. Additionally, denying Joseph a divorce

and issuing a Separate Maintenance Decree, in turn, infringes on Joseph's and a spouse's ability to distribute his assets upon death based upon the State's elective share formula.¹

Joseph acknowledged in the record that he would continue to keep the children on his Tricare health insurance benefits until the children aged out. Nothing in the record suggests that he intended to take the children off, or otherwise would require Krista to put them on her Tricare coverage (in the event she would receive the lifetime Tricare benefits). Krista points out that the parties' son, KI, has autism, ADHD, and tick disorder, making health coverage essential. Again, nothing in the record would support a presumption that Joseph was not going to cover the children under his Tricare, which would require Krista to receive her own lifetime Tricare benefits.

Further, even without lifetime Tricare benefits, Krista would qualify to go on the military base for the children's appointments and complete travel vouchers with the children's military I.D.'s, which they will continue to have. So, Krista's assertion that she would need her own military I.D. to receive these services is incorrect.

Krista failed to address or provide any authority that would support a separate maintenance decree based upon pure financial reasons.

Krista acknowledged in her brief that the separate maintenance statute does not reference division of property or allocation of debt, but rather maintenance or permanent support for the spouse and children. SDCL 25-4-39 and SDCL 25-4-40.

¹ [T]he court upon application of the surviving spouse shall award to the surviving spouse such elective share in the remaining augmented estate as is equitable taking into account all of the circumstances of all interested parties and the length and other circumstances of the marriage of the decedent and such surviving spouse[.] SDCL 30-5A-5 (repealed 1995). *See also In re Estate of Pejisa*, 459 N.W.2d 243, 245 (S.D. 1990). Now, a surviving spouse has a right to an elective share of a deceased spouse's estate. SDCL 29A-2-202. Under SDCL 29A-2-202, the surviving spouse's elective share is determined by formula. *In re Estate of Shipman*, 832 N.W.2d 335, 340-41 (S.D. 2013).

II. The Circuit Court Further Erred In Issuing The Separate Maintenance Decree By Granting Krista the Possible Increase In Joseph's Military Retirement Benefits During The Term Of The Separation.

Judge Krull issued Findings that provided Krista with 50% of the marital portion of Joseph's military retirement benefits at the time of the granting of the Decree of Divorce, on or about June 30, 2022. (Findings, ¶ 13). The Findings, in effect, give Krista the benefit for any future promotions and increase in pay for the length of the entire separation, even though she was in no way directly enhancing or otherwise supporting Joseph's military career during that time.

The Circuit Court should have, similar to providing Krista 50% of the TSP at the time of the Separate Maintenance Decree, provided her with the respective military retirement benefits at the time of the Separate Maintenance Decree, instead of the Divorce in June 2022. The language in the Court's Decree should have directed the Military Qualified Domestic Order to incorporate that Krista's 50% marital share of Joseph's retired pay be based upon the military members base pay at the time of the Separate Maintenance Decree to avoid Krista receiving the increase in pay or any promotions that Joseph would receive between the time of the Separate Maintenance Decree and the Divorce. The parties officially separated in January 2019 when Joseph filed the Complaint for Divorce. R. 7. The divorce trial was held on June 17 and 18, 2020. The Circuit Court issued its Findings on April 8, 2021². R. 813, p. 2. A total of two (2) years and three (3) months had passed between the time the parties separated in January 2019 and the issuance of the Separate Maintenance Decree on April 8, 2021. The effect of the Court's Findings regarding Krista's portion of Joseph's military

² Krista primarily reiterates the Circuit Court's Findings for authority in her brief. However, the Findings that were proposed by Krista were largely adopted and accepted by the Circuit Court.

retirement has her retaining any and all increase in pay or promotions that Joseph would receive during a time where she would not have been supporting or enhancing his career as a military spouse. Krista, in her brief, acknowledged that a separate maintenance suit is a special circumstance warranting an earlier valuation. (Appellee's Brief, p. 11). It is still Joseph's position that the Circuit Court erred in granting the Separate Maintenance Decree, and further dividing the marital estate instead of issuing a divorce decree. Joseph requests that this Court direct the Circuit Court to issue a divorce decree as of April 8, 2021, and specify that Krista's military retirement benefits be calculated based upon Joseph's retired base pay at the time of the Decree. However, in the event this Court does not find the issuance of the Separate Maintenance Decree to be error, Joseph would request that this Court find that Krista shall not be entitled to any increase in retired pay during the term of the separation and the retired pay be calculated as of the date of the Separate Maintenance Decree.

III. Krista's Brief and Argument Concerning Income for Alimony Purposes is Flawed.

Krista states that Joseph's monthly income for alimony purposes was \$6,664.31, with an analysis of certain percentages of his *gross* income. However, Krista's argument is flawed due to her using gross income information as opposed to net or disposable incomes after reasonable expenses, which is what is used in determining an obligor's ability to pay for alimony. At trial, Joseph's budget was submitted with his reasonable expenses of \$6,216. (Plaintiff's Trial Exhibit 14). R. 438. Although the budget did not reflect any income information, Krista provided Joseph's Leave and Earnings Statement as an exhibit at trial, which reflects *gross* wages of \$6,664.31. (Defendant's Trial Exhibit X). R. 675. In her analysis, Krista fails to account for the deductions that would be taken

from Joseph's monthly pay and, therefore, such calculation does not consider his net monthly pay, which was approximately \$5,816.00. R. 899, pp. 10-11.

Ordinarily, net income is the proper basis for alimony orders. It is well settled that a court must base its child support and alimony orders on the available net income of the parties, not gross income. *LaBorne v. LaBorne*, 189 Conn. App. 353, 354, 207 A.3d 58, 59 (2019). *Schabauer v. Schabauer*, 2003 S.D. 146, 673 N.W.2d 274 ("The court's analysis of the relative disposable incomes of the parties establishes that the stability of income established by an alimony award will have marked tax advantages for the parties..."); *Barton v. Barton*, 2012 S.D. 44, 815 N.W.2d 553 (The trial court determined incomes based upon net earning from various sources of income).

IV. Joseph's Issues On Appeal Are Not Incongruent With His Requested Relief.

Krista suggests in her brief that Joseph's legal arguments, as it relates to the division of the marital estate and alimony, are incongruent with the requested relief. First and foremost, Joseph is requesting that a divorce decree be entered as of April 2021, for the various reasons outlined in his Appellant's Brief. This would alleviate the issue as it relates to the property division issued in the Separate Maintenance Decree, which Joseph argues was inconsistent with statutory law.

Second, Joseph argues that the permanent alimony award was inconsistent with his ability to pay, and that such award was not considered in light of the property division (to which Joseph argues was not proper). This argument is consistent with Joseph's request for a Divorce Decree, i.e., if the Circuit Court granted the divorce, the trial Judge would have the ability to divide the marital estate and, hence, consider the same for alimony.

The Circuit Court simply should have considered the amount it would have cost Krista to retain her own health benefits and calculated it in her monthly need and issued the parties divorced as opposed to Krista's argument that the Circuit Court should have simply awarded Krista more alimony to offset the need for her health benefits. Again, this was a Separate Maintenance Decree issued to promote pure financial benefits to Krista, which Joseph has shown such benefits do not outweigh the infringements upon his employment, marriage, and estate rights.

CONCLUSION

For the reasons stated herein, Joseph requests that the Circuit Court's grant of the Separate Maintenance Decree be reversed, and this matter be remanded for further proceedings on the merits.

Respectfully submitted this 3rd day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of December, 2021, she electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed and mailed via U.S. Mail, postage prepaid thereon, to:

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The undersigned further certifies that the original and two (2) copies of the Appellant's Reply Brief in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class, postage thereon prepaid, on the date written above.

/s/ Hollie L. Smith

HOLLIE L. SMITH

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Hollie L. Smith, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 6 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 1,544 words, and 8,062 characters (no spaces) in the body of the Brief.

*/s/ Hollie L. Smith*_____

HOLLIE L. SMITH

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