MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

3015

2001 HOUSE JUDICIARY

HCR 3015

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3015

House Judiciary Committee

☐ Conference Committee

Hearing Date 02-07-01

Tape Number	Side A	Side B	Meter #
TAPE II		x	1949 to 2798
Committee Clerk Signature	Joan Dees		

Minutes: Chairman DeKrey opened the hearing on HCR 3015. Directing the Legislative Council to study the separation of powere between the legislative and judicial branches and the distinction between the responsibilities of each branch.

Rep Weisz: District 14, intorducted the study resolution to look at separation of powers.

Chairman DeKrey: Are there any questions, seeing non we will continue with support to HCR 3015.

Robert Kautzman: (see attached testimony)

Chairman DeKrey: Are there any questions, if none thank you for appearing, is there any one wishing to appear in opposition to HCR 3015. Seeing none we will close the hearing on HCR 3015.

COMMITTEE ACTION

Chairman DeKrey: what are the wishes of the committee? Vice Chr Kretschmar moves a DO PASS on HCR 3015, seconded by Rep Maragos. The clerk will call the roll on a DO PASS motion on HCR 3015. The motion passes with 8 YES, 4 NO, 3 ABSENT

Carrier is Vice Chr Kretschmar.

Date: 02-07-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3015

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Vice Chr Kretschmar Seconded By Rep Maragos

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR --Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore					
Rep Rachael Disrud	✓				
Rep Bruce Eckre		✓			
Rep April Fairfield		✓			
Rep Bette Grande					
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin		✓			
Rep John Mahoney					
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham		✓			

Total (Yes) 8 No 4

Absent 3

Floor Assignment Vice Chr Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 8, 2001 9:02 a.m.

Module No: HR-23-2681
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HCR 3015: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (8 YEAS, 4 NAYS, 3 ABSENT AND NOT VOTING). HCR 3015 was placed on the Eleventh order on the calendar.

2001 SENATE GOVERNMENT AND VETERANS AFFAIRS

HCR 3015

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3015

Senate Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date March 23, 2001

Tape Number	Side A	Side B	Meter #
1		X	14.3-51.0
Committee Clerk Signature			

Minutes: **Chairman Krebsbach** called the committee to order and opened the hearing on HCR 3015 a resolution directing the Legislative Council to study the separation of powers between the legislative and judicial branches and the distinction between the responsibilities of each branch. **Representative Robin Weisz**, District 14, appeared before the committee as primary sponsor of the resolution. He introduced this resolution on behalf of a constituent of his. A copy of the fax is attached. He indicated that basically this is a simple resolution. What is basically asking for is to look at the three branches of government that are critical to our society. As legislators we have all been frustrated at times by seeing legislation we have passed and it appears that the judicial branch at times goes beyond the boundary of their authority in interpreting the laws to actually making law of their own. This resolution asks that we take a look at that and make clearer lines and boundaries and delineate exactly where the authority of each ends and the others begins. He did ask that the committee give their positive reaction to this resolution. **Senator Wardner** inquired about the constituent who had sent the fax. Was their a specific thing that

happened in his career or life that created these feelings? **Representative Weisz** indicated yes there was. The handout he gave will provide information to the specifics. **Senator Dever** inquired if he saw this as the same kind of problem on the state level as on the federal level? Would you see any kind of initiative coming from this study or simple a better understanding between the three branches? **Representative Weisz** indicated that this resolution is looking specifically at the state level. We obviously aren't going to effect the federal level. He would hope that if the study came out with some concrete solutions he would hope that the legislative body would address it. **Senator C. Nelson** noted that there have been a number of things in another committee dealing with the executive branch and the question of whether agency administrative rules supersede what the legislative branch intends. She noted she doesn't see any mention of it. This seems to be a battle between the judicial and legislative branches. She was always taught there are three distinct branches of government. Is there an intent here that you want to spread this out and look at administrative rules too? **Representative Weisz** indicated that this resolution is specifically dealing with the relationship between the legislative and the judicial. **Representative Audrey Cleary**, district 49, indicated that she has had some concerns for a number of years about judges and the people we elect to be judges and how little we know about those people and how little we can find out about them when we are voting for them and that has been one of her concerns. She noted one of her constituents has had a difficult time with judges and she is sure a lot of other people have to. She agrees with Representative Weisz on this issue. This issue needs to be addressed. There was no further testimony in support of, in neutral position on, or in opposition to HCR 3015. The hearing was closed at this time.

Chairman Krebsbach indicated that the amendments that are being proposed here really put the bill into a more amiable form. **Senator Wardner** moved to adopt the amendments which have

been proposed. Seconded by **Senator Dever**. **Senator T. Mathern** indicated that he would oppose the amendments. We had staff here and no one got up to oppose the amendments, no one got up to offer them. He thinks if this was a big deal to them they should have brought it to the committees attention right from the podium. **Chairman Krebsbach** indicated, Senator Mathern, she did have a visit with Chief Justice VandeWalle and he would have been at the hearing today however, he had to be out of town. Comments were offered by Senators **Dever, Wardner, C.Nelson, T. Mathern, and Krebsbach**. A discussion of the amendments ensued as to how the wording could be done to include all three branches of government. Roll Call Vote for adoption of amendments indicated 5 Yeas, 1 Nay, and 0 Absent or Not Voting. A motion to further amend was made by **Senator C. Nelson** to add; in line 2, after the word legislative insert a " , executive" ; in line 7, after the " ; the administrative power of the state is vested in the executive branch" and down in line 13, do another ",executive". Seconded by **Senator Wardner**. Roll Call Vote indicated 6 Yeas, 0 Nays, and 0 Absent or Not Voting. A motion for Do Not Pass as Amended was made by **Senator C. Nelson**, seconded by **Senator Wardner**. Roll Call Vote indicated 2 Yeas, 4 Nay Absent or Not Voting. The motion fails. A motion for Do Pass as Amended was made by **Senator Dever**, seconded by **Senator Wardner**. Roll Call Vote indicated 5 Yeas, 1 Nay, 0 Absent or Not Voting. Senator Dever will carry the resolution.

PROPOSED AMENDMENTS
TO
HOUSE CONCURRENT RESOLUTION NO. 3015

Page 1, line 7, after "Assembly" insert ", and the judicial power of the state is vested in its courts"

Page 1, line 8, remove "due to judicial activism and the apparent desire of courts throughout" and after the second "the" insert " thoughtful and prudent exercise of these powers by each of these separate and co-equal branches, with due respect and consideration for the authority and responsibility of the other, is in the best interest of the people"

Page 1, remove line 9

Page 1, line 10, remove "legislative branch of government have been encroached upon"

Renumber accordingly

Date: 3/23/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3015

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt amendments -

Motion Made By Sen. Wardner Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.	✓		Senator Carolyn Nelson	✓	
Senator Dick Dever, Vice-Chr.	✓		Senator Tim Mathern		✓
Senator Ralph Kilzer	✓				
Senator Rich Wardner	✓				

Total (Yes) 5 No 1

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3/23/01
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3015

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Further Amend

Motion Made By Sen. C. Nelson Seconded By Sen Wardner

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.	✓		Senator Carolyn Nelson	✓	
Senator Dick Dever, Vice-Chr.	✓		Senator Tim Mathern	✓	
Senator Ralph Kilzer	✓				
Senator Rich Wardner	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3/23/01
Roll Call Vote #: 3

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3015

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass as Amended

Motion Made By Sen. C. Nelson Seconded By Sen. Wardner

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.		✓	Senator Carolyn Nelson	✓	
Senator Dick Dever, Vice-Chr.		✓	Senator Tim Mathern		✓
Senator Ralph Kilzer					
Senator Rich Wardner	✓				

Total (Yes) 2 No 3

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3/23/01
Roll Call Vote #: 4

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3015

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Sen. Dever Seconded By Sen. Wardner

Senators	Yes	No	Senators	Yes	No
Senator Karen Krebsbach, Chr.	✓		Senator Carolyn Nelson		✓
Senator Dick Dever, Vice-Chr.	✓		Senator Tim Mathern	✓	
Senator Ralph Kilzer	✓				
Senator Rich Wardner	✓				

Total (Yes) 5 No 1

Absent 0

Floor Assignment Sen. Dever

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3015: Government and Veterans Affairs Committee (Sen. Krebsbach, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HCR 3015 was placed on the Sixth order on the calendar.

Page 1, line 2, after "legislative" insert ", executive,"

Page 1, line 7, after "Assembly" insert ", the judicial power of the state is vested in the courts, and the the administrative power of the state is vested in the executive branch"

Page 1, line 8, remove "due to judicial activism and the apparent desire of the courts throughout" and after the second "the" insert "thoughtful and prudent exercise of these powers by each of these separate and coequal branches, with due respect and consideration for authority and responsibility of the other, is in the best interest of the people;"

Page 1, remove lines 9 and 10

Page 1, line 13, after "legislative" insert ", executive,"

Page 1, line 14, after the semicolon insert "and"

Renumber accordingly

2001 TESTIMONY

HCR 3015

TO THE HONORABLE CHAIR PERSON KAREN KREBACH
AND MEMBERS OF THE GOVERNMENT AND VETERANS
AFFAIRS COMMITTEE

My name is Robert A. Kautzman , I had planned to speak in person to this committee this morning but a work problem came up that needed to be solved.

Thankfully Mr. Weisz agreed to hand out some paperwork for me in my absence. The paperwork shows only a very small part of the Judicial branch infringeing on the law making process.

It is a great concern to many of us to see the law making process sliping away from the LEGISLATIVE ASSEMBLY and into the hands of the JUDICIAL BRANCH, who were elected only to apply the laws set forth by the LEGISLATIVE ASSEMBLY not to create law as they see fit.

HOUSE CONCURRENT RESOLUTION NO. 3015 is a great tool to keep the separation of powers in place, and keep the responsibilities of each branch in place.

I apologize for not being there in person, and I thank you for your time.

Respectfully
ROBERT A. KAUTZMAN
Robert A. Kautzman

Bob - re: attached cases

Christl v. Swanson, 2000 ND 74, 609 N.W.2d 70.

In this case, the district court made a child support ruling based

- partly on its guess as to upcoming changes in the guidelines
- partly on a statutory presumption that clearly did not apply
- and made findings of fact on issues in dispute without a trial on the disputed evidence

The Supreme Court recognized that the application of the presumption was improper, but apparently was not bothered by the district court finding facts without proper hearing of the evidence.

State v. Holecek, 545 N.W.2d 800 (N.D. 1996).

In this case, the district court got it right. It interpreted the clear language in a statute that provided that when a temporary injunction is granted by a court "in no case shall a longer period than six months elapse before the hearing of the merits of the case shall be had" to decide whether to make the order permanent. The district court ruled that because six months had elapsed since the grant of the temporary injunction, and not hearing had been had to decide on its merits, the injunction had expired, was no longer an effective legal injunction, and that defendants could not be prosecuted for violating it.

The Supreme Court, however, ruled that the injunction apparently remains in place forever unless either party asks for a hearing. In order to come to its conclusion, the Supreme Court found that the statute was ambiguous.

Zuger v. Zuger, 1997 ND 97, 563 N.W.2d 804.

In *Zuger*, the court held that a trust set up by the husband's father to take care of husband's mother, was divisible marital property because the husband had a residuary interest in the trust.

*70 609 N.W.2d 70

2000 ND 74

Supreme Court of North Dakota.

Kenneth S. CHRISTL, Plaintiff and Appellant,
v.
Lisa SWANSON and M.M.S., a minor child, represented by her natural mother, Lisa Swanson, Defendants and Appellees.
No. 990256.
April 5, 2000.

Father who was self-employed farmer brought paternity, custody, visitation, and support action against mother and child. The District Court, Cass County, East Central Judicial District, Cynthia A. Rothe-Seeger, J., entered order determining father's net monthly income and establishing his monthly child support obligation. Father appealed. The Supreme Court, Sandstrom, J., held that (1) trial court had discretion when determining father's net monthly income to allow, or not to allow, deduction of business costs paid, but not expensed for internal revenue service purposes, and (2) trial court erred in presuming that asset expenditures father made before child's birth were transactions made for purpose of reducing his income available for child support.

Reversed and remanded.

West Headnotes

[1] Parent and Child ⇐3.3(10)
285 ----
285k3 Support and Education of Child
285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(10) Review.
Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review.

[2] Parent and Child ⇐3.3(7)
285 ----
285k3 Support and Education of Child
285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(7) Amount of Award.
A court errs as a matter of law when it fails to comply with the requirements of the Child Support Guidelines.

[3] Parent and Child ⇐3.3(7)
285 ----
285k3 Support and Education of Child
285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(7) Amount of Award.
A proper finding of net income is essential to a determination of the correct amount of child support under the Child Support Guidelines.

[4] Appeal and Error ⇐941
30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k940 Nature and Extent of Discretionary Power
30k941 In General.
When a district court may do something, it is generally a matter of discretion for appeal purposes.

[5] Appeal and Error ⇐946
30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 Abuse of Discretion.
A district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably.

[6] Parent and Child ⇐3.3(7)
285 ----
285k3 Support and Education of Child
285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(7) Amount of Award.
In determining father's net income from self-employment as farmer for child support purposes, trial court had discretion to allow, or not to allow, deduction of business costs paid, but not expensed for internal revenue service purposes; trial court also had discretion to allow deduction of costs of some kinds of assets, such as tools and farm machinery, but to not allow deduction of cost of other kinds of assets, such as vehicles, computers, and computer programs, which were less necessary for farming than tools and farm machinery. N.D.Admin. Code § 75-02-04.1-05(2).

[7] Parent and Child ⚭3.3(7)
285 ----
285k3 Support and Education of Child
285k3.3 Actions to Compel Support or Payment for Necessaries
285k3.3(7) Amount of Award.
Trial court erred in presuming that asset expenditures father made before child's birth were transactions made for purpose of reducing income available for child support obligation, warranting upward deviation of child support under the Child Support Guidelines; presumption applied only to transactions that occurred after child's birth. N.D.Admin. Code § 75-02-04.1-09(4).

[8] Statutes ⚭197
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k197 Conjunctive and Disjunctive Words.
The literal meaning of the terms "and" and "or" should be followed unless it renders the statute inoperable or the meaning becomes questionable.

*71 Mark R. Fraase (argued) and Douglas W. Nesheim (on brief) of Wegner, Fraase, Nordeng, Johnson & Ramstad, Fargo, N.D., for plaintiff and appellant.

Bonnie Jendro Askew, Fargo, N.D., for defendants and appellees.

SANDSTROM, Justice.

[¶ 1] Kenneth S. Christl appealed a judgment in his paternity, custody, visitation, and support action against Lisa Swanson and the child. We conclude the trial court had discretion to allow, or to not allow, deduction of business costs paid, but not expensed for internal revenue service purposes, in determining Christl's net income from self-employment. We further conclude the trial court erred in ruling capital expenditures Christl made before the child was born were subject to a presumption they were asset transactions warranting an upward deviation from the Child Support Guidelines. We reverse and remand for redetermination of Christl's child support obligation.

I

[¶ 2] Kenneth Christl and Lisa Swanson, who have never married, are the biological parents of a child, who was born September 30, 1998. Christl sued Lisa and the child, seeking a judgment adjudging Christl to be the natural father of the child, granting Lisa Swanson custody of the child, granting Christl reasonable visitation, and requiring Christl to pay Lisa Swanson child support under the Child Support Guidelines, N.D. Admin. Code ch. 75-02-04.1. Lisa Swanson answered the complaint and requested similar relief. Christl moved for summary judgment. The trial court granted partial summary judgment ruling a parent-child relationship exists between Christl and the child and reserved ruling on the other issues.

[¶ 3] Christl, a self-employed farmer, argued he was entitled to deduct all of his expenditures for the purchase of farm assets in computing his income for calculating his child support obligation. Christl submitted copies of his tax returns for 1994 through 1998, calculated his monthly income for those five years as $2,399.99, and argued his child support obligation is $475 per month. Lisa Swanson argued Christl did not borrow any money to purchase assets and was not entitled to deduct any of his expenditures for farm assets. She calculated Christl's monthly income at $8,000 and argued Christl's child support obligation is $1,377 per month.

[¶ 4] The trial court relied on N.D. Admin. Code § 75-01-04.1-05(2), and ruled it had "discretion to subtract certain business costs ... not allowed as a deductible expense for income tax purposes but ... paid by the self-employed parent, from the parent's adjusted gross income." Relying on N.D. Admin. Code § 75-02-04.1-09(2)(h) and (4), the court held:

> The Court may make an upward deviation from the guideline amount of the presumptively correct child support if ... the parent has an increased ability to pay such support, due to his purposeful reduction of income available for payment of child support by "engaging in an asset transaction."
>
> ....
>
> Christl's daughter was born on September 30, 1998. This action for establishment of Christl's child support obligation, among other things, was commenced on January 21, 1999. Hence, all capital expenditures made by Christl subsequent to January 21, 1997 are subject to a presumption of

an asset transaction warranting an upward deviation from the child support guidelines, irrespective of Christl's intention.

The court also ruled: 1) Christl is entitled to deduct some, but not all, of his purchase cost of depreciable assets; 2) it lacked "sufficient farming acumen to judge the propriety" of Christl's capital expenditures for farm machinery; and 3) it "retains its *72 discretion to disallow deductions for vehicle and other non-machinery purchases."

[¶ 5] The trial court did not allow deductions for a vehicle, computer, and computer program. The court found Christl's net monthly income for the purpose of determining his child support obligation is $6,300, and found Christl's child support obligation is $1,103 per month. Christl appealed from the judgment.

[¶ 6] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. Christl's appeal was timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 28-27-01.

II

[1][2][3][4][5] [¶ 7] Christl argues the trial court erred in determining his income and child support obligation because the trial court misapplied the Child Support Guidelines. "Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review." *Buchholz v. Buchholz*, 1999 ND 36, ¶ 11, 590 N.W.2d 215. "A court errs as a matter of law when it fails to comply with the requirements of the Guidelines." *Id.* "A proper finding of net income is essential to a determination of the correct amount of child support under the guidelines." *Schleicher v. Schleicher*, 551 N.W.2d 766, 769 (N.D.1996). "When a district court *may* do something, it is generally a matter of discretion." *Buchholz*, at ¶ 11. "A district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably." *Id.*

[6] [¶ 8] Christl contends the trial court erred in concluding it had "discretion whether to allow Mr. Christl to deduct actual costs of doing business which are not allowed as a deductible expense for income tax purposes."

[¶ 9] Before its amendment in 1999, N.D. Admin. Code § 75-02-04.1-05(2) provided for determining net income from self-employment:

> After adjusted gross income from self-employment is determined, all business expenses allowed for taxation purposes, but which do not require actual expenditures, such as depreciation, *must* be added to determine net income from self-employment. Business costs actually incurred and paid, but not expensed for internal revenue service purposes, such as principal payments on business loans (to the extent there is a net reduction in total principal obligations incurred in purchasing depreciable assets), *may* be deducted to determine net income from self-employment.

(Emphasis added.) In *Hieb v. Hieb*, 1997 ND 171, ¶ 18, 568 N.W.2d 598, we held the word "may" in the regulation is permissive rather than mandatory. We conclude the trial court had discretion to allow, or to not allow, deduction of business costs paid, but not expensed for internal revenue service purposes, in determining Christl's net income from self-employment. We further conclude the trial court had discretion to allow deduction of the cost of some kinds of assets, such as tools and farm machinery, but to not allow deduction of the cost of other kinds of assets, such as vehicles, computers, and computer programs, which are less obviously necessary for farming than tools and farm machinery.

[7] [¶ 10] Christl contends the trial court erred in concluding that for asset purchases made before the child was born on September 30, 1998, "under section 75-02-04.1-09(4), NDAC, 'Christl may be presumed to have engaged in asset transactions' for the purpose of reducing his income available for child support."

[¶ 11] Section 75-02-04.1-09(2)(h), N.D. Admin. Code, provides the presumption that the guideline amount is the correct amount of child support may be rebutted *73 by "[t]he increased ability of an obligor, who has engaged in an asset transaction for the purpose of reducing the obligor's income available for payment of child support, to provide child support." Section 75-02-04.1-09(4), N.D. Admin. Code, provides:

For purposes of subdivision h of subsection 2, a transaction is presumed to have been made for the purpose of reducing the obligor's income available for the payment of child support if:

a. The transaction occurred after the birth of a child entitled to support;

b. The transaction occurred no more than twenty-four months before the commencement of the proceeding that initially established the support order; and

c. The obligor's income is less than it likely would have been if the transaction had not taken place.

[8] [¶ 12] "Unlike the term 'or,' which is disjunctive in nature and ordinarily indicates an alternative between different things or actions, the term 'and' is conjunctive in nature and ordinarily means in addition to." *Narum v. Faxx Foods, Inc.*, 1999 ND 45, ¶ 20, 590 N.W.2d 454 (citations omitted). The literal meaning of the terms "and" and "or" "should be followed unless it renders the statute inoperable or the meaning becomes questionable." 1A Norman J. Singer, *Sutherland Statutory Construction*, § 21.14 (5th ed. 1991) (2000 Cum.Supp. 26).

[¶ 13] The literal meaning of the conjunctive "and" in N.D. Admin. Code § 75-02-04.1-09(4)(a)-(c), rather than the disjunctive "or" does not render the subsection inoperable or its meaning questionable, and indicates all three factors must exist before an asset transaction may be presumed to have been made for the purpose of reducing a child support obligor's income available for the payment of child support. Under N.D. Admin. Code § 75-02-04.1-09(4)(a), the presumption only applies to transactions that occur "after the birth of a child entitled to support." Thus, a transaction by Christl may only be "presumed to have been made for the purpose of reducing the obligor's income available for the payment of child support if" the transaction occurred after the child was born, and within 24 months before commencement of the proceeding initially establishing the child support order, and Christl's income is less than it likely would have been without the transaction. We conclude the trial court erred, as a matter of law, in determining asset expenditures Christl made before the child was born were presumed to be asset transactions made for the purpose of reducing his income available for child support, warranting an upward deviation in child support.

[¶ 14] The trial court had discretion to determine whether, and to what extent, to allow deduction of business costs paid for the purchase of business assets, but not expensed for internal revenue purposes, in determining Christl's net income from self-employment. However, we are not certain how the trial court would have exercised that discretion had it not acted under the mistaken view that capital expenditures made before the child's birth could be presumed to be asset transactions warranting upward deviation from the presumptively-correct Child Support Guideline amount of support. Our function is one of review, rather than initial determination. *See Lippert v. Lippert*, 353 N.W.2d 333, 336 (N.D.1984) ("it is not generally for the appellate court but is for the trial court to initially determine what is equitable"); *Suedel v. North Dakota Workmen's Comp. Bur.*, 218 N.W.2d 164, 171 (N.D.1974) (it is not this court's function to try the facts, but to review the facts to determine if they support the findings made). Therefore, we conclude the trial court must redetermine Christl's child support obligation.

III

[¶ 15] We need not address other issues Christl has raised, because answers to those issues are not necessary to a determination *74. of this appeal. *See, e.g., State v. Evans*, 1999 ND 70, ¶ 17, 593 N.W.2d 336.

[¶ 16] The judgment is reversed and the matter is remanded for redetermination of Christl's child support obligation.

[¶ 17] GERALD W. VANDE WALLE, C.J., WILLIAM A. NEUMANN, MARY MUEHLEN MARING, CAROL RONNING KAPSNER, JJ., concur.

*800 545 N.W.2d 800

Supreme Court of North Dakota.

STATE of North Dakota, Plaintiff and Appellant,
v.
Bernard L. HOLECEK, Defendant and Appellee.
STATE of North Dakota, Plaintiff and Appellant,
v.
John B. BRENNAN, Defendant and Appellee.
STATE of North Dakota, Plaintiff and Appellant,
v.
Ronald D. SHAW, Defendant and Appellee.
STATE of North Dakota, Plaintiff and Appellant,
v.
Timothy K. LINDGREN, Defendant and Appellee.
Criminal Nos. 950175 to 950178.
April 8, 1996.
Rehearing Denied May 14, 1996.

Defendants were charged with disobedience of judicial order, a temporary injunction that placed restrictions on protests outside medical clinic providing abortion services. The District Court, Cass County, East Central Judicial District, Ralph R. Erickson, J., dismissed charges, and state appealed. The Supreme Court, Beryl J. Levine, Surrogate Judge, held that: (1) question of applicability to temporary or permanent injunction of statutory six-month time limit for making temporary restraining order permanent was necessarily part of appeal, even though state did not present that question to trial court; (2) statutory six-month limitation applies to temporary or permanent injunctions; and (3) statute did not render temporary or preliminary injunction automatically void if no hearing was held within six-month period; and (4) temporary injunction was valid at time that defendants were accused of violating it, even though injunction was issued more than six months earlier, where defendants did not demand hearing or seek dissolution of injunction before date on which they were accused of violating injunction.

Reversed and remanded.

Sandstrom, J., filed opinion concurring specially.

West Headnotes

[1] Injunction ⚖219
212 ----
212VII Violation and Punishment
212k217 Writ or Mandate Violated
212k219 Validity and Regularity.
Temporary injunction, which placed restrictions against protestors demonstrating outside medical clinic that provided abortion services, was valid at time that defendants were accused of violating it, and, therefore, trial court improperly dismissed criminal charges for disobedience of judicial order, even though more than six months had passed since issuance of temporary injunction, and statute provided that no more than six months may elapse after issuance of temporary restraining order until hearing of merits of case shall be had for purpose of deciding whether to make temporary restraining order permanent, where defendants were accused of violating injunction before they made motion to dismiss and dissolve injunction. NDCC 12.1-10-05, subd. 1, 32-06-03.

[2] Criminal Law ⚖1028
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1028 Presentation of Questions in General.
Questions not raised before trial court will not be considered on appeal.

[3] Criminal Law ⚖1134(3)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) Questions Considered in General.
Supreme Court has authority and duty to decide applicability of relevant statutes to legal controversies whether or not parties have pointed Court to them or argued a particular construction.

[4] Criminal Law ⚖1134(3)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) Questions Considered in General.
Interpretation of statute is question of law that is fully reviewable by Supreme Court.

[5] Statutes ⚖181(1)
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction

361k180 Intention of Legislature
361k181 In General
361k181(1) In General.
Primary purpose of statutory construction is to ascertain intent of legislature.

[6] Statutes ⚖181(1)
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) In General.
In pursuing goal of ascertaining intent of legislature, Supreme Court is not limited to adopting one of the opposing constructions of statutes urged by parties when neither construction conforms with what Court believes is legislature's intention.

[7] Criminal Law ⚖1037.1(2)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) Particular Statements, Arguments, and Comments.
Proper construction of statute providing that, after issuance of temporary restraining order, in no case shall a longer period than six months elapse before hearing of merits of case shall be had for purpose of deciding question as to justice or necessity of making temporary restraining order permanent, was necessarily part of issue on state's appeal from dismissal of criminal charges alleging disobedience of temporary injunction, even though state did not present argument to trial court that statute was inapplicable to temporary injunction, where critical issue in case was validity of temporary injunction in light of statute's six-month time limit. NDCC 32-06-03.

[8] Injunction ⚖150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
Technically, "temporary restraining order," which may be issued ex parte without hearing, is species of injunction, typically brief in duration, that has as its purpose maintaining status quo until determination can be made on temporary injunction issue.

[9] Injunction ⚖138.3
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)2 Grounds and Objections
212k138.3 Preservation of Power to Effectuate Remedy; Status Quo.

[See headnote text below]

[9] Injunction ⚖150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
Purpose of temporary or preliminary injunction is to maintain cause in status quo until trial on merits.

[10] Injunction ⚖150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
Ordinarily, temporary restraining order precedes temporary or preliminary injunction, which in turn precedes permanent injunction if, after hearing on merits, permanent order is found to be necessary.

[11] Statutes ⚖205
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 In General.
Supreme Court construes ambiguous statutes as a whole to determine intent of legislature.

[12] Injunction ⚖150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
Obvious purpose of statute, which provides that,

after issuance of temporary restraining order, in *800 no case shall a longer period than six months elapse before hearing of merits of case shall be had for purpose of deciding question as to justice or necessity of making order permanent, is, upon motion of party, to prevent misuse of provisional remedy, obtained before a hearing on merits, as effective substitute for permanent injunction. NDCC 32-06-03.

[13] Statutes ⇐181(2)
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(2) Effect and Consequences.
Supreme Court construes statutes to avoid absurd and ludicrous results.

[14] Injunction ⇐150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
Six-month limitation under statute, which provides that, after issuance of temporary restraining order, in no case shall a longer period than six months elapse before hearing of merits of case shall be had for purpose of deciding question as to justice or necessity of making order permanent, applies to temporary or permanent injunctions. NDCC 32-06-03.

[15] Injunction ⇐150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
Trial court improperly construed statute, which provides that, after issuance of temporary restraining order, in no case shall longer period than six months elapse before hearing of merits of case shall be had for purpose of deciding question as to justice or necessity of making order permanent, as rendering temporary or preliminary injunction automatically void if no hearing is held within six-month limitation period; rather, statute, in effect, bestows right upon any party to demand hearing within six months. NDCC 32-06-03.

[16] Injunction ⇐150
212 ----
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k150 Restraining Order Pending Hearing of Application.
When, under statute, which provides that, after issuance of temporary restraining order, in no case shall longer period than six months elapse before hearing of merits of case shall be had for purpose of deciding question as to justice or necessity of making order permanent, legislature had not stated its intended effect of running of six-month time limit, without demand having been made for hearing or for dissolution after time limit has run, it was reasonable to presume that legislature intended the temporary restraining order to remain in effect. NDCC 32-06-03.

*802 Appeals from the District Court for Cass County, East Central Judicial District; Ralph R. Erickson, Judge.

John T. Goff (argued), State's Attorney, Fargo, for plaintiff and appellant.

Karen Orr Hoghaug (argued), of DeMars & Turman, Fargo, Peter B. Crary (appearance), of Peter B. Crary Law Office, Fargo, and Richard D. Varriano, Moorhead, MN, for defendants and appellees. Peter B. Crary and Richard D. Varriano, on brief.

BERYL J. LEVINE, Surrogate Judge.

The State appeals from an order dismissing criminal charges for disobedience of a judicial order against Bernard Holecek, John Brennan, Ronald D. Shaw and Timothy K. Lindgren. Because the judicial order in this case, a temporary injunction, was still valid at the time the appellees were accused of violating it, we reverse and remand for further proceedings.

I

On October 25, 1991, a temporary restraining order was issued, placing restrictions against protestors demonstrating outside the Fargo Women's Health Organization, Inc., a medical clinic which

provides abortion services. The temporary restraining order was continued as a preliminary injunction on November 14, 1991. We modified the preliminary injunction and remanded for findings on the size of the injunctive zone in *Fargo Women's Health v. Lambs of Christ*, 488 N.W.2d 401 (N.D.1992). We upheld the resulting "Amended Temporary Injunction," issued on September 17, 1992, in *Fargo Women's Health v. Lambs of Christ*, 502 N.W.2d 536 (N.D.1993). This temporary injunction enjoins the named party defendants and "all other individuals who receive actual notice of [the injunction] by personal service ... or by having it read to them...." We have affirmed convictions for disobeying a judicial order, under N.D.C.C. § 12.1-10-05, of protestors who violated the temporary injunction. *See State v. Franck*, 499 N.W.2d 108 (N.D.1993); *State v. Wishnatsky*, 491 N.W.2d 733 (N.D.1992).

A civil trial to determine whether the preliminary injunction should be made permanent began in October 1993, but ended in a mistrial in November 1993. After declaring the mistrial, the trial judge stated the "injunction remains in effect." After the mistrial, both sides demanded a new judge. A new trial judge was assigned to the case on January 4, 1994.

On November 22, 1994, the appellees were arrested and charged with disobeying a judicial order, under N.D.C.C. § 12.1-10-05. Allegedly, they violated the terms of the September 1992 amended temporary injunction by protesting against the clinic within the protest-free zone. That injunction was the one the trial court ordered to remain in effect.

On December 27, 1994, the attorneys for the defendants in the civil action, who also are the attorneys for the appellees, (FN1) filed a "motion to dismiss and/or motion to dissolve *803 injunction." They argued that, under N.D.C.C. § 32-06-03, the preliminary injunction had elapsed by operation of law, at the very latest, on July 4, 1994, six months after the new trial judge had been assigned following the mistrial. On the same date, the appellees' attorneys moved for a continuance "until the court presiding over" the civil action "has determined whether or not the preliminary injunction, upon which the [appellees] were arrested, had expired and was, therefore, no longer a lawful injunction at the time the [appellees] were arrested for violating the same...." The State did not object, and the continuance was granted.

On February 15, 1995, the trial court in the civil action denied the defendants' motion to dismiss and dissolve the amended temporary injunction. The civil defendants appealed to this court. In unpublished orders dated May 3 and 10, 1995, we dismissed the civil appeal "for lack of appealability," and dismissed the civil defendants' motion to vacate the mandate and reinstate the appeal, respectively.

Meanwhile, the appellees had moved to dismiss the charges, asserting that "an essential element of the case--the existence of a lawful judicial order--was absent," when they were arrested. The appellees similarly argued that the preliminary injunction was no longer in effect at the time of their arrests because it had expired by operation of law under N.D.C.C. § 32-06-03.

The trial court, on May 8, 1995, agreed and dismissed the criminal charges against the appellees, concluding that N.D.C.C. § 32-06-03 "is a mandatory period of limitations upon the existence of any temporary restraining order or preliminary injunction." The State appealed.

Disobedience of a judicial order is a criminal offense under N.D.C.C. § 12.1-10-05(1):

"1. A person is guilty of a class A misdemeanor if he disobeys or resists a lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, of a court of this state."

The statute the appellees assert relieves them of criminal liability is N.D.C.C. § 32-06-03, which says:

"*Injunction--When granted--Limitation.*--The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. *In no case shall a longer period than six months elapse before the hearing of the merits of the case shall be had for the purpose of deciding the question as to the*

justice or necessity of making the temporary restraining order permanent."

(Emphasis added).

II

[1] The State asserts the six-month time limit applies only to temporary restraining orders, and because the appellees are charged with violating a temporary or preliminary injunction, the statute is inapplicable. The appellees assert this issue is not properly preserved for appeal because the State did not present this argument to the trial court.

[2] Questions not raised before the trial court will not be considered on appeal. *E.g., Taghon v. Kuhn,* 497 N.W.2d 403, 406 (N.D.1993). But, this court has held that, "where a pertinent statute has been overlooked by both counsel and the court, resulting in plain error in a matter that is of public concern, this court will consider the error even though it is not brought to our attention by either of the parties." *Le Pire v. Workmen's Compensation Bureau,* 111 N.W.2d 355, 359 (N.D.1961). *See also State v. Larsen,* 515 N.W.2d 178, 182 (N.D.1994); *Soo Line R. Co. v. State,* 286 N.W.2d 459, 464 (N.D.1979); *Megarry Bros. v. City of St. Thomas,* 66 N.W.2d 704, 708 (N.D.1954). For example, in *Le Pire,* 111 N.W.2d at 359, even though the State had stipulated to an incorrect interpretation of a state statute, the court considered the error notwithstanding the parties' failure to bring it to the court's attention.

**804 [3] In *Larsen,* the argument was that the appellant could not rely on a dispositive decision interpreting the MIDA bond statutes issued after the trial court's ruling because the appellant did not raise the MIDA bond statutes in the trial court proceedings. We disagreed, reasoning:

"We have a duty to conduct appellate review 'in light of all relevant precedents, not simply those cited to or discovered by the district court.' *Elder v. Holloway,* 510 U.S. [510], ----, 114 S.Ct. 1019, 1021, 127 L.Ed.2d 344, 348 (1994). Otherwise, decisions might turn on 'shortages in counsels' or the court's legal research or briefing', *id.,* at ----, 114 S.Ct. at 1023, 127 L.Ed.2d at 350, and 'could occasion appellate affirmation of incorrect legal results.' *Id.,* at ----, 114 S.Ct. at 1023 n. 3."

Larsen, 515 N.W.2d at 182. *Larsen* elucidates not only our authority, but our duty to decide the applicability of relevant statutes to legal controversies whether or not the parties have pointed us to them or argued a particular construction.

[4][5][6][7] Indeed, the interpretation of a statute is a question of law that is fully reviewable by this court. *Zuger v. North Dakota Ins. Guar. Ass'n,* 494 N.W.2d 135, 136 (N.D.1992). The primary purpose of statutory construction is to ascertain the intent of the legislature. *Burlington Northern v. State,* 500 N.W.2d 615, 617 (N.D.1993). As *Larsen* and *Le Pire* demonstrate, in pursuing that goal, we are not limited to adopting one of the opposing constructions of statutes urged by the parties when neither construction conforms with what we believe is the legislature's intention. The critical issue in this case is the validity of the temporary injunction in light of the six-month time limit under N.D.C.C. § 32-06-03. Therefore, the proper construction of that statute is necessarily part of the issue on appeal.

[8][9][10] Technically, a temporary restraining order, which may be issued ex parte without a hearing, is a species of injunction, typically brief in duration, that has as its purpose maintaining the status quo until a determination can be made on the temporary injunction issue. *Amerada Hess Corp. v. Furlong Oil & Minerals,* 336 N.W.2d 129, 132 (N.D.1983); 42 Am.Jur.2d *Injunctions* § 10 (1969). On the other hand, the purpose of a temporary or preliminary injunction "is to maintain the cause in status quo until a trial on the merits." *Gunsch v. Gunsch,* 69 N.W.2d 739, 745 (N.D.1954). Thus, ordinarily, a temporary restraining order precedes a temporary or preliminary injunction, which in turn precedes a permanent injunction if, after a hearing on the merits, a permanent order is found to be necessary. We believe that, by describing as a "temporary restraining order" the temporary or preliminary injunction that ordinarily precedes the trial on the merits of the case, the legislature has created an ambiguity in the statute.

[11][12][13][14] We construe ambiguous statutes as a whole to determine the intent of the legislature. *State v. Erickson,* 534 N.W.2d 804, 807 (N.D.1995). The obvious purpose of N.D.C.C. § 32-06-03 is, upon motion of a party, to prevent the misuse of a provisional remedy, obtained before a hearing on the

merits, as an effective substitute for a permanent injunction. *See German Savings & Loan Society v. Aldridge*, 5 Cal.App. 215, 89 P. 1063, 1064 (1907) (construing Cal.Code Civ.Proc. § 527, upon which N.D.C.C. § 32-06-03 is patterned). The wrong to be remedied, prolonged delay of a hearing on the merits, is as real in the case of a temporary injunction as it is in the case of a temporary restraining order. If we were to construe the six-month limitation as applying to temporary restraining orders alone, the purpose of the statute, preventing prolonged delay of the hearing on the merits, would be defeated whenever a temporary or preliminary injunction was obtained. *See Gunsch*, 69 N.W.2d at 749 (when preliminary injunction is granted, temporary restraining order ceases by its own limitations). We construe statutes to avoid absurd and ludicrous results. *State v. Sorensen*, 482 N.W.2d 596, 598 (N.D.1992). The statute was intended to prevent temporary orders, however designated, to substitute indefinitely for a permanent ruling after a hearing on the merits.

We conclude the six-month limitation under N.D.C.C. § 32-06-03 applies to temporary or preliminary injunctions.

*805 III

[15] We conclude the trial court improperly construed the statute as rendering a temporary or preliminary injunction automatically void if no hearing is held within the six-month limitation period.

[16] Section 32-06-03, in effect, bestows a right upon any party to demand a hearing within six months. The parties are thus empowered to monitor the expedited process the legislature envisioned. It is for the parties' sake that the statute sets a time limit. However, the legislature did not specify a remedy for the failure to demand a hearing within the six-month time limit. The statute says that the hearing must be held within six months. It does not say the temporary restraining order terminates or becomes automatically void if no hearing is held within the six-month period. In contrast to this statute's silence on the subject of remedy, other statutes specify the remedy for the failure to follow a statutory time limit. *See, e.g.*, N.D.C.C. § 28-27-31 (in "every case on appeal in which the supreme court orders a new trial or further proceedings in the court below, the record must be transmitted to such court and such proceedings must be had therein within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, ..."); N.D.C.C. § 29-33-03 (if case not brought to trial within 90 days after request under Uniform Mandatory Disposition of Detainers Act, "no court of this state any longer has jurisdiction thereof, ... and the court shall dismiss it with prejudice"); N.D.C.C. § 29-34-01 Article V(3) (under Interstate Agreement on Detainers Act, if action on which detainer is based is not brought to trial within applicable time periods, the appropriate court where charge is pending "shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect"). *See also* N.D.R.Civ.P. 25(a)(1) (unless motion to substitute party is made not later than 90 days after death is suggested on the record, "the action shall be dismissed as to the deceased party"). *Cf. Lang v. Basin Elec. Power Cooperative*, 274 N.W.2d 253, 258 (N.D.1979) (action to relieve party from judgment after contempt citation issued does not affect contempt order even though motion is granted). Where, as here, the legislature has not stated its intended effect of the running of the six-month time limit without demand having been made for a hearing or for dissolution after the time limit has run, it is reasonable to presume the legislature intended the temporary restraining order to remain in effect.

Under N.D.C.C. § 32-06-03, the appellees had the right to demand a hearing be held within six months of the time the temporary injunction was issued or to seek dissolution of the injunction after six months. *Compare Greenwood v. Moore*, 545 N.W.2d 790 (N.D.1996) (where demand was made for hearing, but hearing was not held within statutory time period, dismissal was proper). Without either of those actions, the injunction remained effective. Here too, we have the additional question of the impact of the order of the trial judge in the civil action continuing the effectiveness of the temporary injunction. In this case, we need not decide whether the trial judge in the civil action had the authority to extend the temporary injunction because the attempt to have that injunction dissolved, based on the six-month time limitation, came too late to assist the appellees, who are accused of violating the injunction before the motion was made.

The temporary injunction was valid at the time the appellees were accused of violating it. Therefore,

the trial court erred in dismissing the criminal charges.

We reverse the order of dismissal and remand for further proceedings.

VANDE WALLE, C.J., and MESCHKE and NEUMANN, JJ., concur.

The Honorable MARY MUEHLEN MARING was not a member of this Court when this case was heard and did not participate in this decision.

SANDSTROM, Justice, concurring specially.

Although I concur in the result reached by the majority, I would not consider the issue answered in part II of the majority opinion. That issue was not raised by the State before the trial court, does not involve plain error, and is not dispositive on appeal.

***806.** In part II the majority considers the State's argument that N.D.C.C. § 32-06-03 "applies only to temporary restraining orders and not to preliminary injunctions." The State did not raise this issue in the trial court.

Issues not raised at the trial court are not considered on appeal. *Morstad v. State*, 518 N.W.2d 191, 194 (N.D.1994) ("Because Morstad did not raise the Eighth Amendment issue below, we do not decide this issue."); *State v. Whiteman*, 79 N.W.2d 528, 540 (N.D.1956). As a sole exception, we have permitted a *defendant* to raise for the first time on appeal an "obvious error" affecting the defendant's fundamental rights. *State v. Austin*, 520 N.W.2d 564, 569-570 (N.D.1994) ("Our power to notice obvious error is exercised cautiously and only in exceptional circumstances where the defendant has suffered serious injustice.") (citing *State v. McNair*, 491 N.W.2d 397, 399 (N.D.1992)).

The majority cites civil cases permitting consideration of other issues or authorities not raised in the trial court, which involve plain error or which are dispositive on appeal. But as the majority concludes, however, the issue considered in part II neither involves plain error (nor any error), nor is it dispositive on appeal.

(FN1.) The attorney who argued this appeal for the appellees did not represent them in the trial court. One of the four appellees, Lindgren, was also a named party defendant in the civil action.

*804 563 N.W.2d 804

1997 ND 97

Supreme Court of North Dakota.

Mary H. ZUGER, n/k/a Mary C. Haunson, Plaintiff, Appellee and Cross-Appellant,
v.
William P. ZUGER, Defendant, Appellant and Cross-Appellee.
Civil No. 960195.
May 23, 1997.

Wife sought divorce. The District Court, Burleigh County, South Central Judicial District, Gerald H. Rustad, J., entered divorce decree. Husband appealed from financial provisions of decree. Wife cross-appealed from custody and visitation provisions. The Supreme Court, Meschke, J., held that: (1) attorney fee earned during the marriage and vested interest in credit trust were part of marital estate; (2) property was to be valued as of date of trial; (3) wife was entitled to permanent maintenance and to attorney fees; (4) husband could not be awarded joint custody; and (5) visitation did not have to be restricted.

Affirmed in part; reversed in part and remanded with directions.

West Headnotes

[1] Divorce ⚖252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) Separate Property and Property Acquired Before Marriage.

Marital estate included contingent attorney fee that husband earned in lawsuit that he undertook and settled while he and wife were separated, even though wife made no direct contribution to acquisition of the fee. NDCC 14-05-24.

[2] Divorce ⚖252.3(1)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(1) In General.

[See headnote text below]

[2] Divorce ⚖252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) Separate Property and Property Acquired Before Marriage.

All of the spouses' assets, regardless of source, must be included in marital estate in making equitable division upon divorce. NDCC 14-05-24.

[3] Divorce ⚖252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) Separate Property and Property Acquired Before Marriage.

Spouse need not make direct contribution to acquisition of asset for it to be included in marital estate. NDCC 14-05-24.

[4] Divorce ⚖252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) Separate Property and Property Acquired Before Marriage.

Asset accumulated after spouses have separated, but while the marriage still exists, is includable in the marital estate. NDCC 14-05-24.

[5] Divorce ⚖252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation

134k252.3(3) Separate Property and Property Acquired Before Marriage.

Source of property is just one factor for court to consider in making equitable distribution. NDCC 14-05-24.

[6] Divorce ⚭253(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k253 Proceedings for Division or Assignment
134k253(3) Valuation of Assets.

Money market account's value was to be determined as of date of trial, rather than as of date of distribution. NDCC 14-05-24.

[7] Divorce ⚭252.3(3)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k248 Disposition of Property
134k252.3 Particular Property or Interests and Mode of Allocation
134k252.3(3) Separate Property and Property Acquired Before Marriage.

Husband's interest in credit trust was certain to reach him upon his mother's death and, thus, was vested interest that could be divided upon divorce, despite his contention that doing so amounted to division of future inheritance. NDCC 14-05-24.

[8] Divorce ⚭286(2)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k278 Appeal
134k286 Review
134k286(2) Presumptions.

Determination that property division is equitable is a finding of fact and, as such, is presumptively correct. NDCC 14-05-24.

[9] Divorce ⚭238
134 ----
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k238 Defenses and Objections.

[See headnote text below]

[9] Divorce ⚭240(2)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k240 Amount
134k240(2) Facts Affecting or Controlling Amount.

[See headnote text below]

[9] Divorce ⚭247
134 ----
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 Commencement and Termination.

Substantial disparity in spouses' earning capacity warranted permanent maintenance award of $100 per month to wife, even though she was employed. NDCC 14-05-24.

[10] Divorce ⚭247
134 ----
134V Alimony, Allowances, and Disposition of Property
134k230 Permanent Alimony
134k247 Commencement and Termination.

Permanent spousal support is appropriate where substantial disparity exists between spouses' earning abilities. NDCC 14-05-24.

[11] Divorce ⚭225
134 ----
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k225 Defenses and Objections.

[See headnote text below]

[11] Divorce ⚭227(1)
134 ----
134V Alimony, Allowances, and Disposition of Property
134k220 Allowance for Counsel Fees and Expenses
134k227 Amount
134k227(1) In General.

Wife was entitled to $5,000 for attorney fees, despite husband's contention that wife was awarded enough property to pay her own fees, where husband earned six to 12 times as much as wife

earned. NDCC 14-05-23.

[12] Divorce ⊜301
134 ---
134VI Custody and Support of Children
134k301 Application for Custody or Access and Proceedings Thereon.
Evidence that mother over-protected children was insufficient, absent some showing of unusual harm to the children from mother's more protective nature, to rebut statutory presumption that father who committed domestic violence during the marriage should not be awarded custody. NDCC 14-09-06.2, subd. 1, par. j.

[13] Infants ⊜19.3(7)
211 ---
211II Custody and Protection
211k19 Proceedings Affecting Custody
211k19.3 Determination of Right to Custody
211k19.3(7) Review of Discretion and Fact Questions.
Custody decision is a finding of fact that will not be reversed on appeal unless it is "clearly erroneous," that is, unless it is induced by an erroneous view of the law, there is no evidence to support it, or the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made.

[14] Infants ⊜19.2(5)
211 ---
211II Custody and Protection
211k19 Proceedings Affecting Custody
211k19.2 Matters Considered in Awarding Custody
211k19.2(5) Religious, Moral and Social Factors.
Any domestic violence must be considered in making custody award. NDCC 14-09-06.2, subd. 1, *804 par. j.

[15] Divorce ⊜301
134 ---
134VI Custody and Support of Children
134k301 Application for Custody or Access and Proceedings Thereon.
Evidence that domestic violence will not occur again because parents' marriage has ended or because parents will have little contact with each other does not rebut presumption against custody award to perpetrator of domestic abuse. NDCC 14-09-06.2, subd. 1, par. j.

[16] Parent and Child ⊜2(3.3)
285 ---
285k2 Custody and Control of Child
285k2(3) Elements Fixing or Determining Right
285k2(3.3) Competency, Character and Conduct of Parent.
Domestic violence need not be directed at children in order for such violence to trigger statutory presumption against awarding custody to the abusive parent. NDCC 14-09-06.2, subd. 1, par. j.

[17] Parent and Child ⊜2(11)
285 ---
285k2 Custody and Control of Child
285k2(4) Proceedings to Determine Right
285k2(11) Particular Cases, Sufficiency of Evidence.
Clear and convincing evidence that best interests of children require perpetrator of domestic violence to participate in or have custody is necessary to rebut statutory presumption against awarding custody to abusive parent; to marshal that clear and convincing evidence, often it will be necessary to detail the failings of the abused rather than the virtues, if they exist, of the abuser. NDCC 14-09-06.2, subd. 1, par. j.

[18] Parent and Child ⊜2(11)
285 ---
285k2 Custody and Control of Child
285k2(4) Proceedings to Determine Right
285k2(11) Particular Cases, Sufficiency of Evidence.
Abusive parent seeking to rebut statutory presumption against custody award in his or her favor must show by clear and convincing evidence why it is not in children's best interest to award custody to parent who did not commit domestic violence. NDCC 14-09-06.2, subd. 1, par. j.

[19] Divorce ⊜299
134 ---
134VI Custody and Support of Children
134k299 Access to Child by Parent Deprived of Custody.
Spouses' diametrically opposed views on parenting precluded award of shared decision-making authority, which would perpetuate spouses' animosity and conflict and necessitate further judicial intervention.

[20] Divorce ⊜299
134 ---

134VI Custody and Support of Children
134k299 Access to Child by Parent Deprived of Custody.
Wife's concerns about whether children would do their homework did not warrant restriction of husband's visitation to one weekend per month. NDCC 14-05-22, subd. 3.

[21] Infants ⇐19.3(7)
211 ---
211II Custody and Protection
211k19 Proceedings Affecting Custody
211k19.3 Determination of Right to Custody
211k19.3(7) Review of Discretion and Fact Questions.
Decision on visitation is finding of fact that will not be reversed on appeal unless it is clearly erroneous.

[22] Divorce ⇐312.2
134 ---
134VI Custody and Support of Children
134k312 Appeal
134k312.2 Presentation and Reservation in Lower Court of Grounds of Review.
By failing to request supervised visitation at trial or on appeal, wife conceded that supervision of husband's visitation was unnecessary to protect children's welfare or health. NDCC 14-05-22, subd. 3.

*805 Judith E. Howard (argued), of Howard Law Firm, Minot, for plaintiff, appellee, and cross-appellant.

Robert O. Wefald (argued), of Wefald Law Office, P.C., Bismarck, for defendant, appellant, and cross-appellee.

MESCHKE, Justice.

[¶ 1] William P. Zuger [Bill] appealed a divorce decree to challenge the division of property, the award of permanent spousal support, and the award of attorney fees. Mary Zuger cross-appealed to challenge joint custody and visitation. We affirm in part, reverse in part, and remand with directions.

I. FACTS

[¶ 2] Bill and Mary were married in 1977. They have two sons, born in 1980 and 1983. The marriage was turbulent and, on at least two occasions, Bill physically abused Mary.

*806 [¶ 3] When they were married, Bill practiced in a law firm started by his father, and Mary worked as a secretary for Bill. Bill later opened his own practice. Mary earned degrees in Spanish and secondary education and, at the time of the divorce, was teaching Spanish at Dickinson State University.

[¶ 4] Mary sued Bill for divorce. The trial court divided the marital property and ordered Bill to pay $100 per month in permanent spousal support and $5,000 for Mary's attorney fees. The court ordered joint legal custody of the children, but placed primary physical custody with Mary. Bill was given visitation each Wednesday evening, every weekend except one each month, and nearly seven weeks during the summer. Mary was given ultimate authority to decide educational matters affecting the children, while Bill had ultimate authority to decide non-emergency medical matters.

II. BILL'S APPEAL

[¶ 5] Bill challenges various financial aspects of the divorce decree, contending the trial court erred (1) by including Bill's fee in one contingent fee case in the marital estate; (2) in valuing Bill's law-office money-market account; (3) by awarding Mary part of Bill's future share in a trust set up by his father;(4) by awarding permanent spousal support; and (5) by awarding attorney fees to Mary.

A. PROPERTY DIVISION

[¶ 6] Bill contends several of the trial court's findings on property division are erroneous. In *Grinaker v. Grinaker*, 553 N.W.2d 204, 207-208 (N.D.1996), we summarized our standard for reviewing a trial court's valuation and distribution of marital property:

The trial court must make an equitable distribution of the marital property, based upon the facts and circumstances of each individual case. NDCC 14-05-24; *Volson v. Volson*, 542 N.W.2d 754, 756 (N.D.1996). The court's determinations on valuation and division of property are findings of fact that will only be reversed on appeal if they are clearly erroneous. *Volson*, 542 N.W.2d at 756; *Braun v. Braun*, 532 N.W.2d 367, 370 (N.D.1995). A finding is clearly erroneous only if the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been

made. *Buzick v. Buzick*, 542 N.W.2d 756, 758 (N.D.1996). As *Buzick*, 542 N.W.2d at 758, and *Fenske v. Fenske*, 542 N.W.2d 98, 102 (N.D.1996), explain, the trial court's findings of fact are presumptively correct, and the complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous.

1) CONTINGENT FEE

[1] [¶ 7] Bill argues that the trial court erred by including in the marital estate a contingent fee he earned in a case acquired and settled while the parties were separated. Bill says Mary made no contribution toward this case and therefore the earned fee should be excluded from the marital estate.

[2][3][4][5] [¶ 8] To make an equitable distribution of property under NDCC 14-05-24, the trial court must include in the marital estate all of the parties' assets, regardless of source. *Linrud v. Linrud*, 552 N.W.2d 342, 344 (N.D.1996); *Bell v. Bell*, 540 N.W.2d 602, 604 (N.D.1995). A spouse need not make a direct contribution to the acquisition of an asset for it to be included in the marital estate. *See, e.g., Berg v. Berg*, 490 N.W.2d 487, 492 (N.D.1992); *Bullock v. Bullock*, 354 N.W.2d 904, 909-910 (N.D.1984). An asset accumulated after the spouses have separated, but while the marriage still exists, is includable in the marital estate. *Kelg v. Kelg*, 270 N.W.2d 558, 560 (N.D.1978). As *Linrud*, 552 N.W.2d at 344, and *van Oosting v. van Oosting*, 521 N.W.2d 93, 96 (N.D.1994), illustrate, the source of the property is only one factor for the court to consider in making an equitable distribution.

[¶ 9] In this case, although Mary did not make a direct contribution to this contingent fee, it was accumulated during the marriage. The trial court therefore properly included the fee in the marital estate.

2) MONEY MARKET ACCOUNT

[6] [¶ 10] Bill argues the trial court erred in valuing the money market account for his *807 law office with the value given at trial, rather than at the time of distribution several months later. We recently addressed the timing of valuation of fluctuating assets in *Grinaker*. In that case, there was a six-month delay between trial and entry of the judgment. The husband sought to introduce evidence that the value of certain mutual funds and annuity accounts had substantially changed since trial. We said:

> Common sense dictates that marital property be valued as of the date of trial, rather than the date of distribution. The trial court hears the evidence on value at trial, and the evidence will ordinarily give a current value for the property. When valuing items like the mutual funds and variable annuities here, any evidence presented at trial on value for some future date would have been purely speculative. The difficulty with the procedure attempted by Gary in this case is evident. Parties would be free to file further "evidence," not subject to cross-examination, whenever they believed a marital asset had changed in value. This procedure would certainly lead to a never-ending trial by affidavit, with parties continually submitting account statements and other materials with each fluctuation of the financial markets.

Grinaker, 553 N.W.2d at 208-209. We conclude the trial court's finding on the value of this money market account is not clearly erroneous.

3) TRUST SHARE

[7] [¶ 11] Bill argues the trial court erred in awarding Mary one-half of Bill's share of a trust set up by his father.

[¶ 12] Bill's late father established a credit trust for Bill's mother to receive the income during her lifetime, and for Bill and his three siblings to receive the principal upon the death of Bill's mother. The trust instrument allows the principal to be invaded up to a maximum of $5,000 or 5 percent per year, whichever is greater. At the time of trial, the trust principal was more than $936,000. Because the principal could be invaded and reduce the share available to Bill upon his mother's death, the trial court concluded an award of a specific dollar amount would be speculative. Relying upon *van Oosting*, the court therefore ordered that Mary receive one-half of Bill's share when it becomes available to him.

[¶ 13] Bill contends it was inequitable to award Mary any part of Bill's share in the trust, arguing that Mary received substantial gifts from Bill's parents during the marriage and received substantial property under the decree. Identical arguments

were raised and rejected in *van Oosting*, a case factually indistinguishable from this one. In *van Oosting*, 521 N.W.2d at 96-98, we held the trial court's failure to award the wife a share of her husband's interest in a credit trust was clearly erroneous, and we remanded with directions that the court award the wife a percentage of the trust proceeds when received by the husband. The trial court in this case followed *van Oosting*, included Bill's interest in the trust as a marital asset and, recognizing the speculative nature of that interest, ordered that Mary receive a percentage of what Bill receives.

[¶ 14] Bill argues that the trial court was invading his "inheritance" from his father, and therefore he should be entitled to a share of Mary's future inheritance from her parents. Bill's interest in the trust is not a future inheritance; he has a current vested interest in the trust. As we explained in *van Oosting*, 521 N.W.2d at 97, when the trust interest is vested, "[a]lthough contingent in nature, his interest is certain to reach him upon the death of his mother."

[8] [¶ 15] Bill insists *van Oosting* is distinguishable because the wife in that case was ill, while Mary is healthy and able to work. Those are factual details that factor into the trial court's decision whether, and to what extent, Mary should share in Bill's interest in the trust. The trial court found that it was equitable to distribute one-half of Bill's share in the trust to Mary. That finding of fact is presumptively correct, and Bill has not met his burden of demonstrating that the finding is clearly erroneous.

B. SPOUSAL SUPPORT

[9] [¶ 16] Bill argues the trial court erred in ordering him to pay $100 per month permanent *808 spousal support to Mary. He contends that Mary has been fully rehabilitated because she acquired college degrees during the marriage, received substantial property under the decree, and is employed.

[¶ 17] A divorce court "may compel either of the parties ... to make such suitable allowances to the other party for support during life or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively." NDCC 14-05-24. As *Wald v. Wald*, 556 N.W.2d 291, 296 (N.D.1996), and *Wiege v. Wiege*, 518 N.W.2d 708, 710 (N.D.1994), show, spousal support decisions are findings of fact that will not be reversed on appeal unless clearly erroneous.

[¶ 18] We differentiate between two types of spousal support. *Heley v. Heley*, 506 N.W.2d 715, 719-720 (N.D.1993). Rehabilitative spousal support is ordered to give a disadvantaged spouse time and resources to acquire an education, training, work skills, or experience that will allow the spouse to become self-supporting. *Id.* Permanent spousal support is ordered to maintain a somewhat comparable standard of living for a spouse who is incapable of adequate rehabilitation. *Id.*

[10] [¶ 19] Bill contends permanent support is inappropriate because Mary is presently employed and self-supporting. We have clarified, however, that permanent support is not limited to a spouse who is incapable of *any* rehabilitation, but may also be awarded to a spouse who is incapable of *adequate* rehabilitation or self-support. *Wald*, 556 N.W.2d at 296; *Wiege*, 518 N.W.2d at 711. As *Wald* at 296-297, and *Wiege* at 711-712, illustrate, permanent support is thus appropriate when a substantial disparity between the earning abilities of the spouses exists.

[¶ 20] The trial court found that Bill had an average annual income of nearly $120,000. The court found that Mary was capable of earning $10,000-$20,000 per year as a Spanish instructor. This substantial disparity in earning ability supports this permanent spousal support. We affirm the trial court's findings on spousal support.

C. ATTORNEY FEES

[¶ 21] Bill challenges the trial court's award of $5,000 in attorney fees to Mary. He contends Mary was awarded sufficient property to pay her own attorney fees.

[11] [¶ 22] The North Dakota Century Code authorizes an award for attorney fees in a divorce case. NDCC 14-05-23. In *Quamme v. Bellino*, 540 N.W.2d 142, 148 (N.D.1995), we explained the relevant standards:

> The principal standards guiding an award of attorney fees in a divorce action are one spouse's need and the other's ability to pay. *Foreng v. Foreng*, 509 N.W.2d 38, 41 (N.D.1993). "The

court should consider the property owned by each party, their relative incomes, whether property is liquid or fixed assets, and whether the action of either party has unreasonably increased the time spent on the case." *Bakes v. Bakes*, 532 N.W.2d 666, 669 (N.D.1995) (citing *Lucy v. Lucy*, 456 N.W.2d 539, 544 (N.D.1990)). We will not overturn an award of attorney fees unless the appellant affirmatively establishes the trial court abused its discretion. *Heller v. Heller*, 367 N.W.2d 179, 184 (N.D.1985).

We have already pointed out the great disparity in the respective incomes here: Bill earns six to twelve times more than Mary. Under these circumstances, the trial court did not abuse its discretion in awarding $5,000 in attorney fees to Mary.

III. MARY'S CROSS-APPEAL

[¶ 23] Mary challenges the placement of joint custody and the visitation schedule. She also seeks attorney fees for this appeal.

A. CUSTODY

[12] [¶ 24] Mary contests the trial court's finding that the presumption against awarding custody to a parent who has engaged in domestic violence was rebutted in this case. Accordingly, she contends joint custody is inappropriate.

[13] [¶ 25] A trial court's custody decision is a finding of fact that will not be reversed on appeal unless it is clearly erroneous. *809 *Kluck v. Kluck*, 1997 ND 41, ¶ 14, 561 N.W.2d 263; *Huesers v. Huesers*, 1997 ND 33, ¶ 6, 560 N.W.2d 219. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

[14] [¶ 26] NDCC 14-09-06.2(1)(j) requires a court to consider evidence of domestic violence to determine custody:

> In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, this evidence creates a rebuttable presumption that a parent who has perpetrated domestic violence *may not be awarded* sole or *joint custody of a child.* This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent.

(Our emphasis). By its terms, the statutory presumption applies to joint custody with an abusive parent.

[¶ 27] The effect of this presumption was explained in *Engh v. Jensen*, 547 N.W.2d 922, 924 (N.D.1996):

> When credible evidence of domestic violence is presented in a child custody dispute, such evidence "creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child." N.D. Cent.Code § 14-09-06.2(1)(j). We have interpreted the statutory presumption, in essence, to make domestic violence the paramount factor to consider in a custody decision.... The rebuttable presumption outweighs other factors and prevents the abusive parent from obtaining custody of the child, unless, in the case of two fit parents, the violent parent proves "by clear and convincing evidence that the best interests of the child require" that the perpetrator receive custody. N.D. Cent.Code § 14-09-06.2(1)(j)....

[¶ 28] In *Heck v. Reed*, 529 N.W.2d 155, 162 (N.D.1995), we described the formidable burden upon a violent parent to overcome this presumption:

> In amending subsection (j), the legislature placed the burden of proof on the perpetrator to prove that the best interests of the children *require* that the perpetrator be a custodial parent. NDCC § 14-09-06.2(1)(j). The use of the word "require" is a clear legislative signal that the presumption against awarding custody to a domestic violence perpetrator is not overcome merely by balancing the other factors slightly in the perpetrator's favor. The word "require" is a word denoting compulsion; it means to "insist upon" or "demand." *Webster's New World Dictionary*, 1208 (2d College Ed.1980). The legislature intended not only that domestic violence committed by a parent weigh heavily against that parent's claim for child custody, but that it be overcome only by clear and convincing evidence that the best interests of the children demand that the

perpetrator of domestic violence serve as custodial parent.

... In a real sense, it takes compelling or exceptional circumstances under NDCC § 14-09-06.2(1)(j) to award custody to a perpetrator of domestic violence, and certainly something more than the customary weighing and reciting of the factors found in NDCC § 14-09-06.2(1)(a) through (i), (k), (*l*).

[¶ 29] The trial court in this case found that Bill's domestic violence triggered the statutory presumption against his custody. The court found, however, that the presumption was overcome, citing numerous factors that the court believed established joint custody was in the best interests of the children. The factors listed by the court were:

1) Bill's violence was not directed at the children;

2) The children are old enough that there is minimal risk of harm to them from Bill's temper;

3) The violence was related to the marital relationship and is unlikely to continue after the divorce;

4) Bill is on medication to control his stress and alleviate depression;

*810 5) Mary is very over-protective of the children;

6) Bill and Mary live close to each other, so the children could go to the other parent for protection if necessary;

7) The risk of further violence is minimal because of the ages of the children and the proximity of Bill's and Mary's homes; and

8) Bill and Mary each have "great contributions available for the children."

Under our prior opinions on the effect of the statutory presumption, most of these factors are irrelevant or insufficient to overcome the presumption.

[15][16] [¶ 30] Evidence that the violence will not occur again because the marriage has ended or these parents will have little contact with each other does not rebut the presumption. *See Engh*, 547 N.W.2d at 925-926; *Heck*, 529 N.W.2d at 164-165. Nor is it relevant that the violence was not directed at the children. *Id.*

[17][18] [¶ 31] The factors used by the trial court focused almost exclusively upon Bill's conduct and the likelihood he would commit more violence in the future. Once the presumption arises, sole custody with the non-abusive parent is presumed unless the abuser can show by clear and convincing evidence that the best interests of the children somehow require the abusive parent to participate in or have custody. To marshal that clear and convincing evidence, often "it will be necessary to detail the failings of the abused rather than the virtues, if they exist, of the abuser." *Heck*, 529 N.W.2d at 166 (VandeWalle, J., concurring). Thus, to rebut the presumption, Bill needed to demonstrate by clear and convincing evidence why sole custody with Mary was not in the children's best interests.

[¶ 32] Bill concedes on appeal that "[h]e has never questioned Mary as a parent and he does not dispute that Mary is a 'fit parent.' " When questioned at trial whether he had "problems" with Mary's parenting abilities, Bill responded:

> No. And I--I have taken that position both by repeated affidavits to this Court and otherwise from the very beginning of this. Mary is a good mother. She loves the kids; the kids love her.

The only factor cited by the trial court on Mary's parental abilities was that Mary was over-protective of the children. The court added that "Bill is more inclined to foster independence on the part of the boys." There is no evidence, however, that Mary is so abnormally over-protective that harm or psychological difficulty for the children will result. As cases like *Engh*, 547 N.W.2d at 926, *Bruner v. Hager*, 534 N.W.2d 825, 828 (N.D.1995), and *Heck*, 529 N.W.2d at 162, exemplify, absent some showing of unusual harm to the children from Mary's more protective nature, this finding is simply one of the customary factors used for a custody decision, so it does not rebut the presumption.

[¶ 33] We conclude the trial court's placement of joint custody is clearly erroneous. We therefore reverse and remand for entry of a decree placing sole physical custody with Mary.

[19] [¶ 34] We also reverse that part of the divorce decree giving Bill ultimate authority over medical decisions affecting the children. Under the circumstances of this case, splitting authority over critical decisions affecting the children can only continue the animosity and conflict between Mary and Bill. Shared decisionmaking authority can be successful only where the parties have demonstrated an ability and willingness to cooperate in the children's best interests. *See Olson v. Olson*, 361 N.W.2d 249, 251 (N.D.1985). The evidence in this case demonstrates diametrically opposed views on parenting by Bill and Mary and continuous conflict over parental decisions. Rather than extend that conflict and cause further judicial intervention to mediate any future conflict, we conclude it is important to keep all decisionmaking authority with the sole custodial parent, Mary.

B. VISITATION

[20] [¶ 35] The trial court ordered that Bill would have visitation each Wednesday evening, each weekend except one every month, and nearly seven weeks during the *811. summer. Mary challenges the frequency of weekend visitations, contending Bill should get only a single weekend per month.

[21][22] [¶ 36] The trial court's decision on visitation is a finding of fact that will not be reversed on appeal unless it is clearly erroneous. *Kluck*, 1997 ND 41, ¶ 21, 561 N.W.2d 263. In cases involving domestic violence, NDCC 14-05-22(3) governs visitation:

> If the court finds that a parent has perpetrated domestic violence and that parent does not have custody, the court shall allow only supervised child visitation with that parent unless there is a showing by clear and convincing evidence that unsupervised visitation would not endanger the child's physical or emotional health.

See also Kluck, 1997 ND 41, ¶ 21, 561 N.W.2d 263. However, Mary did not seek supervised visitation in the trial court. Nor does she challenge on appeal the unsupervised visitation with Bill on Wednesdays and during the summer weeks. Mary has thus effectively conceded that unsupervised visitation will not endanger the children's physical or emotional health. Therefore, supervised visitation is not required.

[¶ 37] Mary argues the weekend visitation schedule should be altered to limit Bill's visitation to only one weekend per month. She contends this is necessary for her to assure the boys do their homework, because Bill is less assertive about making the boys do their school work. We have reviewed the record and conclude the trial court's findings on visitation are not clearly erroneous.

C. ATTORNEY FEES ON APPEAL

[¶ 38] Mary seeks an award of attorney fees for this appeal. Under NDCC 14-05-23, we have concurrent jurisdiction with the trial court to award attorney fees for an appeal in a divorce. *Martin v. Martin*, 450 N.W.2d 768, 771 (N.D.1990). We have often expressed our preference to have this issue addressed initially by the trial court because it is generally in a better position to weigh the relevant factors. *See, e.g., Hager v. Hager*, 539 N.W.2d 304, 306 (N.D.1995); *Wiege v. Wiege*, 518 N.W.2d 708, 712 (N.D.1994). We therefore direct the trial court on remand to consider awarding attorney fees to Mary for this appeal.

IV. CONCLUSION

[¶ 39] We reverse the placement of joint custody and remand for entry of a decree consistent with this opinion. We direct the trial court on remand to consider an award of attorney fees to Mary for this appeal. In all other respects, we affirm the decree.

[¶ 40] VANDE WALLE, C.J., MARING and NEUMANN, JJ., and JAMES M. BEKKEN, District Judge, concur.

[¶ 41] JAMES M. BEKKEN, District Judge, sitting in place of SANDSTROM, J., disqualified.

ROBERT'S ACCOUNT VALUED AT $95,249.13 WITH MINNESOTA MUTUAL LIFE INSURANCE COMPANY WAS ABSOLUTELY EXEMPT UNDER NORTH DAKOTA CENTURY CODE §28-22-03.1 AND §26.1-33-36.

On September 30, 1999, *the District Court issued an Order which accepted Robert's position.*[1] In reference to the judgment that was authorized for the property division equalizing payments, the District Court specifically informed Rachel that her judgment may be used to foreclose the liens previously granted by the trial court on certain real property [lake property and West Fargo personal residence] and certain shares of stock [Kautzman Construction, Inc.].[2]

Rachel, knowing the limitations of the judgment that she secured for the property equalizing payments, subsequently levied upon an annuity owned by Robert[3] in direct contravention to this Court's September 30, 1999 Order.

Importantly, Rachel never appealed from the September 30, 1999, Order.

Equity cannot *create* a legal remedy that wipes out (a) the foreclosure procedure for the liens, or (b) the exemptions granted Robert by law -- both of which recognize Robert has *existing* legal rights. Even the District Court must recognize North Dakota's policy against discrimination on the basis of "status with regard to marriage" or any attempt to discriminate in "state and local government services".[4] Robert, by being divorced, does not lose his rights to exemptions guaranteed to all North Dakota residents. The State's court system is responsible for protecting those rights, not participating in their usurpation – YET ROBERT LOST HIS LEGAL RIGHTS.

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1 Kautzman IV App., ps 70-73. ¶ 2 specifically addresses how the $290,000 judgment could be enforced by "Special executions to allow conduct of Sheriff's Sales" as compared to: ¶ 3's $50,000 "Money Judgment" where "(Rachel) shall be entitled to resort to all legal remedies to collect on said judgment."; ¶ 4's spousal support "Money judgment" where "(Rachel) shall be entitled to resort to all legal remedies to collect on said Judgment."; and ¶ 5's $1,500 "Money Judgment" where "(Rachel) shall be entitled to resort to all legal remedies to collect on said Judgment."

2 Kautzman IV App., p 71.

3 Kautzman IV App., p 79.

4 § 14-02.4-01, N.D.C.C.

Rachel cannot have it both ways. At the District Court level, Robert argued that if the money judgment arising from the equalizing payments is to be regarded as a general money judgment, Robert's homestead should be in all ways exempt from the force and effect of the judgment. Otherwise, equity would be creating a super-lien that is inconsistent with Robert's legal right, protected by statutes and two Constitutions, to have exempt property.[5]

Robert further argued to the District Court that Rachel's argument is inconsistent with Robert's homestead rights guaranteed by law to be uniformly applied to all.[6]

The net effect of Rachel's claimed super-lien arising out of a divorce judgment would be that, for all practical effect, Robert was given no property by the divorce court and Rachel was given all of the property. When combined, the amounts due Rachel for the existing equalizing payments and alimony, would reduce Robert's assets to less than $2,500.00 worth of property at any one time -- *with Rachel having the capability of reaching all other property.*[7]

For Rachel to reach all other property, Rachel need only continue levying against any of Robert's property that he may accumulate during his lifetime and bid in nominal amounts upon her existing judgment(s). Robert would have absolutely no recourse against such successive executions. Robert would be reduced to being a debtor without any ability to accumulate any property greater

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[5] Generally, Robert's exemptions are found primarily in Chapter 28-22, N.D.C.C. and Chapter 47-18, N.D.C.C. As it relates to the annuity, Robert specifically identified § 28-22-03.1, N.D.C.C. and § 26.1-33-36, N.D.C.C. Kautzman IV App., ps 85-86; 93-94.

[6] Kautzman IV App., ps 104-107.

[7] Robert's original prediction has come true as the Sheriff has taken even those monies that were claimed as exempt. Robert has been reduced to less than any other North Dakota pauper for the State will not even grant him the right to any exempt property.

than $2,500.00.[8]

If Rachel's argument is accepted by the Supreme Court, the effect of the trial court's division of property is never an equitable splitting of property, but rather, the divorce judgment has reduced Robert's property to consist of only his absolute exemptions -- *minus* the benefit of a homestead.

Equity cannot do what the law forbids. If the trial court originally wanted Rachel to have a general money judgment for the property equalizing payments, it could not have made such indebtedness a lien upon Robert's homestead.[9]

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[8] § 28-22-05, N.D.C.C.

[9] "**28-22-02. Absolute exemption.** The property mentioned in this section is absolutely exempt from all process, levy, or sale:

...

7. The homestead as created, defined, and limited by law.

..."

The annuity is totally exempt under North Dakota Century Code § 28-22-03.1 and North Dakota Century Code § 26.1-33-36.

§ 28-22-03.1(3), N.D.C.C.[10] provides for an additional absolute exemption for residents of North Dakota and § 26.1-33-36, N.D.C.C.,[11] provides the surrender value of any life insurance policy [under certain circumstances] "is exempt absolutely from the claims of creditors of the insured to the extent provided in section 28-22-03.1" and may not "be subject to seizure under any process of any court under any circumstance." THIS RIGHT HAS BEEN TAKEN AWAY FROM ROBERT.

Because Chapter 26.1-34 of the North Dakota Century Code provides for a guaranteed death benefit for all annuities, Minnesota Mutual Life Insurance Company's annuity policy should also be construed as a life insurance policy. Robert's daughter is the beneficiary under the existing policy. The specific statute cited controls, and there is no legal process that can reach the annuity policy that is exempt from Rachel's present levy and execution which she predicated upon a money judgment.

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10 § 28-22-03.1, N.D.C.C. is attached as Addendum #8.

11 § 26.1-33-36, N.D.C.C. is attached as Addendum #9.

North Dakota Century Code §14-05-25.1 is not applicable to the money judgment arising out of equalizing payment for property division.

This statute is being used to take away property that does not even exist on the date of the divorce, or before.

II. THE FEBRUARY 3, 2000, SHERIFF'S SALE IS VOID.

The court is limited in its jurisdiction to statutory remedies for the enforcement of its divorce judgment.

Rachel believes that the District Court has the right to create a super lien exposing all of Robert's assets to the judgment she obtained in the divorce action. This position is clearly antagonistic to the decision of the District Court in a Memorandum Opinion, dated January 21, 2000, wherein Judge Backes stated in reference to the money judgment obtained by Rachel: **"Accordingly, the money judgments should be enforceable like any other judgment, subject to available exemptions."**[12]

If Rachel merely has a money judgment lien, then Rachel must be bound by all statutes in reference to such judgments.

The District Court, by Memorandum Opinion dated January 20, 2000, viewed the judgment as a general judgment lien subject to all available exemptions. If true, Robert's homestead could not be attached without Rachel having first complied with Chapter 47-18 of the North Dakota Century Code.[13] Before a judgment lien can attach to a homestead there must be (a) an appraisal initiated by the judgment creditor, and (b) the appraisal must show there is at least $80,000 of equity in the homestead.[14]

Rachel failed to comply with the requirements of Chapter 47-18 of the North Dakota Century Code -- if she is operating on the basis of a money judgment [as she now purports to act], and

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[12] Kautzman IV App., ps 111.

[13] Chapter 47-18 of the North Dakota Century Code is attached as Addendum #7.

[14] N.D.C.C.§ 47-18-04 (4) and N.D.C.C.§ 47-18-06.

therefore, the Sheriff's Sale of February 3, 2000, cannot be said to have conveyed Robert's homestead interest. Robert's homestead interest was properly conveyed to Kautzman Millwright, Inc., prior to Rachel's judgment lien attaching to the homestead.[15]

Robert submits that the District Court was required to have chosen (a) a path of foreclosure consistent with statutory mortgage foreclosure procedures [Chapter 32-19 N.D.C.C.], or (b) a path involving sales under execution consistent with statutory judgment procedures [Chapter 28-23 N.D.C.C.]. This latter path would entail Rachel waiving her liens on the three properties, the indebtedness being reduced to money judgments, and then Rachel would enforce the resulting lien thereby created.

The divorce court cannot form an hybrid method of enforcement. See Burr v Trinity Medical Center, 492 N.W.2d 904, 908 (N.D. 1992), which, after recognizing the prioritized "will of the sovereign power" set forth in § 1-01-03, N.D.C.C., provided:

> "A further indicia of the preferable treatment afforded statutory law rather than common law is found in Section 1-01-06, N.D.C.C., which states: 'In this state there is *no common law in any case where the law is declared by the code.*' *Id.* (emphasis added).
>
> > The above statutory laws bespeak the legislature's persistence that codified law commands more attention and compliance than common law. Therefore, it would be inappropriate for district courts to haphazardly fashion equitable remedies with no deference to codified law. Instead, district courts should tread carefully when entering the realm of equitable remedies, fashioning them only when directed to do so by statutes and court rules, when there is no adequate legal remedy, or when the equitable remedy is better adjusted to render complete justice. See *D.C.Trautman Co. v. Fargo Excavating Co.*, 380 N.W.2d 644, 645 (N.D.1986)('{a} party is not entitled to equitable relief if there is a remedy provided by law which is equally adjusted to rendering complete justice'); *A & A Metal Bldgs. V. I-S,*

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[15] The appraisal procedures found an N.D.C.C. §§ 47-18-06 through 47-18-16 are necessary before a general judgment attaches to a homestead.

Inc., 274 N.W.2d 183, 188 (N.D.1978)('[a] court has equitable jurisdiction to provide a remedy where none exists at law'); *Ziebarth v. Kalenze*, 238 N.W.2d 261, 267 (N.D.1976)('the existence of a remedy at law does not precluded equitable relief if the equitable remedy is better adapted to render more perfect and complete justice'); *Graven v. Backus*, 163 N.W.2d 320, 327 (N.D.1968)('if the equitable remedy is better adapted to render more perfect and complete justice than' the legal remedy, it should be implemented)."

Robert has properly demanded marshaling, but it has been ignored.

The District Court never addressed Robert's demand for marshaling pursuant to § 35-01-15, N.D.C.C. At the time of the second proceeding involving the sale of real property, the District Court essentially retreated from its January 21, 2000, Memorandum Opinion and created a super lien -- contrary to the identified statutory procedures. Robert submits Rachel must first resort to the shares of KCI, where she has an "exclusive lien" prior to resorting to the homestead, where she has a subordinate lien.[16] Since Rachel has an exclusive lien on said shares of stock, such should be the first property resorted to by her in any collection efforts.

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[16] N.D.C.C. § 35-01-15.

THERE WAS NO REPORT OF SALE THAT COULD BE CONFIRMED.

The Deputy Sheriff announced the period of redemption as being *one year*, and that the only thing being sold was the interest of Robert A. Kautzman on the date of the Sheriff's Sale, whatever that interest consisted of. The undersigned also protested the lack of an appraisal, made notations to that effect on the previously typed document, and requested that the table and objections be reported as part of the sale proceedings.[17]

Inexplicably, the report of sale by the Deputy Sheriff has never been filed with the District Court, which means that the resulting Order on Plaintiff's Motion to Confirm Results of Sheriff's Sale and Order Setting Redemption Period[18] is **not** predicated upon a statutory prerequisite:

> **"28-23-13. Proceedings upon confirmation.** If the court, upon the return of any execution for the satisfaction of which any real property or interest therein has been sold, **after having carefully examined the proceedings of the officer**, is satisfied that the sale has been made in all respects in conformity to the provisions of this chapter, the court shall make an order confirming the sale and directing the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such real property, or interest therein, at the expiration of one year from the day of sale unless the same is redeemed. The officer after making such sale may retain the purchase money in his hands until the court has examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto by order of the court." [**emphasis** -- this point; emphasis -- next point]

If the report of the officer's proceedings have not been filed with the District Court [nor served upon Robert], then Robert can safely conclude that the District Court has not complied with his statutory duty to "**carefully examine the proceedings of the officer**". The District Court's determination that Robert's statutory exemptions will also be ignored gives further credence to Robert's perception of improper judicial oversight of Rachel's actions.

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[17] See § 28-23-13, N.D.C.C.

[18] Kautzman IV App., ps 142-143. Addendum # 4.

THE COURT CANNOT SHORTEN THE REDEMPTION PERIOD, BUT IGNORED THE STATUTORY 1 YEAR PERIOD OF REDEMPTION.

The Court has no statutory authority to shorten the redemption period set by law. Judge Backes clearly acted without statutory authority when he shortened the period of redemption to 30 days. Had he followed the law, he would have been required to issue "an order that the officer make to the purchaser a deed of such real property, or interest therein, at the expiration of **one year** from the day of sale unless the same is redeemed."[19]

A District Court Judge is not a judicial dictator capable of ignoring statutes under the guise of exerting control over the marital property -- and everything a litigant owns thereafter.

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[19] If Robert's interest is an estate "less than a leasehold of two years' unexpired term" the period of redemption is eliminated. § 28-23-11, N.D.C.C.

THE SHERIFF'S SALE IS VOID.

The District Court's Order setting a thirty day period of redemption of Robert's interest rendered the February 3, 2000, sale void. The District Court does not have the authority to confirm a judicial sale upon terms not authorized by law. See, 47 Am.Jur.2d Judicial Sales, ¶115, which cites Gibson v. Lyon, 115 U.S. 439 (1885), as authority that the court has no power to change the terms of the sale after a sale has been held.

ROBERT DEMANDED A JURY TRIAL, BUT IT WAS DENIED. [MOOT?]

1. Rule 38 N.D.R.Civ.P. preserves the "right of trial by jury as declared by the constitution of the United States of by the constitution of the state of North Dakota" and such right "shall be preserved to the parties inviolate."

2. Once Robert made a timely demand for a jury trial, Rachel cannot deprive Robert of a jury trial by scheduling the matter for a nonjury trial. See 47 AmJur2nd, Jury, § 61. The same principle should exist for nonjury proceedings that were scheduled prior to service of process upon Robert over which he had no control or prior knowledge.

AN ADDITIONAL 8 DAY NOTICE WAS NOT SERVED UPON ROBERT, AS REQUIRED BY THE RULES. [MOOT?]

1. Rule 55 N.D.R.Civ.P. requires an additional 8 day notice upon Robert before he can be considered in default ["If the party against whom judgment by default is sought has appeared in the action, the party (or if appearing by representative, the party's representative) must be served with written notice of the application for judgment at least eight days before the hearing on the application."]

The transcript of May 17, 2000, clearly shows the Court's and knowledge, Rachel's counsel's knowledge, and Rachel's knowledge of Robert's Answer and appearance. See pages 4, 5, 6, 7, 8, 11, 14, and 15. [The Answer was also filed with the Clerk of District Court which resulted in a filing fee of $50.00.] No additional eight day notice was ever sent or served upon Robert or his counsel.

RACHEL HAS ATTEMPTED TO EXPAND UPON POSSIBLE OUTCOMES OF AN EVICTION ACTION THEREBY CAUSING THE DISTRICT COURT TO EXCEED ITS JURISDICTION. [MOOT?]

1. Chapter 33-06 N.D.C.C. only provides for an "action of eviction to recover the possession of real estate .." See § 33-06-01 N.D.C.C.

2. § 33-06-04 N.D.C.C. specifically provides that "(a)n action of eviction cannot be brought in a district court in connection with any other action, except for rents and profits accrued or for damages arising by reason of the defendant's possession. No counterclaim can be interposed in such action, except as a setoff to a demand made for damages or for rents and profits. If the court finds for the plaintiff in the action, the court shall enter judgment that the plaintiff have immediate restitution of the premises. .."

3. The District Court has been invited by Rachel to turn an eviction action [only legally involving "possession of real estate" between two individuals -- Robert and Rachel] into some form of Quiet Title Action, all contrary to law.

In addition to the invitation to exceed the jurisdiction of the District Court as it relates to such an action relating to possession of real property, Rachel has invited the District Court to further compound its error by requesting attorney fees which were verbally granted, but not permitted by law.

4. Rachel has failed to properly identify the legal status with respect to the real property. For instance, Kautzman Millwright, Inc., had a first mortgage interest in the real property was was prior in time to any claim equitable lien alleged by Rachel to presently exist.

I. THE DISTRICT COURT FAILED TO MAKE A PROPER DETERMINATION OF THE VALUE OF KCI AND THEN PROPERLY REDETERMINE THE PROPERTY DISTRIBUTION.

After being told that he had to revalue KCI, the judge conceded that he would be "doubling up here between the 84 and the 196"[1], and then doubled it up anyway [perhaps even tripled or quadrupled – the record was so bad].

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[1] Transcript of 1/14/99, page 20, referencing the disputed amounts commonly rounded off or abbreviated to $84,000 and $196,000.

POINT 1. THERE IS NOT $196,000 IN RETAINED EARNINGS OF KCI FROM JANUARY 1, 1997, THROUGH SEPTEMBER 1997.

Rachel's argument to both courts, resulting in an additional valuation of $196,000 in KCI in the Third Amended Judgment, which has no evidentiary support, misstates the evidence, and misleads both courts. In the process, Rachel ignores corporate expenses, and misleads both Courts as to KCI's actual retained earnings.

KCI's actual 1996 net earnings were **negative** $60,641[2] -- KCI's retained earnings at the beginning of 1996 was a **negative** $12,571, and at the end of the 1996 it was a **negative** $76,615.[3] Extrapolating 1997 corporate **retained earnings** from 1996 retained earnings would result in a **negative** $45,000 being added to $301,001.48 for a corporate valuation of $255,000 at the mandated September, 1997, date for valuation.

KCI's actual retained earnings for the entire year of 1997 was a **negative** $52,698.[4] Three-fourths of the negative $52,598 is approximately a **negative** $39,500. If one were to adjust KCI's value by either its net or retained earnings, it should result in a *reduction* to the trial court's valuation of KCI - not an increase. The negative earnings reflected on corporate tax returns are real numbers.

True corporate retained earnings of a negative $60,641 should *reduce* the value of KCI. The judge's willingness to exult arguments of Rachel's counsel to evidentiary status was error – ignored

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[2] 1996 KCI Return, lines 28 and 30. App., p. 479.

[3] 1996 KCI Return, Schedule L, line 25. See App., p. 482.

[4] If the legitimate Northern Pipe expense of $43,576 (which were added to marital property by the trial court because it was a prepaid in 1996) were subtracted, one would have a **negative** $96,274 in retained earnings for the corporation.

Northern Pipe resulted in 1997 KCI income, but the trial court's methodology did not ever allow for subtraction of its expenses.

by the Supreme Court and Judge Backes' by refusing to correct that error when requested by Robert.

POINT 2: TO VALUE KCI, $85,000 IS BEING COUNTED AT LEAST TWICE.

In the Third Amended Judgment, $85,000 was once again added to the value of KCI. It is submitted that adding $85,000 to the value of said corporation has no evidentiary support, and is a duplication.

Judge Leclerc's willingness to establish a new value which would most certainly result in "doubling up" was error, as was Judge Backes' refusal to correct that error when requested by Robert.

The current trial court's error in returning the value of KCI back to $581,860 is particularly egregious when we realize it is probably a "triple up" -- Judge Leclerc had already added $85,000 because he felt compelled to follow the Supreme Court's suggestion,[5] forgetting he had once before added it without proper subtraction from KCI's gross value.

If the same $85,000 is the basis for describing Robert's *gross income* as $400,000 -- instead of the $320,000 KCI *gross income* for which evidence exists, then it is a quadrupled number [with adverse impact every year there exists a spousal support obligation].

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[5] Transcript of 1/14/99, page 19.

THE TRIAL COURT'S METHOD OF VALUING KCI IS NOT IN ACCORDANCE WITH LAW NOR ANY ACCEPTABLE ACCOUNTING PRACTICE.

In valuing shares of stock in a closely held corporation, this Court has followed one of the three methods, or combinations thereof, as discussed in Brown v. Hedahl's-Q B & R, Inc.[6]

The three methods are: asset value; investment value (or earnings value); or market value. In proper cases, a combination of the three may also result in the proper valuation of the corporation.

The asset value of KCI in September 1997 would not exceed the $301,001.58 value made by the trial court in the Second Amended Judgment.

Point 4 of this Appellant's Brief shows the Special Master's asset value of KCI is based upon faulty numbers. A factual hearing should have been granted to determine the true value of the corporation as of the trial date.

The investment method (earnings method) would result in a zero ($0) valuation -- the corporation was running at a loss in 1996.

There is no ready market value for the corporation. The chief asset is the willingness of Robert to continue to work for it. Without Robert's willingness to continue working for KCI, there is no market value. Even Judge Leclerc has now recognized the illegitimacy of his earlier opinion [elevating Rachel's corporate role] when he described KCI as a "one-person corporation."[7]

The trial court's method does not follow any of the generally accepted methods to value a corporation. Adding gross income, without any deduction for corporate debts and expenditures, to the Master's determined asset value results in an unfair valuation of KCI.

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[6] Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249 (N.D.1971).

[7] Transcript of 1/14/99, pages 17, 22.

Robert was not allowed to cross-examine the Special Master to determine the validity of any figure at the time of the original trial, or thereafter.

A. ROBERT'S INABILITY TO PAY ATTORNEY FEES, BUT ORDERED TO PAY ANYWAY.

The uncontroverted evidence is that Robert does not have the ability to pay the attorney fees when coupled with all other payments required of him. Robert's 1996 income tax shows gross personal income of $145,393.[8] Extrapolating 1997 personal income from information on his 1996 income tax returns, Robert would have no monies to live on if he pays according to the judgment.

From $145,393 [gross personal income] - $24,900 [interest income as Rachel got the bank accounts] - $48,000 [alimony payments] - $5,627 [employees' share of FICA] - $5,112 [assumed federal income taxes]- $575 [state income taxes] - $4,491 [real property taxes] - $2,446 [home mortgage payments] - {either} $30,400.00 or $41,627.00 [interest at 8% payable to Rachel] and there must be an adjustment of $26,193 [due to need to modify negative retained earnings of KCI relating to Rachel's corporate salary[9]]-- for a total subtraction from $147,744 to $158,971.

Thus, *before* the award of $50,000 in attorney fees, Robert has no monies to live on -- if he had paid everything required of him under the judgment.

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[8] App., p. 506.

[9] 1996 retained earnings of KCI are a negative $60,641. To the negative retained earnings one must add the salary paid Rachel estimated to be $32,000 and employer's share of FICA taxes estimated paid upon Rachel's salary for a negative $26,193. Negative retained corporate earnings are real numbers and must be made up by loss of corporate assets or shareholder contribution.

B. RACHEL HAS NO NEED FOR ATTORNEY FEES, BUT GOT THEM ANYWAY.

Requiring Robert to pay an additional $50,000 in attorney fees does not address the second main factor: Rachel's need.

Rachel does not have any demonstrated need for attorney fees -- she has already paid the very same attorney fees from marital property.

Both "need" and "ability to pay" factors should override any other factor, and militate against an award of additional $50,000.

THERE WAS NO BASIS FOR A JUDICIAL LIEN TO BE CONVERTED INTO A MONEY JUDGMENT FOR $322,139.18 WITHOUT COMPLIANCE WITH CHAPTER 32-19 N.D.C.C.

Equity follows the law concerning judicial liens envisioned by the trial court.[10] Chapter 32-19 of the North Dakota Century Code should control the legal procedures necessary to foreclose the judicial liens originally created, especially when the original lien was on the homestead. When the judicial lien was created, it was in the nature of a mortgage on the homestead, and other specific property. The present judgment allows for a lien on the homestead, and *all other property*, depriving Robert of the protections of Chapter 32-19 N.D.C.C., or alternatively, absolute exemptions allowed by law -- homestead rights. The right to rely upon the law has been taken away from Robert.

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[10] Leifert v. Wolfer, 24 N.W.2d 690 (N.D. 1946).

THE DISTRICT COURT FAILED TO PROVIDE ROBERT WITH APPROPRIATE RELIEF WITH RESPECT TO THE ISSUE OF SPOUSAL SUPPORT.

Rachel is no longer entitled to either type of spousal support factually -- a factual position that she never truly contested.[1] In the instant case, Rachel never presented any factual information or testimony countering matters testified to by Robert. When Rachel did not present any evidence to counter Robert's evidence, the trial court concocted a reason, all by himself to prevent spousal support relief.

Judge Backes declined to rule according to the law, so he never made factual findings of need or ability to pay,[2] -- the uncontroverted evidence established Rachel had no need and Robert had no ability to pay.

The judge also failed to recognize the uncontroverted evidence that the prior judicial decision, affirmed by the Supreme Court, which confused "corporate gross income of $400,000" equating it to be "Robert's personal net income" was wrong -- by hundreds of thousands of dollars.

Because Judge Backes declined to rule at all, at no time, did the trial court ever make factual

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1

The Affidavit of Rachel M. Dietz was untimely filed on September 15, 1999. Appendix, pages 171-175. She presented no evidence countering Robert's testimony as to his circumstances, but rather, claimed that she was attending school, unemployed, and professing a need for monies.

2

Fenske v. Fenske, 542 N.W.2d 98, 103 (N.D. 1996), citing Gronland v. Gronland, 527 N.W.2d 250 (N.D. 1995). See also, Heley v. Heley, 506 N.W.2d 715, 720 (N.D. 1993); Weir v. Weir, 374 N.W.2d 858, 865 (N.D. 1985).

See also, Carmichael v. Carmichael, 555 N.W.2d 75, 79 (Neb.App. 1996): "We look at the trial court's alimony award not from the standpoint of what we would have done, but whether the award is untenable such as to deprive a party of a substantial right or a just result. (case cited) Here, the alimony award is beyond what Steven can pay, as well as being beyond what Jocelyn needs, and thus it is clearly unreasonable and deprives Steven of a just result. .. The purpose of alimony is not to equally divide income, but rather, to assist the supported spouse for a reasonable period while obtaining education and training."

findings of need or ability to pay,[3] -- the uncontroverted evidence established Rachel had no need and Robert had no ability to pay.

Spousal support could no longer be justified, but such fact was ignored.

In the instant case, the judge made no findings of fact whatsoever in violation of his duty under Rule 52 of the North Dakota Rules of Civil Procedure.[4] Rachel presented no evidence to controvert any factual presentation of Robert over a period of approximately seven months until less than 24 hours prior to the hearing, and then directed only to her own circumstances -- not Robert's inability to pay. The trial court could not make any findings of fact contrary to Robert's position as to his inability to comply with the previously ordered spousal support because there was no evidence from any legal means by which the trial court could deny Robert's requested relief.

Once the purported contempts were corrected, and Robert "purged" himself of the contempt as permitted by Judge Backes' earlier decision, Judge Backes continued to deprive Robert of his right to an open and impartial court when he rejected Robert's Motion for Reconsideration.

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[3] Fenske v. Fenske, 542 N.W.2d 98, 103 (N.D. 1996), citing Gronland v. Gronland, 527 N.W.2d 250 (N.D. 1995). See also, Heley v. Heley, 506 N.W.2d 715, 720 (N.D. 1993); Weir v. Weir, 374 N.W.2d 858, 865 (N.D. 1985).

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[4] **"(a) Effect.** In all actions tried upon the facts without a jury .., the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment .."

RESULT: THE TRIAL COURT DEPRIVED ROBERT OF AN OPEN COURT AND AN IMPARTIAL DETERMINATION.

Article I, § 9, of the Constitution of North Dakota provides, in pertinent part:

> "**Section 9.** All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay."

On the basis of this provision in the Constitution of North Dakota, the North Dakota Supreme Court pronounced in Kristensen v. Strinden,[5] "(o)ur Constitution does not permit State courts any discretion in determining whether or not to entertain actions properly brought before them."

Robert properly sought relief under § 14-05-24 N.D.C.C., a statute which provides for judicial modification of any order for spousal support "from time to time". Judicial cessation of proceedings due to a judicial perception of a contempt of court -- a position never advanced by Rachel -- constitutes an abuse of process and a violation of the public policy of the State of North Dakota which recognizes Robert's absolute right to seek judicial relief, by statute and constitution.

Under Judge Backes' view of the law, a person may be denied his statutory right to modification of spousal support if he has any unrelated judicial determinations of non-compliance with any existing Court orders. Judge Backes' position violates Article 1, Section 9 of the Constitution of North Dakota[6], which guaranties the liberty rights of an open court system and due process of law.

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[5] Kristensen v. Strinden, 343 N.W.2d 67, 71 (N.D. 1983).

[6] Robert further asserts such interpretation would be a violation of the Fourteenth Amendment to the Constitution of the United States of America.

PROPOSED AMENDMENTS
TO
HOUSE CONCURRENT RESOLUTION NO. 3015

Page 1, line 7, after "Assembly" insert ", and the judicial power of the state is vested in its courts"

Page 1, line 8, remove "due to judicial activism and the apparent desire of courts throughout" and after the second "the" insert " thoughtful and prudent exercise of these powers by each of these separate and co-equal branches, with due respect and consideration for the authority and responsibility of the other, is in the best interest of the people"

Page 1, remove line 9

Page 1, line 10, remove "legislative branch of government have been encroached upon"

Renumber accordingly