

CASE NO. A05-2094

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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In re the Marriage of:

Jeremy James Zander, Petitioner,

*Respondent,*

vs.

Melinda Alice Zander,

*Appellant.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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## ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE DISTRICT COURT PROPERLY CONSIDERED EVIDENCE OFFERED AT TRIAL IN REGARD TO RESPONDENT'S RESIDENCE IN ITS OVERALL DETERMINATION OF CUSTODY.

The district court found no evidence that Respondent misrepresented his intentions to the court, or that any other reason existed to justify amending its findings to remove the evidence regarding Respondent's residence.

- II. WHETHER THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT AWARDED THE PARTIES JOINT CUSTODY OF THEIR CHILDREN.

The district court held that based upon review of all statutory factors in light of the testimony and evidence presented at trial, joint legal and physical custody of the children was appropriate.

- III. WHETHER THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN CLASSIFYING THE INCOME APPELLANT RECEIVED DURING THE MARRIAGE AS MARITAL PROPERTY SUBJECT TO DIVISION BY THE COURT.

The district court held that the income Appellant received during the parties' marriage was marital income and as such, divisible upon dissolution.

## STATEMENT OF THE CASE AND FACTS

### Statement of the Case

This case arises out of Scott County District Court, The Honorable Diane M. Hanson presiding. The case involves a dissolution of the marriage between Appellant, Melinda Alice Zander, and Respondent, Jeremy James Zander. The case was tried on March 15, 16, 17 and 18, with written arguments submitted after the conclusion of the trial. During the trial, the court heard testimony from seventeen witnesses and received forty-three exhibits. Following the trial and submission of the written arguments, the trial court issued Findings of Fact, Conclusions of Law, Order for Judgment & Judgment and Decree, which determined all issues relevant to the dissolution, including custody of the parties' children, the marital or non-marital nature of the parties' property, and an equitable division of that property.

Dissatisfied with the district court's determination of custody and characterization of certain property as marital, Appellant filed a motion seeking the Judgment and Decree be either vacated or amended. Despite the procedural rules and jurisprudence requiring the district court to consider a motion for amended findings based only on the record before it at trial, Appellant submitted additional evidence with her Motion. Following a hearing on the matter and consideration of Appellant's motion and Respondent's counter-motion, the district court declined to amend its findings in any respect. Hence, Appellant initiated this action seeking reversal of the district court's decisions.

While the record is replete with details of the parties' parenting ability, the parties' assets and property considerations, the arguments on appeal hinge on a few select areas of dispute and matters of fact, outlined below.

### **Statement of Facts**

The parties initially met while they were attending junior high school in Shakopee, Minnesota. (Transcript (hereinafter T.) p. 14.) After several years apart, the parties again became acquainted in 1998 and they moved in together in January of 1999. (T. p. 16.) When the parties moved in together, Respondent immediately began playing the role of a father figure to Appellant's two children from previous relationships, namely Casandra Marie Zander, d.o.b. 12/10/90, and Warren Amos Zander, d.o.b. 02/21/94. (Findings of Fact, Conclusions of Law, Order for Judgment & Judgment and Decree (hereinafter FCOJD) Finding ¶ V; T. pp. 30-32.) The parties were married on September 14, 2001 and Respondent adopted the children in November of 2001. (FCOJD Finding ¶¶ 4,5.) From the beginning of the parties' relationship, Respondent was happy to assume the role of the children's father and the Appellant encouraged him to do so. (T. 31-32, 476.)

The parties separated in January 2004 and this dissolution action was commenced. (FCOJD Finding ¶ IV.) The trial mainly focused on the issue of custody, but also encompassed the issues of parenting time, child support, the marital or non-marital nature of the parties' property and the impact of Appellant's and the children's Native American heritage on the proceeding.

At the trial, Respondent agreed with the custody evaluator's recommendation for joint legal and joint physical custody, stating, "the kids need both of us." (FCOJD

Finding ¶XIII(1).) Appellant requested sole legal and sole physical custody. (Id.) Upon agreement of the parties, the court interviewed each child individually, with only Judge Hanson and her court report present, in order to ascertain the reasonable preferences of the children, though the sessions were not recorded. (FCOJD Finding ¶XIII(2).) After meeting with each child, the district court determined both children to be of “sufficient age and intelligence to communicate [their respective] preference” regarding the custody arrangement. (Id.) The court found that Casandra, then age 14, “indicated that she enjoys different activities with each parent, but needs and wants time with both.” (Id.) Similarly, Warren, then age 11, “expressed his definite desire to spend equal time with each parent,” and “indicated that he is aware that the parties have different approaches to parenting, but that he likes being with both of them as much as possible.” (Id.) Both children were consistent in expressing a desire to spend time with each parent in their many conversations with the custody evaluator, as well as when interviewed by the court. (Id.)

The court found that neither party could be considered the children’s primary caretaker. (FCOJD Finding ¶XIII(3).) Both parties presented testimony that each contributed significantly to the children’s care and lives on a daily basis and witnesses for both parties confirmed the parties were equally involved with the children. (Id.) The report of the custody evaluator also confirmed that both parents contributed significantly to the children’s upbringing and made “no clear determination that either parent was the primary caretaker.” (Id.) While the written custody evaluation did not find either parent

as the primary parent, at trial her testimony “indicated her impression that [the] Husband (Respondent) tended to do more caretaking than [the] Wife (Appellant).” (Id.)

Each parent has a loving and appropriate relationship with the children and each is actively involved in different aspects of the children’s academic and various extracurricular activities. (FCOJD Finding ¶XIII(4).) The children benefit from their relationship with each parent in differing ways as Appellant’s relationship with the children tends to be more “controlled and structured”, while Respondent tends to have a more relaxed and affectionate relationship with them. (Id.) Witnesses for both parties confirmed “that the children are a priority to both.” (Id.) Although the parties have different parenting styles “they are both equally committed to the children and share common goals for their futures.” (FCOJD Finding ¶XIII(10).)

During the marriage Respondent interacted with both of the children in a variety of ways, including academic, extracurricular, tribal community activities and informal daily routines. (FCOJD Finding ¶XIII(5).) Appellant shared many of the same activities but also took the “children to doctor and dental appointments, on shopping trips, and [on] foreign travel.” (Id.) The court also noted the custody evaluator’s “opinion that the children’s ability to interact equally with each parent is critically important to their well-being.” (Id.)

The court found that during the parties’ year-long separation, the Respondent had made the “children’s interaction with extended family (primarily members of [Appellant] Wife’s family) a priority,” while the temporary order granting Appellant more parenting time than Respondent has meant she is now “more involved in the children’s daily

routines...but appears to place somewhat less value on their contact with extended family and involvement in tribal and community activities.” (Id.) Both parents understand the importance of the children’s connection and involvement with the tribal community, however the court found that Appellant “Mother has been somewhat less consistently involved in the Native American community” than Respondent. (FCOJD Finding ¶XIII(6).) Glenn Crooks, a member of the Mdewakanton Tribal Council, testified that Respondent “seems to understand and value the children’s tribal connection.” (FCOJD Finding ¶XIII(10).)

Respondent is not currently involved in a romantic relationship. The Appellant has been involved with another individual throughout the parties’ separation. (FCOJD Finding ¶XIII(5).) The district court found that the children “are not completely comfortable with [the man Appellant is now seeing] and feel that he has become too involved in their lives too quickly.” (Id.) Appellant “does not seem to fully appreciate the children’s concerns about” her new romantic relationship and “does not seem to have a clear idea of what this man’s role should be with respect to the children.” (Id.)

The instant proceedings appear to have been affecting the children’s performance at school. (FCOJD Finding ¶XIII(6).) At trial, Respondent raised his concern regarding the children’s consistent tardiness while in Appellant’s care and the court found that she acknowledges the tardiness “but seems to minimize the situation and blames the children for not getting ready on time.” (Id.)

Since joint custody was awarded the ability of the parties to cooperate is of great importance and the court stated that the stress of the divorce has recently affected their

ability to communicate, however they “have a history of effective co-parenting and have indicated their desire to do what is best for their children.” (FCOJD Finding ¶XIII(14(a)).) Although the parties do not always agree, they have been willing to put their differences aside for the best interest of the children. For instance, although Respondent is not Catholic, he did not object to Appellant’s Catholic beliefs and has even attended events at the Catholic church to show his support of the children. (FCOJD Finding ¶XIII(10).) Another example of their ability to cooperate is that while Appellant and Respondent disagreed over the choice of schools the children should attend, Respondent has always supported the children and assisted them in performing their best at any school. (FCOJD Finding ¶XIII(5); T 117) While the parties sometimes do not agree, they have each “acknowledged that the other is an important figure in the children’s lives and that the children need both of them.” (FCOJD Finding ¶XIII(13).) Additionally, the parenting time expeditor testified that the parties did a “‘fine job’ in reaching and following through with an agreement” for altering their 2004 holiday parenting time schedule. (FCOJD Finding ¶XIII(14(a)).) As can be seen from the above, while the parties do not always agree, they “have a history of being able to communicate with each other regarding the children’s needs and best interests.” (FCOJD Finding ¶XIII(14(b)).)

During the parties’ separation, Appellant remained in the parties’ home in Jordan, Minnesota, and Respondent moved to a trailer home owned by Appellant on the Shakopee Mdewankanton Sioux (Dakota) Community reservation. (FCOJD Finding ¶¶ 1-2, XI-XII.) Respondent asked the district court to award him Appellant’s non-marital

trailer home on the reservation, in exchange for a proportionate decrease in his share of the marital estate, for several reasons. During the course of the separation and divorce, the children had grown accustomed to spending time with their father in the mobile home and it became a source of security and comfort to them. (FCOJD Finding ¶XVI(2).) Moreover the location of the home provided the children with “easy access to activities and friends within the tribal community”. (Id.) The close proximity of the parties’ homes – Appellant always living in Jordan and Respondent always living in Prior Lake – means that “transferring back and forth between the two residences is not a problem, and does not disrupt the children’s involvement in school and community activities. (FCOJD Finding ¶XIII(6).)

As a member of the Shakopee Mdewakanton Sioux (Dakota) Community Appellant receives monthly per capita payments. (FCOJD Finding ¶XVIII.) These payments are the result of revenue “generated by the Community’s casino and other business interests.” (Id.) The per capita payments are distributed in regular monthly amounts and are entirely liquid. (Id.) During the marriage most of the per capita payments received by Appellant were deposited into joint accounts and used to pay the household and family expenses. (Id.) Respondent was freely allowed to spend Appellant’s income during the marriage and he participated in the “parties’ decisions regarding the spending, saving, and investing of [Appellant’s] income.” (Id.)

Appellant argued that the income she received was her non-marital asset by reference to the Mdewakanton Community Tribal Law or, in the alternative, because the payments were analogous to a structured settlement or annuity. (Id.) Despite this

assertion, Appellant offered no legal authority to suggest that the court was required to apply the Tribal Code and the court found that Appellant's "monthly per capita payments are regular ongoing periodic distributions of income from business revenue that will continue throughout her lifetime." (Id.)

After the conclusion of the trial, Appellant brought a motion for amended findings or in the alternative a new trial. Appellant's motion was denied in its entirety. (Order & Judgment filed September 22, 2005 (hereinafter Order & Judgment) Order 1.) At the post-trial motion hearing, Appellant attempted to introduce evidence of events which occurred after the conclusion of the trial in regard to Respondent's residence, a harassment restraining order and parenting time disputes, among other things. (Judicial Memorandum attached to Order & Judgment (hereinafter Judicial Memorandum) pp. 2,5.)

The parties submitted considerable evidence for the district court to consider in reaching its decision. The district court's Findings of Fact, Conclusions of Law, Order for Judgment & Judgment and Decree are thorough and indicate that the district court considered all of the evidence, weighed its credibility and exercised great care in reaching a fair and equitable decision which is supported by both the law and the evidence.

### **SUMMARY OF THE ARGUMENT**

In a marital dissolution proceeding, the district court's decision is guided by both law and equity, and the court is charged with making "a just and equitable division" of the parties' property. Minn. Stat. § 518.58 (2004). The court must also make a determination of custody based upon review of many statutory factors. Minn. Stat. §

518.17, subd. 1 (2004). Whenever joint legal or physical custody is sought, the court must consider additional statutory factors. Minn. Stat. § 518.17, subd. 2 (2004). “[E]quity denotes fairness and requires the application of the dictates of conscience or the principles of natural justice to the settlement of controversies.” *Nardini v. Nardini*, 414 N.W.2d 184, 188 (Minn., 1987).

As the Minnesota Supreme Court noted, “each marital dissolution proceeding is unique and centers upon the individualized facts and circumstances of the parties and that, accordingly, it is unwise to view any marital dissolution decision as enunciating an immutable rule of law applicable in any other proceeding.” *Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997). The district court is afforded broad discretion in making dissolution awards—whether related to property or other dissolution issues—and this Court will not disturb its decision absent clear error. *Servin v. Servin*, 345 N.W.2d 754, 758 (Minn. 1984). Even if this Court would decide things differently, if the district court’s decision has a reasonable basis in fact, this Court must affirm. *Id.*

In the instant matter, the district court considered the extensive submissions of the parties to determine the proper custody arrangement and division of the substantial property holdings. Both parties presented testimony and evidence regarding their ability to parent the children and the marital or non-marital character of the family’s income and the property purchased with that income, including forty-three (43) exhibits at trial, testimony from seventeen witnesses and written submissions by both parties at the conclusion of the trial. Finding the evidence and argument proffered by Respondent more credible, the district court reasonably determined that the parties should share joint

legal and physical custody of the children and that the income Appellant received during the parties' marriage was marital property to be equitably divided in accordance with the law.

Similarly, at a post trial hearing, the district court weighed the contested and contradictory evidence before it regarding Appellant's claim that Respondent committed a fraud upon the court. Acting within the purview of its discretion, the district court determined that no evidence of fraud existed. Accordingly, the district court declined to amend its decision. This determination was not an abuse of the district court's discretion and, consequently, this Court should affirm the decision below.

Since it lies within the district court's discretion to weigh the evidence before it and determine the character of property, the respective values of the property, and how it should ultimately be divided, this Court should be reticent to tamper with the decision below absent substantial evidence of a clear abuse of discretion. Moreover, since the district court is limited to making decisions based on the record before it at trial, even when it considers a motion seeking amended findings, this Court should also be bound by that record. In any event, there is no evidence that the district court abused its discretion or misapplied the law in the case at bar. The district court made well-reasoned decisions grounded in fact. It did not abuse its discretion. Accordingly, its decision should be affirmed in all respects.

## ARGUMENT

### I. STANDARD OF REVIEW

It is well-settled that the district court is vested with broad discretion in its determination of both custody of the parties' minor children and the appropriate property division in marriage dissolution proceedings. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1959); *DuBois v. DuBois*, 335 N.W.2d 503, 506 (Minn. 1983).

In its review of a custody determination the appellate court's review is limited to a determination of whether or not the trial court abused its discretion by making findings that are not supported by the evidence or by improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). Further, the trial court's "decision will not be set aside unless it was arbitrary or a clear abuse of discretion." *Andersen v. Andersen*, 360 N.W.2d 644, 646 (Minn.Ct.App. 1985).

The delicate balancing of property division and financial issues necessary to place the parties in comparable post-dissolution financial positions is reserved for the judgment of the district court. *Nardini*, 414 N.W.2d at 199. In fact, the Minnesota Supreme Court noted that, "[i]f the determination, as ordered by the lower court, has a reasonable and acceptable basis in fact and principle, this court will and *must* affirm." *DuBois*, 335 N.W.2d at 506, *citation omitted, emphasis supplied*.

Even if this Court finds that a different result is supportable, and that it might have reached a different result, it does not necessarily mean that the district court's award is an abuse of discretion. *Chamberlain v. Chamberlain*, 615 N.W.2d 405, 412 (Minn. Ct. App. 2000). Since the district court has broad discretion in dividing marital property, its

decision will be overturned only for a clear abuse of discretion. *Servin*, 345 N.W.2d at 758. See also, *Coffel v. Coffel*, 400 N.W.2d 371, 373 (Minn. Ct. App. 1987); *Kowalzek v. Kowalzek*, 360 N.W.2d 423, 426 (Minn. Ct. App. 1985).

In order to find that the district court actually abused its discretion, the district court must have made a clearly erroneous conclusion that is against logic and the facts on record. *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. Ct. App. 1988); *Carrick v. Carrick*, 560 N.W.2d 407, 410 (Minn. Ct. App. 1997). The Minnesota Supreme Court cautioned against supplanting a district court's decision in marriage dissolution issues, noting that it has, "criticized before the court of appeals' misapplication of the scope of review when it has usurped the role of the trial court by reweighing the evidence and finding its own facts." *Dobrin*, 569 N.W.2d at 202, *citations omitted*.

In the case at bar, the district court made extensive findings, and its legal conclusions are adequately supported by the record. There is no evidence that the district court made a clearly erroneous decision that was either against logic or against the facts on the record; rather, just the opposite is true. Accordingly, pursuant to *DuBois*, *Duffey*, and their progeny, this Court must affirm the district court's decision herein.

**II. THE DISTRICT COURT PROPERLY CONSIDERED EVIDENCE IN REGARD TO RESPONDENT'S RESIDENCE IN ITS OVERALL DETERMINATION OF CUSTODY AND ACTED WITHIN ITS DISCRETION IN DECLINING TO AMEND ITS INITIAL FINDINGS.**

The record does not support appellant's assertion that the findings of the district court regarding Respondent's home are clearly erroneous. Appellant's argument in this respect is based upon evidence which was not part of the record herein and was first

introduced at the post-trial motion for amended findings. Because the evidence was not properly introduced into the record, the district court did not consider it in declining to amend its findings and this Court should also refrain from considering the post-trial evidence. However, even if this Court chooses to review the evidence from outside the record, it will see that the findings of the district court are still supported.

In a post-trial motion to vacate or amend findings, the trial court is provided an opportunity to review the evidence and, if necessary, to rectify errors or omissions alleged by the parties. *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. Ct. App. 1992). Denying a motion for a new trial or amended findings lies within the trial court's discretion. *Bongard v. Bongard*, C3-02-793, 2003 Minn. App. LEXIS 279, \*24 (Minn. Ct. App. March 11, 2003), unpublished, citing *Bains v. Piper, Jaffray & Hopwood, Inc.*, 497 N.W.2d 263, 271 (Minn. Ct. App. 1993), review denied (Minn. Apr. 20, 1993).

When considering a motion for amended findings, "the trial court must apply the evidence as submitted during the trial of the case. It may neither go outside the record, nor consider new evidence." *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 238, 219 N.W.2d 641, 651 (1974). The evidentiary limitation is predicated on the notion that the purpose of a motion for amended findings is for a district court to review its own exercise of discretion, which requires it to apply the evidence as submitted. *Johnson v. Johnson*, 563 N.W.2d 77, 78 (Minn. Ct. App. 1997), citing *Stroh v. Stroh*, 383 N.W.2d 402, 407 (Minn. Ct. App. 1986).

Appellant assigns error to the trial court for declining to amend its findings regarding Respondent's residence as they relate to the issue of custody. Appellant offers

no legal authority or theory to explain how the trial court erred. Moreover, a careful review of the Memorandum attached to the Order denying Appellant's motion for amended findings shows that although the district court did not consider the new evidence offered by Appellant, its decision would have been the same even if it had allowed the additional evidence into the record. In the Memorandum the court states

“[Appellant] wife's arguments...are based largely upon post-trial incidents and allegations, which the Court is prohibited from considering in this type of motion. Even if the Court were to consider this evidence, it is insufficiently reliable and/or compelling to justify amended findings.”

Appellant's Appendix p. 118. The court further explains its position that even if it were to consider the post-trial evidence regarding Respondent's residence, it would not have altered the outcome of the trial when it stated in its Memorandum that

“During the trial, Petitioner Husband requested that he be awarded the trailer home on the reservation...[and]...indicated that his future plans included acquiring a larger home in the same general area. He did not promise to live forever in the trailer on the reservation, nor did the Court order or expect him to do so.”

Appellant's Appendix p. 118.

It is also important to note that while Appellant asserts “the district court placed special emphasis...on the fact that the Respondent resided on the Shakopee Mdewakanton Reservation” this assertion is not supported by the record or a review of the Findings of Fact herein. Appellants Brief p. 6. Appellant quoted the trial court's findings out of context where the court was simply stating where the Respondent currently resided and not in the context of the custody findings. In reviewing the findings that relate to the custody of the parties' children, the Court will find that twenty pages

were devoted to discussing each of the statutory factors regarding the best interests of the children, as well as the joint custody factors. FCOJD pp. 6-26. The few short quotes cited in Appellant's brief by no means exhibit a "special emphasis" when considered in light of the totality of the court's consideration of this matter.

Finally, it is of note that through the post-trial hearing and now in her brief, Appellant has attempted to support her position by the fact that she obtained a harassment restraining order against Respondent after the trial. Yet, the restraining order was obtained by default after the Respondent chose that, with the conclusion of the trial, he did not wish to fight with Appellant in the public forum. In fact, the judge who issued the restraining order specifically wrote "the Court is awarding Judgment on a default basis without[t] making fact findings. I[t] appears that the vast majority of the Petitioner's complaints are typical of any divorce." Appellant's Appendix p. 108. Furthermore, since the restraining order was obtained after the trial, the Court must be precluded from reviewing the order based upon the above discussion of *Rathbun*.

### **III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT AWARDED THE PARTIES JOINT CUSTODY OF THEIR CHILDREN.**

Appellant is unhappy with the decision of the trial court and, as such, attacks its analysis of the statutory factors used to assist in determining custody and in particular the trial court's analysis regarding the parties' ability to co-parent. As Appellant correctly points out in her brief, when a court determines the custody of the parties' children and joint custody is at issue, the court must do so based upon the factors set forth in Minn. Stat. §518.17, subd. 1 and Minn. Stat. §518.17, subd. 2. What Appellant fails to express

is that the trial court provided twenty pages of Findings of Fact related specifically to the issue of custody. Within those twenty pages the Court expressly discusses each and every factor outlined in Minn. Stat. §518.17, subd. 1 and subd. 2. FCOJD pp. 6-26.

As with Appellant's argument regarding Respondent's residence, discussed above, Appellant attempts to add to the record alleged events that occurred after the trial in this matter. As stated above, any evidence not properly included in the record should not be considered by this Court.

Appellant refers to the decision in *Stanford v. Stanford*, 266 Minn. 250, 123 N.W.2d 187 (1963) to express that a court has "a duty to do more than rubber stamp the report of an evaluator." Appellant's Brief p. 14. A careful reading of the trial court's decision shows that the report of the custody evaluator was only one piece of the large volume of evidence and testimony submitted to and reviewed by the court prior to making its decision. One example of this is the court's finding in regard to her analysis of who was the children's primary caretaker. The trial court cites the testimony of the Petitioner, the Respondent, the custody evaluator, the witnesses for the Petitioner and the witnesses for the Respondent. FCOJD p. 9, 10.

Appellant attempts to use case law to show that joint custody is inapplicable in this case. However, a thorough reading of the cases will show that the trial court made the appropriate decision when it ordered joint legal and physical custody.

Many of the usual barriers to joint custody do not exist in this case. Minnesota courts have generally held that joint physical custody is not appropriate where the children were young and the distance between the parents would cause disruption in

shifting between homes. See *Mansfield v. Mansfield*, 42 N.W.2d 315 (Minn. 1950); *Kaehler v. Kaehler*, 18 N.W.2d 312 (Minn. 1945); *Larson v. Larson*, 223 N.W. 789 (Minn. 1929). In the instant matter, the parties live less than ten miles apart and at the time of the trial the children were 11 and 14 years old. With the close proximity of the parents' homes, the children are able to attend the same schools, participate in the same activities and keep the same friends regardless of which parent is exercising parenting time. There is little or no disruption in the children's lives caused by changing from one parent's house to the other.

Appellant appears to center her argument on the purported inability of the parties to communicate. Appellant relies, in great part, on the harassment restraining order obtained following trial, as well as her own refusal to follow the parenting time schedule or pay child support as ordered by this court. Appellant is attempting to show the Court that since *she* will not cooperate with Respondent and the court's orders, this Court should reverse the trial court's decision by withdrawing joint custody.

Minnesota courts have denied joint custody "where the difficulties between the parties were so significant and pervasive as to preclude cooperation." *Wopata v. Wopata*, 498 N.W. 2d 478, 483 (Minn.Ct.App. 1993). However, the difficulties that exist between the parties in this matter do not rise to the level of precluding cooperation. As the trial court stated in its Findings, the parties had been able to work together to resolve issues in the best interest of their children prior to the trial in this matter. (FCOJD Finding ¶XIII(14(a)).)

Minnesota courts have upheld grants of joint custody where the parties' inability to cooperate was of recent origin or where the parties were able to cooperate to resolve major decisions concerning the children. *Veit v. Veit*, 413 N.W.2d 601 (Minn.Ct.App. 1987); *Berthiaume v. Berthiaume*, 368 N.W.2d 328 (Minn.Ct.App. 1985). The facts in *Veit* are strikingly similar to the instant case. In *Veit* "both parents were primarily involved in parenting their children...the children have established significant emotional bonds with each of the parents...each of the parents had different values and different styles of parenting, both of which were of significant importance to the continued best interests of the minor children...both parties have significant attachments to the children...both [parents] love their children" and the fact "that the parties cannot cooperate is of relatively recent origin." *Veit*, 413 N.W.2d at 603-04. Like *Veit*, the trial court herein stated that both parents provided significant care for the children and in fact shared the duties as caretaker, and that both parties have a loving relationship with the children.

As stated above, the *Veit* court determined that the differing parenting styles of each parent were equally important to the ongoing well being of the children; similarly, the trial court noted that the custody evaluator indicated "the children's ability to interact equally with each parent is critically important to their well-being." (FCOJD Finding ¶XIII(5).) Additionally, the custody evaluator believed that the children "would be harmed if either parent were to have sole physical custody." (FCOJD Finding ¶XIII(14(c)).)

In view of all relevant statutory factors, the best interest of the parties' children is achieved by the trial court's grant of joint custody. The trial court's findings regarding custody are well reasoned and supported by the evidence herein and its conclusions are supported by the case law.

**IV. THE DISTRICT COURT PROPERLY APPLIED THE LAW IN CLASSIFYING THE INCOME APPELLANT RECEIVED DURING THE MARRIAGE AS MARITAL PROPERTY SUBJECT TO DIVISION BY THE COURT.**

Issues of property division are matters to be addressed by the trial court. *Hertz v. Hertz*, 304 Minn. at 146, 229 N.W.2d at 45 (1975). The trial court's discretion in property division matters is broad, and "will be overturned only upon a clear showing that such discretion has been abused." *Id.*, 304 Minn. at 147, 229 N.W.2d at 45, *emphasis supplied*. The general rule is that all property acquired after the marriage and before the valuation date is presumed to be marital regardless of whether the spouses hold title individually or in co-ownership. Minn. Stat. §518.54, subd. 5. The presumption that property is marital is overcome only by the introduction of evidence to show that the property is non-marital. Minn. Stat. §518.54, subd. 5.

Once the facts surrounding the property have been established, the determination of "whether property is marital or nonmarital is a question of law upon which [the appellate] court will exercise its independent judgment." *Wopata v. Wopata*, 498 N.W.2d 478, 484 (Minn.Ct.App. 1993). However, the "reviewing court must defer to the trial court's underlying findings of fact." *Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997); *see also Swick v. Swick*, 467 N.W.2d 328, 330 (Minn. Ct. App. 1991). A party asserting

that an asset is non-marital bears the burden of proof and must do so by showing a preponderance of the evidence that the asset is, in fact, non-marital. *Id. See also, Coffel*, 400 N.W.2d at 374. In order for property to be characterized as non-marital, there must be a showing that the property meets one of the following requirements:

- (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;
- (b) is acquired before the marriage;
- (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);
- (d) is acquired by a spouse after the valuation date; or
- (e) is excluded by a valid antenuptial contract.

Minn. Stat. § 518.54 subd. 5.

- A. **Finding that the income Appellant received during the marriage was marital property was an appropriate exercise of the trial court's discretion because the record reasonably supports that determination based on evidence of the nature of the income and the parties' conduct with respect to the income.**

Although Appellant alleges the per capita payments she receives as a member of the Shakopee Mdewakanton Sioux (Dakota) Community are non-marital in nature, those payments do not fall within any of the exemptions to marital property established by Minn. Stat. § 518.54 subd. 5. The parties did not enter into an antenuptial agreement. The payments were received as a benefit of Appellant's membership within the Shakopee Mdewakanton Sioux (Dakota) Community; they were not a gift, bequest, devise or inheritance. Appellant received regular per capita payments while the parties were married. Throughout the entire proceeding, Respondent understood that any such payments received by Appellant prior to the marriage or subsequent to the dissolution would constitute Appellant's non-marital property. As such, Respondent sought only to

have the trial court divide the income – and property acquired by that income – accrued during the parties’ marriage.

Appellant argues that her membership in the Shakopee Mdewakanton Sioux (Dakota) Community is a non-marital asset. Even if Appellant established the membership itself is a non-marital asset, the per capita payments would be considered marital income that is divisible upon dissolution.

Minnesota courts consistently follow the logic expressed by the *Johnson* court when it stated “Marital judgment governs decisions for spending or saving income of a couple, and there is no rational basis for distinguishing the effects of that judgment on income from different sources.” *Johnson v. Johnson*, 388 N.W.2d 47, 49 (Minn.Ct.App. 1986). Moreover, when dealing with non-marital assets the courts recognize a difference between “appreciation in value and the income produced by an investment” – appreciation in value remains non-marital, while investment income becomes marital. *Id.*

When dealing with income from a non-marital asset, it is important to distinguish between appreciation and income. The Minnesota courts have often turned to an analysis of whether or not the income has been realized. When the income has not been realized, the amount of control exerted by the individual claiming the non-marital interest, when and if those incomes are realized, also comes into play. In the instant case, we need not evaluate Appellant’s control over the organization in disbursing the income, as it is clear from the record that she regularly received (realized) income from her membership in substantial amounts. (FCOJD Finding ¶¶ XII, XVIII.) It is these amounts received that are marital income and were properly divided by the trial court in this proceeding.

The *Gottsacker* court flushes out much of the above discussion regarding appreciation versus income. In *Gottsacker*, the parties seeking the dissolution owned several shares in multiple closely held corporations run by the ex-wife's family. The court held that the shares gifted to the wife were her non-marital assets, but those shares that were purchased with corporate distributions from the non-marital stock were marital assets. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 859 60 (Minn. 2003). As such, dividends and distributions from non-marital stock were considered marital income. *Gottsacker* states, "If the interest is 'income' from the non-marital asset, it is marital income." *Id.* at 854. The discussion regarding corporate dividends in *Gottsacker* is analogous to the facts in the instant case.

As with stock ownership in *Gottsacker*, Appellant's membership in the Shakopee Mdewakanton Sioux Community grants her both governance and financial rights. Appellant's right to vote on various Tribal issues is not a part of this dispute; however, her right to corporate earnings is at issue. Similar to the non-marital stock in *Gottsacker*, Appellant may have a non-marital interest in her membership in the Shakopee Mdewakanton Sioux (Dakota) Community; however, the per capita payments, like the corporate dividends, are marital income. The per capita payments Appellant received as a member of the Mdewakanton Sioux Community are distributions of the Community's corporate earnings, which, like the distributions in *Gottsacker*, are marital property.

*Gottsacker* partially relied on *Swick* which stated that interest earned on a non-marital certificate of deposit was marital income. *Swick*, 467 N.W.2d 328. The *Swick* decision relies heavily on the difference between appreciation and income. The

difference is explained by noting that appreciation of a non-marital asset can only be realized when the asset is sold and would therefore remain non-marital. However, income from a non-marital asset is liquid, available to the parties and therefore “becomes an asset ‘acquired during the marriage’ and, as marital property, is divisible between the parties upon dissolution.” *Id.* at 331. The Court further stated that since the interest from the certificate of deposit was a liquid asset available to the parties during the marriage, “Minnesota law treats such income as marital property divisible upon dissolution.” *Id.* at 332.

In the instant case, Appellant received regular per capita payments during the parties’ marriage. Those payments were received as checks which upon receipt, could be cashed or deposited in the same manner as any other check. The per capita payments were funds that were available to be spent by the parties upon receipt. As such, the per capita payments were a liquid asset and, following *Swick*, should be treated as marital income.

*White* further states that “[w]hile the initial contribution to principal remains non-marital, the court stated that realized interest constitutes ‘income’ and not ‘appreciation.’” *White v. White*, 521 N.W.2d 874 (Minn.Ct.App. 1994). This is analogous to the case herein by noting that Appellant’s membership rights in the Community may be her non-marital property, which she would then be allowed to retain as a non-marital asset after dissolution. The fact that Appellant’s membership in the Community has increased in value due to the expansion of gaming on the Shakopee Mdewakanton Sioux (Dakota) Community is not of concern. However, the per capita payments received during the

marriage constitute realized income during the marriage and are marital property that is divisible upon dissolution.

Like *Gottsacker*, *White* also relies on several cases which discuss various non-marital assets which generate income resulting in marital income. (Income interest generated from non-marital interest-bearing debentures is marital income) *Moore v. Moore*, 391 N.W.2d 42 (Minn.Ct.App. 1986); (rental income from a non-marital apartment building is marital income) *Campion v. Campion*, 385 N.W.2d 1 (Minn.Ct.App. 1986); (rental income for non-marital farmland is marital income) *Pearson v. Pearson*, 363 N.W.2d 337 (Minn.Ct.App. 1985). A review of the above cases shows that Minnesota courts have consistently held that income acquired during the marriage is marital in nature and divisible upon dissolution, regardless of the source of that income.

Under extremely limited circumstances, the Minnesota courts are willing to extend the non-marital designation to “income” generated by a non-marital asset. This limited context occurs “[w]here...the non-marital assets are shown to have been kept separate from the marital estate and where there is no marital investment or entrepreneurial decisions made regarding the non-marital assets, a district court may treat interest earned by the non-marital assets as non-marital property.” *Bentfield v. Bentfield*, 2004 WL 1381653 (Minn. Ct. App.). The fact situation described in *Bentfield* is distinguishable from the case at hand. In *Bentfield*, the wife had inherited a sum of money that was deposited into an interest bearing account. Marital funds were never added to the account, nor were any decisions made regarding the management of the account. In fact,

it appears from the opinion that the fund was almost completely ignored throughout the marriage except for a very small number of withdrawals. Substantial weight is put on the fact that the account was kept completely separate from any other monies. Conversely, in the instant case, the per capita payments received by Appellant were consistently used by the parties to meet the financial needs of the family. Moreover, instead of placing the per capita payments in a separate location where they would only be reachable by the passive appreciation of market forces, these per capita payments were included in joint bank accounts and the sum of the payments were subject to the marital judgment rule expressed in *Johnson*, 388 N.W.2d 47.

At trial the Respondent testified that he was responsible for the management of the parties' finances and was responsible for making decisions concerning monthly expenses and savings. (During his testimony, the Respondent provided a log that he kept showing the monthly accounting of the family finances which were derived from the income the Appellant received.) The Appellant presented no testimony that would suggest that her per capita payments fell within the narrow *Bentfield* exception. The trial court found Respondent's testimony to be credible as can be seen when it stated

[T]he parties used the joint [checking and savings] account for most of their expenses, and [Appellant] Wife allowed [Respondent] Husband to spend her income freely during the marriage. Additionally, [Respondent] Husband participated in the parties' decisions regarding the spending, saving, and investing of [Appellant] Wife's income."

- B. Appellant's reliance on *Kucera, Coursolle* and the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community is misplaced.

Making the argument for the first time, Appellant's brief states that the Minnesota Supreme Court in *Kucera* "found that when the 'plaintiff contributed nothing to the defendant's assets and that the defendant's assets are of a highly speculative nature' the trial court may refuse to award marital property to the plaintiff." Appellant's Brief p. 19. However, a careful reading of *Kucera* reveals that the trial court did not refuse to award marital property, as Appellant contends, but refused to grant an award of the husband's non-marital property to the wife under the then existing Minn. Stat. §518.59, similar to now Minn. Stat. §518.58 subd. 2, which deals with marital property. *Kucera v. Kucera*, 146 N.W.2d 181 (Minn. 1966). The *Kucera* court specifically stated "The record is clear that the property referred to was not acquired during coverture." *Id.* at 184. Conversely, the property in question in the instant proceeding is the money acquired by the parties during the marriage. Respondent did not seek, nor did the court award to him, Appellant's premarital assets<sup>1</sup>.

Further, Appellant raises the issue of the "highly speculative nature" of the assets as discussed in *Kucera*. The court in *Kucera* stated that highly speculative nature of the premarital assets owned by the husband may be one reason to justify the trial court's refusal to make an award of that property. *Id.* Even if considered, the "highly speculative nature" aspect of *Kucera* is not applicable because the property in question herein consisted for the most part of the parties' checking and savings accounts;

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<sup>1</sup> Respondent did ask for and was awarded a trailer home owned by Appellant prior to the parties' marriage; however, he asked that the value of that property be offset by awarding Appellant additional marital funds. The trailer home was sought by Respondent to help provide continuity in the lives of the parties' children. The Appellant owned and lived in a second, much larger, premarital home nearby.

Respondent did not ask the court to divide Appellant's membership in the Shakopee Mdewakanton Sioux (Dakota) Community. The value of a dollar already in a bank account is not a "highly speculative" asset.

Similar to *Kucera*, for the first time in this proceeding Appellant discusses *Coursolle* in her brief. *Coursolle* is distinguishable from the instant case. The reviewing court in *Coursolle* appears to base its opinion on a quote from the district court when it stated "this was a marriage in ceremony only and does not entitle...[respondent to] a share of [appellant's] property." *Coursolle v. Coursolle*, 2002 WL 31501904, at 5 (Minn.Ct.App. 2002).

The parties in *Coursolle* had never lived together, as they met while Appellant was incarcerated and he remained in prison throughout the 14-month marriage. *Id.* at 2. Moreover, the parties had "spent less than 100 hours in each other's company, have never had sexual relations and have never established a home together," and "the respondent quit her job and contributed only to the depreciation of the marital estate. She was never a homemaker for appellant. There was no commingling of assets; respondent simply spent appellant's assets. *Id.* at 3,5.

Conversely, the parties in the instant proceeding lived together for more than five years, both prior to and during the marriage. Respondent has always helped to care for the parties' children and it was shortly after the parties' marriage that Respondent adopted Appellant's children from previous relationships. Both prior to and during the marriage, Respondent helped with home maintenance and ensured bills were paid on time. As stated above, the income derived from Appellant's membership in the

Community was, for the most part, deposited into joint checking and saving accounts. Respondent herein quit working in order to assist in the family routine, care for the children, manage the family finances and maintain the homestead.

*Coursolle* is a situation where the district court found that no marriage existed other than by ceremony because of the facts of that case. This is not a similar fact situation. *Dobrin* states that in a marriage dissolution one case does not create an immutable rule of law for all future dissolutions, the court must review the particular facts of each case. *Dobrin*, 569 N.W.2d 199, 201. The facts of the instant case are so far removed from those of *Coursolle* as to make it inapplicable to the instant matter.

Appellant relies on the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community in support of her claim that all property held by the parties are her non-marital asset. Appellant's reliance on this provision is misplaced. 28 USC §1360, specifically states:

- (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, *and those civil laws of such State that are of general application to private person or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:*

Minnesota All Indian country within the State, except the Red Lake Reservation.

- (c) *Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.*

Emphasis added.

The Community's Domestic Code for those dissolutions brought within the tribal court does not apply to the case at hand as this matter was before a Minnesota District Court. The appropriate laws are those of the State of Minnesota and not those of the tribal court. The Domestic Code is contrary to the statutes and case law within the State of Minnesota and, as such, does not apply to this case.

Since the record includes ample evidence supporting the district court's conclusion that the per capita payments received by Appellant were marital income, the district court's decision does not constitute an abuse of discretion. Accordingly, this Court should affirm the district court with respect to its characterization of the property.

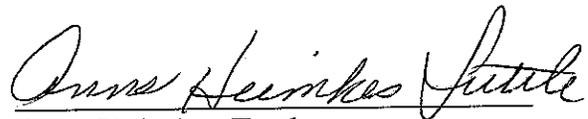
#### **CONCLUSION**

The district court, in the best position to assess the parties' actions and testimony, exercised its discretion appropriately in finding that joint custody was appropriate and that property acquired by the parties during the marriage was marital property. In all respects, the district court acted consistently with the law.

Since the district court's decision is reasonable and supported by facts in the record, and Appellant has failed to provide any clear evidence the district court abused its discretion, Respondent respectfully requests this Court affirm the decision below in all respects.

Dated: 1/12/06

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).