IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

APPEAL NO. 30738 & 30750

TAMMIE MORIN

Plaintiff/Appellant,

vs.

BRIAN BAXTER

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA
THE HONORABLE ROBERT GUSINSKY PRESIDING

APPELLANT'S BRIEF

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NOTICE OF APPEAL WAS FILED ON JUNE 21, 2024

Filed: 11/25/2024 12:41 PM CST Supreme Court, State of South Dakota #30738

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RECORD REFERENCES

Appellant Tammie Morin is referred to herein as "Tammie" and Appellee Brian Baxter is referred to herein as "Brian". References to the "Clerk's Index" are designated as "R" followed by the page number. References to the trial transcript are designated as "T" followed by the page number. References to the Appendix are designated as "APP" followed by the page number. References to other items are made by appropriate description.

JURISDICTIONAL STATEMENT

This is an appeal from a final Amended Judgment and Decree of Divorce entered by the Seventh Judicial Circuit Court in Pennington County, South Dakota on May 28, 2024. (R 2976; APP 1). Notice of Entry of the Amended Judgment was served and filed on May 29, 2024. (R 2979).

Appellant timely filed her Notice of Appeal and Docketing Statement on June 21, 2024. (R 2989, 3011). This is an appeal as of right from a final judgment pursuant to SDCL § 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

A. Whether the circuit court's findings of fact that Tammie had agreed to the divorce being granted on grounds of irreconcilable differences was clearly erroneous?

Dunham v. Sabers, 2022 S.D. 65, 981 N.W.2d 620

Dussart v. Dussart, 1996 S.D. 41, 546 N.W.2d 109

Hybertson v. Hybertson, 1998 S.D. 83, 582 N.W.2d 402

Walker v. Walker, 2006 S.D. 68, 720 N.W.2d 67

B. Whether the circuit court erred when it transferred and/or gifted the Vanguard 529 Savings Plan accounts to the parties' adult children?

26 U.S.C. § 529

SDCL § 25-4-44

SDCL Chapter 13-63

Behrens v. Behrens, 818 S.E.2d 55 (N.C. Ct. App. 2018)

Miller v. Brown, 83 N.E.2d 252 (Ind. Ct. App. 2017)

Nickles v. Nickles, 2015 S.D. 40, 865 N.W.2d 142

Watson-Wojewski v. Wojewski, 2000 S.D. 132, 617 N.W.2d 666

C. Whether the circuit court abused its discretion when it ordered the complete elimination of Brian's permanent alimony obligation after thirty-six months?

Arens v. Arens, 400 N.W.2d 900 (S.D. 1987)

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D. Whether the circuit court abused its discretion in limiting Brian's permanent alimony obligation to $7,500 per month?

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

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

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E. Whether the circuit court abused its discretion in denying Tammie attorney's fees without considering this Court's two-step analysis mandated in divorce actions?

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Osdoba v. Kelley-Osdoba, 2018 S.D. 43, 913 N.W.2d 496

F. Whether the circuit court's finding that Tammie's post filing debts were non-marital and not included in the court's property distribution was clearly erroneous?

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

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

G. Whether the circuit court abused its discretion by failing to include the water repair estimate expense as a deduction in the value of the marital residence?

Abrams v. Abrams, 516 N.W.2d 348 (S.D. 1994)

Osdoba v. Kelley-Osdoba, 2018 S.D. 43, 913 N.W.2d 496

STATEMENT OF THE CASE

This is an appeal from the May 28, 2024 Amended Findings of Fact and Conclusions of Law and the Amended Judgment and Decree of Divorce of the Honorable Robert Gusinsky, Seventh Judicial Circuit, Pennington County, South Dakota. (R 2962, 2976. APP 1, APP 4).

The trial took place April 22-25, 2024 and May 15, 2024. (R 2962). The circuit court issued its bench decision on May 15, 2024. (T 1204-19). The Court

did not request that either party submit proposed findings of fact and conclusions of law. Instead, the court announced it would prepare its own. (T 1204-05).

On May 22, 2024, the circuit court entered its Findings of Fact and Conclusions of Law. (R 2938). On May 22, 2024 the circuit court entered its Judgment and Decree of Divorce. (R 2935). On May 28, 2024, the circuit court entered its Amended Findings of Fact and Conclusions of Law. (R 2962, APP 4). On May 28, 2024, the circuit court entered its Amended Judgment and Decree of Divorce (R 2976, APP 1).

On May 29, 2024, Brian served Notice of Entry of the Amended Judgment and Decree. (R 2979). Tammie filed her Notice of Appeal on June 21, 2024 (R 2989).

STATEMENT OF FACTS

Tammie, age 57, and Brian, age 58, met in 1989 while attending the University of Montana. (T 26, 30, 665). They dated for approximately six years before getting married on May 20, 1995. (T 31). Three children were born to the marriage, all of whom have now reached the age of majority. (T 35, 39, 665).

Tammie graduated from the University of Montana with a bachelor's degree. (T 27). She then attended the University of Montana law school where she obtained her juris doctorate in 1992. (T 28). Tammie was admitted to the Montana Bar and the Michigan Bar. (T 28). Tammie has maintained her Montana license on an inactive status. (T 234).

Brian served in the United States Air Force prior to attending medical school. (T 666). Brian obtained his undergraduate degree from the University of Montana. (*Id.*) He obtained his MD from the University of New Mexico. (R 2963 ¶ 14). Brian then completed four years of residency in radiology in Ann Arbor, Michigan and one year in a fellowship program in Hanover, New Hampshire. (*Id*).

After completing his medical education, Brian was employed in Centerville, Ohio for four years. (T 666). He did so to qualify for educational funding provided by the Air Force. (T 667, R 2963 ¶ 15). While employed in Centerville, Brian was also employed part-time in Columbus, Ohio. (*Id.*)

After the birth of their first son in November, 1998, the parties agreed that Tammie should discontinue her professional career to become a stay-at-home mother and homemaker. (T 36). Both parties wanted the children to be raised with a parent at home. (*Id.*) The parties agreed that Tammie should fill that role while Brian continued his medical career. (*Id.*)

Tammie has not been gainfully employed outside the home for the past 27 years having devoted herself to being a fulltime wife, mother and homemaker. (T 40). Tammie has no recent education or special skills that would allow her to significantly increase her earning capacity. (R 2974). She spent most of her adult life caring for the needs of the parties' children which the circuit court found contributed value to their marriage and their lives. (*Id.*) Tammie's contributions to the marriage allowed the parties to attain a lifestyle that both parties wanted. (*Id.*) The court concluded that Tammie's contributions as a homemaker and stay-at-

home mother enabled Brian to complete his medical training and obtain his current career. (*Id.*)

In 2002, Tammie and Brian relocated to Rapid City, South Dakota and have maintained their residency there since that time. (T 39). Tammie has been very involved in her church and community throughout the marriage. (T 45). She was a bible school teacher for approximately ten years. (T 45). At the time of trial, she served as an assistant supervisor of the children's program in an open bible study program. (T 45, 46, 240). Tammie attended a bible study fellowship for two years. (T 46). These positions have all been volunteer-based with no compensation or benefits. (R 2964 ¶ 19). These positions were very important to Tammie, and she found her work in these roles fulfilling. (*Id.*)

Tammie was extremely involved in the children's lives. (R 2964 ¶ 20). She spent substantial time aiding the children's development, education, extra-curricular activities and religious involvement. (T 50-64; R 2964 ¶ 20). Both parties agreed that Tammie added considerable value to their marriage and family by being a stay-at-home mother and homemaker. (*Id.)*

Over the past two decades, since 2002, Brian has continued his medical career in Rapid City as a radiologist with Dakota Radiology. (T 667).

At the time of trial, Tammie was suffering from several health-related issues including recovery from anterior and posterior repair of the rectocele, high blood pressure, hypothyroidism, left knee replacement surgery recovery and iron deficiency anemia. (T 171-175, T 647-48, T 661; R 1098, 1170). In addition,

Tammie needed a right knee replacement and repair of a meniscus tear. She also suffered health issues related to obesity and was diagnosed with prediabetes. (*Id*).

Facts Related to Standard of Living

Over the course of their 29 year marriage, Brian earned a substantial income. During the past several years, he has earned approximately $1,000,000 per year. (R 1426, 1502, 1585, 1659 and 2376). In 2023, Brian's gross annual income exceeded $830,764 (R 2376, 2927). At the time of trial, Brian's monthly disposable income was $38,959 per month (net after contributions to investment and retirement accounts and taxes). (R 2927).[1]

As a result, Brian and Tammie enjoyed an upper-class lifestyle. They spent money freely, frequently traveled internationally and treated themselves to a variety of entertainment -- often with other people. (T 178-179; 1086). During the marriage, in addition to meeting their regular living expenses, they regularly deposited money into savings, investment and retirement accounts. As noted above, the net equity in the parties' marital estate at the time of trial exceeded $7.4 million with the majority amassed to their savings, investment and retirement accounts. (R 2972, APP 14).

In addition, Tammie was able to make regular charitable contributions and donations to various non-profit organizations and religious organizations throughout the course of their twenty-nine year marriage. (T 157-58, 1097). The

[1]At trial, Brian offered testimony from his CPA that he intends to make annual retirement and investment contributions of $73,500 for himself for the foreseeable future. (T 1175).

circuit court found Tammie's charitable contributions and religious donations of $62,000 over the 18 month period of March 2022 to September 2023, were reasonable in light of the parties standing in the community. (R 2971 ¶ 23; APP 13).

Facts Related to Extreme Cruelty

In March of 2023, Tammie sought a divorce from Brian. (R 1, 14). In her prayer for relief, Tammie sought a divorce on the grounds of extreme cruelty *or* if a settlement was reached, upon irreconcilable differences. (R 15). As no settlement was reached, Tammie pursued the divorce on the grounds of extreme cruelty. (T 19).

Brian counterclaimed for a divorce solely on the grounds of irreconcilable differences. (R 21). In her Answer to the Counterclaim, Tammie acknowledged Brian's allegation of irreconcilable differences; however prayed for the relief set forth in her Complaint. (R 27).

At trial, the only ground Tammie asserted was extreme cruelty as grounds for the divorce. (T 67). At trial, Tammie alleged that Brian sexually abused her throughout the marriage. (T 67-88). Tammie sought therapy to cope with the abuse. (T 175-177). Tammie's board certified OBGYN expert, Dr. Rochelle Christianson, supported Tammie's assertion that Brian had subjected Tammie to sexual abuse. (T 727-739; R 1098). Dr. Christenson offered surgery. (T 715-16). Dr. Christenson opined that Tammie's large grade 4 rectocele was caused by anal penetration and sexual assault. (T 745). The circuit court rejected Tammie's

testimony as well as Dr. Christenson's testimony. (R 2968). Brian admitted that Tammie experienced a lot of emotional pain during the course of their marriage. (T.1050-51). He also admitted that he knew Tammie was participating in sexual abuse group therapy. (T 1051). Brian admitted he had sodomized Tammie but claimed it was always consensual. (T 801-04). Tammie explained that during sex, Brian had hurt and humiliated her when he shocked her with a dog shock collar (T 80-81). Brian admitted using the dog shock collar on Tammie. (T 1052)

The circuit court prohibited Tammie from presenting the testimony of two material witnesses related to her sexual abuse, namely, Dr. Christenson's PA Diane Weber and Tammie's sexual group therapist, David Jetson. (T 1180-1195). In both instances, and notwithstanding the recent appearance of Tammie's counsel, the court enforced its strict discovery and disclosure deadline of October 31, 2023 and ruled that Weber and Jetson were not true rebuttal witnesses. (T 1183-85; 1193-95).

The circuit court did not address Brian's other conduct which subjected Tammie to extreme cruelty. Tammie has been a devout Christian throughout her life. (T 45). At the outset of the marriage, Brian claimed to be a Christian but later described himself as an atheist – a non-believer. (T 52, 785-86). After the 2016 national election, Brian labeled Christians as "ignorant", "murderers" and "anti-vaxxers." (T 52-53). He called Tammie a "homophobe". (T 99). And, in front of their children, he called Tammie a "Trumper", a "right-win radical" and a "Jesus Freak". (T 100). Brian's repeated verbal attacks against Tammy and her religious,

moral and political beliefs caused considerable tension and malcontent in the household.[2] Brian's conduct played a significant causative role in the irretrievable breakdown of the marriage and Tammie's claim of extreme cruelty.

Despite evidence to the contrary, the circuit court denied Tammie's extreme cruelty grounds and granted the divorce only on grounds of irreconcilable differences. (R 2976). The circuit court concluded Tammie and Brian had "agreed" to the divorce on grounds of irreconcilable differences and declined to grant the divorce on the grounds of fault by either party citing *Dunham v. Sabers,* 2022 S.D. 65, 981 N.W.2d 620. (R 2968).

Facts Related to Division of Marital Property & Spousal Support

The circuit court divided the parties' marital property and debts. (R 2972, APP 14). Tammie and Brian each received an equal 50/50 share of the marital estate. The circuit court awarded each party a net equity sum of $3,734,434. (*Id.*)

Tammie sought an award of permanent alimony until her death. (R 961-62, 1736). Prior to the trial and beginning in September 2023, Brian paid $7,500 per month to Tammie to cover her basic living expenses. (T 365, 415, 835). In addition, Brian paid other monthly expenses Tammie incurred including property

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[2]The circuit court found the marriage relationship began deteriorating following the 2016 national election. (R 2964 ¶ 26). The parties were unable to discuss their moral and political views in a civil manner. (*Id.*) This led to considerable tension and discontent in the household. (*Id.*) Specifically, Tammie's closely held religious beliefs and Brian's scientific education became a point of malcontent. (*Id.*) This persisted for several years and ultimately led to the irretrievable breakdown of the marriage. (*Id.*)

taxes ($692), auto insurance ($110); property insurance ($316); electricity ($235); garbage ($51); cell phone ($64) and medical insurance. (T 1127-1129; R 2464). As such during their separation and prior to trial, Brian was providing Tammie with at least $8,858 per month toward her living expenses in addition to paying Tammie's health insurance.

At trial, both party's introduced monthly budgets itemizing Tammie's living expenses. Tammie's monthly budget totaled approximately $23,000 inclusive of health, vision and dental insurance.[3] Brian's proposed budget of Tammie's monthly expenses totaled $6,513.39 exclusive of any health, vision or dental insurance. (R 2464).

At trial, Brian conceded Tammie was legally entitled to alimony. (T 248) and proposed to the court that he pay Tammie $7,500 per month spousal support for 36 months. (T 22). Brian's proposal consisted of the $6,513.39 monthly expenses he had listed on his proposed budget together with Tammie's health insurance premium charges of $942. (T 894). The circuit court awarded Tammie alimony of $7,500 per month and ordered Brian to pay Tammie's health insurance premiums for a three year period. (R 2973, 2977).

The circuit court made no allowance for Tammie to continue to make

[3]This sum does not include various expenses Tammie claimed in her monthly budget itemization including $5,000 for attorney's fees, and $2,000 for home repairs. These appear to be more appropriately addressed under Tammie's request for attorney fees and the needed repairs to Tammie's water system as a deduction to the value of the house she was awarded.

contributions to savings, investment and retirement accounts ($3,000) or charitable contributions ($2,000) as she had been accustomed to during their marriage. Tammie testified that she had historically made charitable donations of $3,000 per month. (T 47). Brian acknowledged that Tammie had made charitable contributions to various organizations prior to the divorce. (T 1097). The parties' investments and retirement account values establish that the parties made substantial contributions to their savings, investment and retirement accounts throughout the marriage.

The circuit court made no allowance for Tammie's future medical ($883): dermatology ($275); eye doctor, contacts, glasses ($135); vitamins ($150); prescriptions ($1,000); and counseling ($300). (R 1737, 2464). Instead, the circuit court appears to have accepted Brian's position that these particular expenses would be $0 because they would be paid via Tammie's Health Savings Plan. (1737, 2464).

Further, the circuit court made no allowance for Tammie's future debt payments, Tammie's personal fitness trainer and her needed vehicle purchase.

Facts Related to Miscellaneous Matters

At the time of trial, the parties had three Vanguard 529 Savings Plan accounts that had been set up for the parties' three adult children. Tammie proposed that "[t]he funds be divided equally between the parents to distribute for the children's education". (R 1736). As of December 31, 2023, the three Vanguard 529 accounts had a collective value of $339,547. (R 2352–2354). Although the

accounts constituted a part of the marital estate, the circuit court excluded them from the marital estate based on a (non-existent) "agreement" between the parties. (R 2971 ¶ 13, 2977). The circuit court denominated the accounts as marital and then awarded the accounts directly to the three adult children. (R 2971 ¶ 13 and T 1196-1204).

The circuit court declined to include in the marital estate several debts Tammie incurred after the divorce action commenced, including a $10,000 loan from Dr. Raymond, $12,512 in credit card debt owed to Wells Fargo and a $5,000 loan from the Helsdons. (R 2970-2971). As stated earlier, the circuit court also declined to include any necessary payments ($1,500 per month) on these debts in Tammie's budget for purposes of alimony.(R 1737).

The circuit court also declined to reduce the value of the marital home by the estimate from Farmers Supply in the amount of $44,668 (R 1763) to make needed repairs to the marital residence that was awarded to Tammie including replacement of the water system associated with the home. (R 2971). As stated earlier, the circuit court also declined to include any necessary payments ($2,000 per month) on this future expense in Tammie's budget for purposes of alimony.(R 1737).

Tammie also filed a motion for her reasonable attorney fees. (R 1786). The circuit court summarily rejected Tammie's motion for attorney fees. The court did so without entering any findings of fact and conclusions of law to support its decision. (R 2972 ¶ 26; APP 14).

STANDARD OF REVIEW

The circuit court's determination of the grounds for divorce is reviewed for clear error. *Evens v. Evens,* 2020 S.D. 62 ¶ 20, 951 N.W.2d 268, 276. "Clear error is shown only when, after a review of all the evidence, we are left with the definite and firm conviction that a mistake has been made." *Id.*

The circuit court's determinations on awards of attorney fees and the division of property are reviewed for an abuse of discretion." *Evens v. Evens, supra* at 277. Similarly, this Court reviews alimony determinations under the abuse of discretion standard. *Leedom v. Leedom,* 2020 S.D. 40, ¶ 11, 947 N.W.2d 143, 147. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Evens v. Evens, supra* at 277.

Questions of law are reviewed de novo. *Oman v. Oman,* 2005 S.D. 88, ¶ 4, 702 N.W.2d 11, 13.

LEGAL ARGUMENT

A. THE CIRCUIT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT TAMMIE HAD AGREED TO THE DIVORCE BEING GRANTED ON GROUNDS OF IRRECONCILABLE DIFFERENCES WAS CLEARLY ERRONEOUS .

The circuit court erred in finding the parties had mutually agreed to a divorce being granted on grounds of irreconcilable differences. Tammie never consented to the divorce being granted on grounds of irreconcilable differences and produced evidence of extreme cruelty at trial. Tammie should have been

granted a divorce on grounds that Brian subjected her to extreme cruelty during the marriage.

SDCL § 25-4-17.2 precludes a circuit court from entering a divorce decree on the grounds of irreconcilable differences without the parties' consent. The statute states in relevant part:

> The court may not render a judgment decreeing the legal separation or divorce of the parties on the grounds of irreconcilable differences without the consent of both parties unless one party has not made a general appearance.

This Court considered the statutory consent requirement in *Dussart v. Dussart,* 1996 S.D. 41, 546 N.W.2d 109, *Walker v. Walker,* 2006 S.D. 68, 720 N.W.2d 67 and most recently in *Dunham v. Sabers,* 2022 S.D. 65, 981 N.W.2d 620. Each of these cases, which are entirely distinguishable from the immediate case, is discussed below.

In *Dussart,* plaintiff filed a divorce complaint based on irreconcilable differences. 1996 S.D. 41 ¶ 2, 546 N.W.2d at 110. She then filed an amended complaint asserting divorce based on fault. *Id.* The circuit court granted a divorce based on irreconcilable differences. *Id.* On appeal, plaintiff argued that she did not consent to irreconcilable differences because her amended complaint did not allege that ground. *Id.* ¶ 4, 546 N.W.2d at 110–11. The plaintiff also argued that evidence of fault was presented at trial and thus tried on that basis "by implied consent of the parties." *Id.*

On appeal, this Court acknowledged that "a divorce may not be granted on

irreconcilable differences unless both parties consent." *Id.* ¶ 5, 546 N.W.2d at 111. However, this Court affirmed the circuit court's divorce ruling because "[n]othing in the record show[ed] the plaintiff had] legally discarded irreconcilable differences as an alternative basis for the divorce." *Id.* The plaintiff's amended complaint was not properly before the circuit court because the plaintiff did not receive court approval to file the amended complaint and the record was "replete with evidence of the substantial differences between the parties from which the trial court could conclude irreconcilable differences existed and were consented to by both parties as the basis of the divorce." *Id.* Additionally, this Court further observed that "at no time—not during trial, after trial, or even after filing of the judgment—did [the plaintiff] move to have the pleadings conform to the evidence on fault to support her contention the issue was tried by implied consent." *Id.* ¶ 6, 546 N.W.2d at 111.

In *Walker,* the plaintiff pleaded irreconcilable differences as an alternative ground for divorce. 2006 S.D. 68 ¶ 13-18; 720 N.W.2d at 71-72. At trial, however, she refused to agree to a divorce based on irreconcilable differences. *Id.* Rather, she steadfastly sought a divorce ruling based on extreme cruelty. *Id.* On appeal, this Court rejected the plaintiff's position and ruled that the circuit court had not erred in granting the divorce based on irreconcilable differences as the plaintiff had not "ma[de] an oral or written motion to amend her complaint or otherwise withdraw[n] her alternative ground of irreconcilable differences". 720 N.W.2d at 72. Further, this Court noted the plaintiff had not "legally discard[ed]"

irreconcilable differences as an alternative ground for the divorce. *Id.* By pleading irreconcilable differences as an alternative ground in her complaint, she impliedly consented to a divorce based on that ground, thereby satisfying the statutory consent requirement. *Id.*

In *Dunham,* both parties pled alternative grounds for divorce based on irreconcilable differences and extreme cruelty. 2022 S.D. 65 ¶ 9, 981 N.W.2d at 74. At trial, Sabers sought the divorce on the grounds of extreme cruelty. 981 N.W.2d @ 85. However, like the plaintiff in the *Walker* case, Sabers had pled irreconcilable differences as grounds for divorce and thereby consented to a divorce based on that ground. *Id.*

Here, in contrast to *Dussart, Walker* and *Dunham*, Tammie's prayer for relief in her complaint (and in her response to Brian's counterclaim), sought a divorce on the grounds of extreme cruelty (unless the parties resolved their dispute by settlement). (SR 15). As no settlement was ever reached between the parties, Tammie did not "consent" to a divorce on grounds of irreconcilable differences. (T 19).

Unlike *Dussart, Walker* and *Dunham,* Tammie did not need to amend her pleadings (or move the circuit court at trial to amend her pleadings to conform to the evidence submitted at trial). During the pretrial conference Tammie's counsel emphasized that Tammie had reserved her right to move forward on grounds of extreme cruelty as alleged in her complaint. (HT 4/2/2024 page 45). Her pretrial conference checklist regarding grounds for divorce solely referenced extreme

cruelty. (SR 960-61). Additionally, in Tammie's request for relief she sought a divorce being awarded to her solely on "grounds of [e]xtreme [c]ruelty". (R 1735). At trial, she reiterated that she only sought a divorce on grounds of extreme cruelty. (T 19, 67; R 1735).

In decreeing the divorce on grounds of irreconcilable differences, the circuit court cited *Dunham.* (SR 2968, 2976). However, *Dunham* (and *Dussart* and *Walker)* are not factually applicable to this case. As SDCL § 25-4-17.2 precludes a circuit court from entering a divorce decree on the grounds of irreconcilable differences without Tammie's consent, the circuit court's divorce ruling must be reversed.

The circuit court should have granted Tammie a divorce based on the grounds she alleged in her complaint, extreme cruelty. SDCL § 25-4-4 defines extreme cruelty as "the infliction of grievous bodily injury or grievous mental suffering upon the other, by one party to the marriage". In *Hybertson v. Hybertson* 1998 S.D. 83, 582 N.W.2d 402, this Court analyzed this ground, stating in part as follows:

> "Any definition of extreme cruelty in a marital setting must necessarily differ according to the personalities of the parties involved. What might be acceptable and even commonplace in the relationship between rather stolid individuals could well be extraordinary and highly unacceptable in the lives of more sensitive or high-strung husbands and wives. Family traditions, ethnic and religious backgrounds, local customs and standards and other cultural differences all come into play when trying to determine what should fall within the parameters of a workable marital relationship and what will not. [citation omitted]. The Court must not focus on isolated incidents but must look at the evidence ...in light of the full context of the marriage."

Hybertson, 1998 S.D. 83 ¶ 9, 582 N.W.2d at 405.

Even without consideration of Brian's physical conduct, Brian's relentless verbal attacks on Tammie, viewed in the full context of their marriage and Tammie's devotion to Christianity, warranted a finding of extreme cruelty. As this Court has previously stated, "[i]t is all right for each spouse to have his or her own [n]otions and religious beliefs ..., but if one carries such beliefs to the extent of disrupting and destroying the family life, it seems his conduct becomes cruel treatment and outrage[ous] towards his or her mate. *Hybertson,* 1998 S.D. 83, ¶ 11, 582 N.W.2d 402, 407.

As Tammie did not consent to divorce on the grounds of irreconcilable differences, the circuit court erred and the case should be reversed and remanded to the circuit court with directions to grant Tammie the divorce on the grounds of extreme cruelty.

B. THE CIRCUIT COURT ERRED WHEN IT TRANSFERRED AND/OR GIFTED THE VANGUARD 529 ACCOUNTS DIRECTLY TO THE PARTIES' ADULT CHILDREN.

The circuit court committed reversible error when it excluded the value of the 529 Savings Plans from the property distribution, divested Tammie of her ownership of the accounts and ordered the accounts transferred and/or gifted to the parties' adult children.

South Dakota is an "all property state," meaning all property of the divorcing parties is subject to equitable division by the circuit court, regardless of

title or origin. *Nickles v. Nickles,* 2015 S.D. 40, ¶ 32, 865 N.W.2d 142, 153; *Halbersma v. Halbersma,* 2009 S.D. 98, ¶ 9, 775 N.W.2d 210, 214; *Endres v. Endres,* 532 N.W.2d 65, 68 (S.D. 1995). "In arriving at an equitable division of property, a circuit court must classify property as "marital" or "non-marital." *Nickles, supra.*

Here, the parties funded a 529 Savings Plan for each of their three children with Tammie being identified as the sole owner on all three accounts. As of December 31, 2023, the accounts had a collective value of $339,547. (R 2352 – 2354). "A 529 Savings Plan permits parents to set aside money for their children's college expenses under tax-favorable conditions." *Berens v. Berens,* 818 S.E.2d 155, 157 (N.C. 2018). A 529 Savings Plan is a qualified tuition program subject to the Internal Revenue Code, 26 U.S.C § 529 and SDCL Chapter 13-63 in South Dakota.

Under a 529 Savings Plan, the parents are under no obligation to spend the money in a 529 Savings Plan on the educational expenses of the children listed as the plan beneficiaries. *Berens,* 818 S.E.2d at 157; SDCL § 13-63-11 (providing that an "[a]ccount owner" of a 529 Savings Plan may withdraw all or part of the balance from the account).

Accordingly, the Vanguard 529 Savings Plan account funds were solely the property of the parties – the parents of the designated (now adult) children

beneficiaries -- not property of the children.[4] Tammie, the sole designated owner of the accounts, contended the accounts should be divided equally with each parent being in charge of 50% of the account funds. (T 14, 127-128, 1196-1204). At trial, Tammie asserted that she and Brian (the parents) were in the best position to determine how to distribute the funds (T 1196) and stated that she was willing to have the account funds listed in her column of the marital property distribution. (T 1203).

While the circuit court properly determined that the three Vanguard 529 Plan accounts were marital property, it *excluded* the value of the 529 Plans from the property distribution, divested Tammie of her ownership of the accounts and ordered the accounts transferred and/or gifted to the parties' adult children. (R 2971 ¶ 13).

As the parties' children had no ownership interest in the Vanguard 529 Plan account funds, and there was no agreement between the parties to transfer or gift the account funds to their adult children, the circuit court committed reversible error. An equitable division of marital property belonging to husband or wife or both cannot include the transfer of property to persons with no legal interest in the property.

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[4]The parties' adult children cannot be considered "owners" of the accounts either in trust or otherwise. *See e.g. Miller v. Brown,* 83 N.E.3d 252 (Ind. Ct. App. 2017).

The court in *Berens v. Berens,* emphasized the ownership issue in pertinent part as follows:

> Moreover, parents are under no obligation to spend the money in a 529 Savings Plan on the educational expenses of the children listed as the plan beneficiaries. For example, a family with four 529 Savings Plans, one for each of their four children, could later choose to use all the money for a single child with particularly high college expenses. Or those same parents could withdraw all the money, pay a tax penalty, and buy a vacation home. Whether these are wise decisions, or ones that parents likely would make, is irrelevant—parents *could* do so if they wanted, and this is proof that 529 Savings Plan contributions are not gifts to the plan beneficiaries. Thus, absent some additional actions by the parents to restrict the use of the 529 Savings Plan funds, those funds are solely the property of the parents.

Berens, 818 S.E.2d at 157.

Further, the circuit court's decision to divest Tammie of ownership and transfer the funds to the adult children effectively imposed an obligation on her to provide financial support to the parties' children beyond the age of 19. SDCL § 25-5-18.1 provides that the "parents of any child are under a legal obligation to support their child in accordance with the provisions of SDCL § 25-7-6.1 until the child attains the age of eighteen or until the child attains the age of nineteen if the child is full-time student in secondary school." This Court has held that a circuit court does not have "the authority or discretion to extend the application of [SDCL § 25-5-18.1] beyond the age of nineteen". *Watson-Wojewski v. Wojewski,* 2000 S.D. 132, ¶ 42, 617 N.W.2d at 677 (citing *Birchfield v. Birchfield,* 417 N.W.2d 891, 895 (S.D. 1988)).

In accordance with the circuit court's 50/50 marital property distribution, Tammie and Brian should each be awarded 50% of the value of the Vanguard 529 accounts.

C. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT ORDERED THE COMPLETE ELIMINATION OF BRIAN'S PERMANENT ALIMONY OBLIGATION AFTER THIRTY-SIX MONTHS.

"Permanent alimony is among several types of alimony recognized in South Dakota." *Lowe v. Schwartz,* 2007 S.D. 85, ¶ 12, 738 N.W.2d 63, 66 (citing *Sanford v. Sanford,* 2005 S.D. 34, ¶ 24, 694 N.W.2d 283, 290). "Permanent alimony is distinguishable from other forms of alimony in that it is intended as an allowance for support and maintenance for such things as food, clothing, habitation and other necessaries." *Lowe,* 2007 S.D. 85, ¶ 12 (citing *Fox v. Fox,* 467 N.W.2d 762, 767 (S.D. 1991)). "[C]ommon to [an award of permanent alimony] are payments until death of the recipient or other significant event, such as remarriage, which terminates the need for continuing support." *Lowe,* 2007 S.D. 85, ¶13 (citing *Sanford, supra*)

Tammie sought permanent alimony to pay for her reasonable and necessary living expenses until her death. (SR 961-62, 1736). The circuit court ordered Brian to pay permanent alimony of $7,500 per month. However, -- and although Brian regularly earns an annual gross income of approximately $1,000,000 -- the circuit court's order limited Brian's $7,500 monthly alimony obligation to a period of just 36 months. The circuit court did not explain its rationale; it appears to have

based its decision on the *assumption* that Brian would retire when he turned 62, three years from the date of the divorce trial.[5] Brian's expressed plan to retire in 3 years should not dictate the court's length of his alimony obligation.

The circuit court's award of alimony for a period of 36 months was arbitrary and unreasonable and requires reversal. An alimony award cannot be based on assumptions regarding the future financial circumstances of the parties. Rather, it should be granted "on the premise that a trial court cannot foresee all circumstances which may arise after the original decree is entered." *Saxvik v. Saxvik,* 1996 S.D. 18, ¶11, 544 N.W.2d 177, 182 (citing *Foley v. Foley,* 429 N.W.2d 42, 46 (S.D. 1988)).

In *Guindon v. Guindon,* 256 N.W.2d 894 (S.D.1977), this Court held the circuit court abused its discretion when it terminated alimony 24 months after the divorce decree where it appeared the trial court had *assumed* certain events would occur in the future such as the husband's dire predictions of decreased income in the future and the wife becoming self-supporting within 24 months. *Id.* at 898. This Court in *Guindon* modified the husband's permanent alimony obligation to provide for its continuation until the death or remarriage of his ex-wife. *Id.*

Brian should have been ordered to pay permanent alimony for the remainder of Tammie's life. Rather than terminating Brian's permanent alimony obligation after 36 months based on assumed future facts, Brian's obligation

[5]Brian advised the court he would pay Tammie $7,500 per month spousal support for 36 months. (T 22). Brian conceded Tammie was legally entitled to alimony. (T 248).

should continue until Tammie dies, subject to a change in circumstances modification under SDCL § 25-4-41 if Brian does, ***in fact***, discontinue employment at age 62. *See e.g., Arens v. Arens,* 400 N.W2d 900, 901 (S.D. 1987) (holding that several permanent alimony factors, including a 26-year marriage, the husband's greater earning capacity, the parties' pre-divorce social standing and the husband's fault weighed in favor of the wife's request for permanent alimony for the remainder of her life or until she remarried); *Scherer v. Scherer,* 2015 S.D. 32, ¶10, 864 N.W.2d 490, 496 (noting that pursuant to SDCL § 25-4-41 a "court may from time to time modify its [alimony] orders"); *Leedom v. Leedom,* 2020 S.D. 40, ¶ 20, 947 N.W.2d 143, 148 (a "change in circumstances refers to a change in the necessities of the recipient and the financial ability of the obligor.") *See also, Miller v. Cox,* 44 Va. App. 674, 607 S.E.2d 126, 132 (2005) (stating that "[a]ny change in either party's position regarding support is more properly addressed, not in speculated anticipation of change, but in relation to the current circumstances of the parties" as "the trial court retains jurisdiction to alter the amount of the support upon a proper showing of changed circumstances.")

The circuit court abused its discretion in limiting its award of permanent alimony to Tammie to a period of 36 months. It was an abuse of discretion because it was "arbitrary or unreasonable.'" *Evens v. Evens,* 2020 S.D. 62 ¶ 21, 951 N.W.2d at 277. The circuit court's decision should be reversed with instructions to award Tammie permanent alimony until Tammie dies.

D. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ONLY AWARDING TAMMIE ALIMONY OF $7,500 PER MONTH.

A circuit court's award of alimony (spousal support) is reviewed under the abuse of discretion standard. *Dejong v. Dejong*, 2003 SD 77, ¶ 5, 666 N.W.2d 464, 467. A decision based on an error of law is, by definition, an abuse of discretion. *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 37, 781 N.W.2d 464, 474.

It is well settled in this State,

> "that the amount and length of alimony payments are left to the discretion of the trial court. SDCL 25–4–41 gives the court discretion to grant "suitable allowance" to a spouse, "as the court may deem just, having regard to the circumstances of the parties represented...." The factors for a trial court to consider in exercising its discretion have long been established to include the following: "(1) the length of the marriage; (2) their respective earning capacity; (3) their respective financial condition after the property division; (4) their respective age, health and physical condition; (5) their station in life or social standing; and (6) the relative fault of the parties in the termination of the marriage."

Guindon v. Guindon, 256 N.W.2d 894, 898 (S.D.1977).

The circuit court abused its discretion by awarding Tammie only $7,500 per month in alimony and making no allowance for Tammie to continue to make contributions for savings, investment and retirement accounts ($3,000) or charitable contributions ($2,000) as she was accustomed to doing during the marriage or to pay her utilities, property taxes and property insurance . Nor did the circuit court make allowance for future, medical, dental, vision, dermatology and counseling expenses (that would not be covered by health insurance, which was awarded for a period of three years). Nor did the circuit court make allowance for Tammie's need to purchase a new vehicle, pay her creditors, purchase her own

health insurance after 3 years and make needed water repair expenses so the home had drinking water.

The purpose of an award of alimony under SDCL § 25-4-41 is "to support the needs and standard of living of the spouse." *Havlik v. Havlik*, 2014 S.D. 84, ¶ 14, 857 N.W.2d 422, 426 (citing *Haanen v. Haanen*. 2009 S.D. 60, ¶ 18, 769 N.W.2d 836, 842)). *See also Morrison v. Morrison*, 323 N.W.2d 877, 878 (S.D.1982) (circuit courts are required to consider the parties' "station in life or social standing" during the marriage); *Clark v. Clark*, 2008 S.D. 59, ¶ 17, 753 N.W.2d 423, 428 (holding the circuit court did not abuse its discretion "in ensuring that [wife] would enjoy the same standard of living that she enjoyed prior to the divorce.")

Accordingly, an award of alimony is appropriate to enable the receiving spouse to maintain as nearly as possible the standard of living s/he enjoyed during the marriage. *Id.* (citing *Billion v. Billion*, 1996 S.D. 101, ¶ 41, 553 N.W.2d 226, 235)).

Here, Tammie requested an award of spousal support to include $3,000 to make contributions to savings, investment and retirement accounts and $2,000 for making donations to various charitable and religious organizations, including her church. (R 1737). Tammie also included a future car payment of $2,223 and debt payments of $1,500 per month. [6]

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[6] Where a wife had been a stay at home mother and wife for 23 years and her husband earned $400,000 per year as a cardiologist, the circuit court did not abuse

The record evidence established the parties' marital custom of using their income to deposit funds into savings, investment and retirement accounts and for purposes of making donations to various charitable and religious organizations, including Tammie's church. Indeed, the evidence reflected Brian's stated intention of ***continuing*** that custom on his own individual behalf by depositing over $6,000 per month ($73,500 annually) into ***his*** investment and retirement accounts. (T 1175).[7] The circuit court further found that Tammie's charitable contributions, which averaged over $3,000 per month during the 18 month period of March 2022 to September 2023, were reasonable in light of the parties' standing in the community.[8]

South Dakota has not addressed the specific issue of whether a divorcing couple's custom of making regular deposits to savings, investment and retirement

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its discretion when it awarded wife $8,000 per month spousal support and included the wife's anticipated future vehicle expense and debt payments in determining the wife's financial need for support as these expenses would be normal for someone with the wife's station and social standing in life. *Fausch v. Fausch,* 2005 S.D 63 ¶ 16-19, 697 N.W.2d 748, 753-54.

[7]Brian's claimed monthly income of $38,959 was reduced by taxes and the $6,125 in monthly investment and retirement account contributions he intended to make. (R 2927, 2973 ¶ f, APP 15). If Brian's "retirement contributions" are added back into Brian's income, it appears the circuit court's alimony award allows Brian to keep 81% of his net income or $36,642 per month.

[8]The circuit court thus clearly abused its discretion in rejecting Tammie's claims on the grounds that her monthly budget items were "not based on actual expenditures and significantly exceed the parties' lifestyle." (R 2974 ¶ h. *See Evens v. Evens,* 2020 S.D. 62 ¶ 20, 951 N.W.2d 268, 277 ("a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.")

plans and charitable contributions should be considered in determining the amount of alimony needed to maintain the marital standard of living. However, numerous jurisdictions have done so. The majority rule is that where "ongoing, regular saving was part of the couple's standard of living during the long-term marriage and ... the parties' combined post-dissolution income is adequate to allow both spouses to maintain the standard of living enjoyed during the marriage," such contributions should be considered when calculating spousal support to ensure the marital standard of living. *Openshaw v. Openshaw*, 493 Mass. 599, 228 N.E.3d 551, 555 (2024) (describing majority rule and citing decisions from Arizona, California, Colorado, Iowa, New Jersey, North Carolina, North Dakota, Utah, Virginia and Wisconsin).[9] (*Id.* at 559, fn 20).

The Massachusetts Supreme Court recently addressed the marital standard of living (referred to as the "marital lifestyle" in Massachusetts) stating in pertinent part:

> The plain meaning of "marital lifestyle" is the characteristic manner in which the couple chose to live their life during the marriage. (citations omitted) [M]arital lifestyle pertains to the "manner of living to which [the spouses have] been accustomed," and term "focus[es] on the spouses' lifestyle during the marriage" (citations omitted)
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> ...

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[9] The same analysis has been applied with respect to charitable contributions. *See e.g., Knowles v. Knowles*, 2022 UT App 47, 509 P.3d 265 (holding that trial court abused its discretion in not including tithing expenditures as part of alimony award); *In re Marriage of Stenzel*, 908 N.W.2d 524 (Iowa Ct. App. 2018) (holding that charitable donations and retirement savings could be included in spousal support)

> As it regards the couple's financial decisions, "marital lifestyle" includes the typical way the parties regularly allocated their income during the marriage; to be considered the marital lifestyle, such allocations must be so customary as to identify the parties' financial decision-making during the marriage. (citation omitted)

Openshaw, 228 N.E.3d at 557.

Courts applying the majority rule have recognized that efforts to restrict the marital standard of living calculation to direct and immediate expenses would be too limited. "[I]t would be a perverse state of the law if we, as a rule, always included in an alimony calculation all sums parties spent, even imprudently, but excluded sums wisely saved." *Mintz v. Mintz,* 2023 UT App 17, ¶ 26, 525 P.3d 534, 543, *cert. denied*, 531 P.3d 730 (Utah 2023). As noted by one court, "there is no demonstrable difference between one family's habitual use of its income to fund savings and another family's use of its income to regularly purchase luxury cars or enjoy extravagant vacations." *Lombardi v. Lombardi,* 447 N.J. Super. 26, 39, 145 A.3d 709, 715 (App. Div. 2016).

Having accepted Brian's proposed budget as "credible" the circuit court appears to have rejected Tammie's claims on the grounds that, in light of the marital assets she would receive upon the 50/50 distribution of the assets (and her ability to derive income from them in the future) she did not need any spousal support to invest in savings, investment or retirement accounts or to make any donations to charitable and religious organizations, including her church. (R 2974 ¶j.

The circuit court erred. Nothing in SDCL § 25-4-44 (which addresses marital property) precludes consideration of the parties' custom of allocating portions of their marital income to savings, investment and retirement accounts as part of the "marital standard of living" for purposes of an award of spousal support under SDCL § 25-4-41. Nothing in either statute suggests that an award of spousal support based on maintenance of the standard of living that was enjoyed *during* the marriage can or should be eliminated, reduced or offset by future income that may be derived from marital assets.[10] If routine investments and charitable donations were not considered in calculating an award of spousal support, the spouse who sought support would be placed in an inequitable and disadvantaged position relative to the other spouse:

> [A]n equitable distribution of the marital estate ensures that both parties reap the benefits of regular saving during the marriage in the form of the marital assets. However, where, as here, the parties' post-dissolution income is sufficient for each party to continue to live the marital lifestyle, if routine saving is not considered in connection with the determination of alimony, the recipient spouse will be forced to rely on the appreciation of current assets while the payor spouse will be able to continue the full extent of the marital lifestyle, including regular saving."

Openshaw, 228 N.E.3d at 561. *See also Lombardi v. Lombardi*, 447 N.J. Super. 26 at 40, 145 A.3d 709 (App. Div. 2016) (addressing same issue and stating "it is not equitable to require [the recipient spouse] to rely solely on the assets she

[10] Here, and while a circuit court is required to consider the allocation of property and spousal support together (*see e.g*., *Terca v. Terca*, 2008 S.D. 99, ¶ 28, 757 N.W.2d 319, 326), the court distributed the parties' marital assets on an equal, 50/50 basis. (R 2972)

received through equitable distribution to support the standard of living while [the payor spouse] is not confronted with the same burden").

The circuit court abused its discretion by not setting spousal support at a level that would permit Tammie to continue saving (including contributions to a Health Savings Plan) and making investments, contributing to her own retirement plan; to purchase a new vehicle; to pay her creditors; to pay for needed home repairs; to pay for future health insurance costs; and to pay for her future medical, dental, vision and counseling expenses , pay utilities, property taxes and property insurance, in order to "maintain a standard of living reasonably comparable to that which she enjoyed during the marriage." *Hubert v. Hubert*, 465 N.W.2d 252, 258-59 (Wis. Ct. App. 1990).

Accordingly, the circuit court's alimony decision should be reversed and remanded with appropriate instructions.

E. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING TAMMIE ATTORNEY FEES WITHOUT CONSIDERING THIS COURT'S TWO-STEP ANALYSIS MANDATED IN DIVORCE ACTIONS.

Tammie sought an award of attorney fees. (SR 1786). Tammie's trial attorney, Debra Watson, submitted an affidavit with an itemized listing of services rendered totaling $47,004.90 (SR 1786-90). Tammie's previous attorney, Mindy Werder, submitted an affidavit with an itemized listing of services rendered totaling $147,225.11 (SR 1791-1844).

A circuit court abuses its discretion in denying attorney fees when it fails to properly consider the relevant factors and make findings based on those factors. *Nickles v. Nickles,* 205 S.D. 40, ¶ 35, 865 N.W.2d 142, 154 ("The trial court is required to make specific findings based upon the factors.") Here, the circuit court rejected Tammie's motion for attorney fees without entering any findings of fact and conclusions of law to support its decision. (SR 2972). The circuit court stated (without any explanation) that "[e]ach party shall be responsible for their own attorney fees and costs." (R 2973 ¶26). As this Court stated in *Evens v. Evens,* 2020 S.D. 62, ¶ 44, 951N.W.2d at 282, the relevant factors are:

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

The circuit court abused its discretion in summarily denying Tammie's motion for attorney's fees as "a review of the record establishes that the trial court did not conduct the two-step analysis to determine whether to award attorney fees." *Osdoba v. Kelley-Osdoba,* 2018 S.D. 43 ¶ 32-33, 913 N.W.2d 496, 504. Accordingly, just as this Court decided in *Osdoba*, this Court should reverse and remand for the circuit court to consider the mandated two-step analysis and enter

specific findings of fact and conclusions of law addressing the factors related to Tammie's request for an award of attorney fees.

F. THE CIRCUIT COURT ABUSED ITS DISCRETION EXCLUDING TAMMIE'S POST FILING DEBTS IN THE COURT'S PROPERTY DISTRIBUTION

The circuit court abused its discretion in declining to include several of Tammie's post-filing debts in the marital estate, including a $10,000 loan from Dr. Raymond, a $5,000 loan from the Helsdon's and $12,512 in credit card debt. (T 139; R 2971-72 ¶ 19). Tammie explained that Brian had cut her off from funds necessitating her need to borrow funds from friends and use a credit card to meet her living expenses. (T 125, 132, 411).

A circuit court is obliged to make well-reasoned findings of fact regarding whether post-separation debts constitute marital or non-marital debt in consideration of the parties' financial situation as a whole. *Green v. Green,* 2019 S.D. 5, ¶ 24-25, 922 N.W.2d 283, 293-94; *Taylor v. Taylor,* 2019 S.D. 27, ¶ 23-24, 928 N.W.2d 458, 470-71. Here, the circuit court's sole reference to the debts is found in the court's conclusion of law #19 where the court stated: "These debts are personal, not marital debts." (R 2971-72). The circuit court provided no rationale or explanation as to why the debts were "personal" and "not marital". The circuit court's failure to enter well-reasoned findings of fact regarding whether the debts were marital or non-marital was an abuse of discretion requiring reversal. *Green, supra.*

G. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO DEDUCT THE WATER SYSTEM REPAIR ESTIMATE EXPENSE IN THE VALUE OF THE MARITAL RESIDENCE.

The circuit court abused its discretion when it declined to deduct the estimate from Farmers Supply in the amount of $44,668.04 to make necessary repairs to the marital residence awarded to Tammie and to replace its water system from the property value. (R 1763). The residence did not have potable water for household use. (T 135).

In *Abrams v. Abrams,* 516 N.W.2d 348 (S.D. 1994), this Court held it was reasonable for the trial court to consider the net value of the marital residence to the party who received it. *Id.* at 350-351. The Court further stated that "[v]aluation is nothing more than a function of what the home is worth if it were to be presently sold; therefore, the costs of achieving [that] value should be considered." *Id.* at 350. *See also, Osdoba v. Kelley-Osdoba,* 2018 S.D. 43, ¶ 14, 913 N.W.2d 496, 501(affirming the circuit court's reduction in the value of the marital residence to take into account the anticipated costs and expenses that would be associated with its sale).

In this case, the circuit court inquired as to whether the Farmers Supply estimate had been taken into consideration when the marital residence was valued. (T 137). Brian presented a comparative market report from real estate broker, Ed Dreyer. The report indicated that the Farmers Supply estimate had ***not*** been considered in determining the home's value. (R 2275 page 9). According to

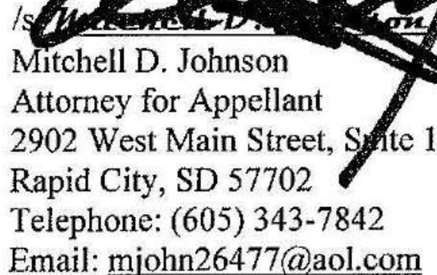
Dreyer, the home's value would need to be reduced based on the cost to drill a new well with potable water for household use. (*Id.*)

Here as in *Abrams*, Tammie will incur costs and expenses to repair and replace the current water system associated with the marital residence which affects its net value to Tammie. (T 134-137). The circuit court's failure to deduct this cost from the value of the marital residence was an abuse of discretion requiring reversal.

CONCLUSION

Based on the foregoing, Tammie respectfully requests this Court reverse the circuit court's Amended Findings of Fact and Conclusions of Law and Amended Judgment and Decree of Divorce and remand this case with appropriate instructions.

Respectfully submitted this 25th day of November, 2024



/s/ Mitchell D. Johnson
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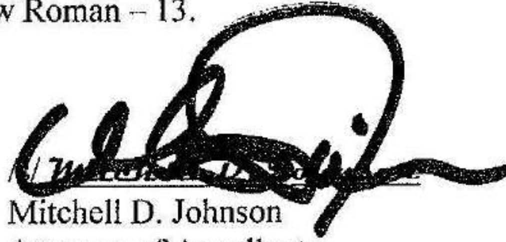
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to SDCL § 15-26A-66 that Appellant's brief complies with the type volume limitation required under SDCL § 15-26A-66(b)(2). Appellant's brief contains 8,537 words. Appellant's brief contains the type style font of Times New Roman – 13.

Dated this 25th day of November, 2024



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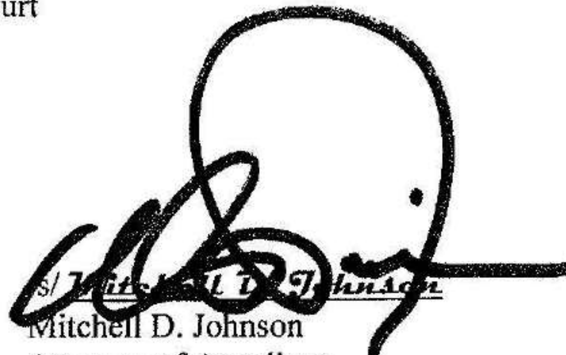
CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2024, I caused the original of the **Appellant's Brief** to be filed with the Clerk of the South Dakota Supreme Court by enclosing the same in an envelope, securely sealed with first class postage prepaid and deposited in the U.S. Mail, Rapid City, South Dakota; an electronic copy of the Appellant's Brief to be filed with the Clerk of the South Dakota Supreme Court to the email address listed below; and a copy of the Appellant's Brief to be served upon the Appellee's attorneys of record via Odyssey File and Serve.

Shirley Jameson-Fergel,
Clerk of the South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070
Email: SCClerkBriefs@ujs.state.sd.us

Dated this 25th day of November, 2024



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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

APPEAL NO. 30738 & 30750

TAMMIE MORIN

Plaintiff /Appellant

vs.

BRIAN BAXTER

Defendant /Appellee

APPENDIX CONTENTS

Amended Judgment and Decree of Divorce (R 2976) ....App 1

Amended Findings of Fact and Conclusions of Law (R 2962) ....App 4

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
TAMMIE MORIN,	)	FILE NO. 51 DIV 22-106
	)	
Plaintiff,	)	
v.	)	**AMENDED JUDGMENT AND**
	)	
BRIAN BAXTER,	)	**DECREE OF DIVORCE**
	)	
Defendant.	)	

The above-entitled matter came before this Court through a trial held on April 22-25, 2024, and May 15, 2024. The Plaintiff appeared in person and through her attorney, Debra Watson. The Defendant appeared in person and through his attorneys, Steven Nolan and Emily Smorgiewicz. The Court's Amended Findings of Fact and Conclusions of Law are incorporated herein as a part of this Amended Judgment and Decree of Divorce.

Based upon the Amended Findings of Fact and Conclusions of Law, the Court does now hereby:

ORDER, ADJUDGE and DECREE that the bounds of matrimony heretofore existing between the Plaintiff and Defendant are hereby dissolved and the Plaintiff is granted a divorce from the Defendant on the grounds of Irreconcilable Differences, restoring the parties to the rights, status and condition of single persons; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue of custody is moot by agreement of the parties as their youngest child, Alexa, turns 18 on April 28, 2024 and graduates from Stevens High School on May 26, 2024;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the parties are awarded property as set forth in the Amended Findings of Fact and Conclusions of Law; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the title to the 2016 Murano shall be transferred to the parties' son, Isaiah, and the title to the 2014 Traverse shall be

transferred to parties' son, Joshua. These vehicles are excluded from the marital estate based on the agreement of the parties; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Vanguard 529 accounts shall be excluded from the marital estate by agreement of the parties and designated for the benefit of their children. The Vanguard accounts shall be maintained as 529 accounts and managed by each of the children, respectively, free and clear of any claim or supervision by either parent; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that each party shall pay the debt assigned by the Court in the Court's column on the Joint Property Exhibit, and he/she shall hold harmless and indemnify the other party from any liability therefor. Each party shall take all necessary steps to remove the other party's name from any debt documents within 65 days of the Amended Judgment and Decree of Divorce and shall do so for the Wood Ave. property prior to the date that the loan matures. Neither party shall incur any further liability on behalf of the other party; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, beginning on June 1, 2024, Tammie is awarded permanent alimony in the sum of $7,500.00 per month for a period of 36 months, payable on the 1st day of each month by direct deposit into her checking account. As part of the alimony award, Brian is ordered to continue to provide and pay Tammie's health insurance through the COBRA Bronze plan at Radiology Associates for a period of 36 months following the entry of the Amended Judgment and Decree of Divorce, with no changes made by Brian in the current health policy without Tammie's written consent or an order of the Court; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Brian is not required to maintain a life insurance policy to ensure payment of the alimony award.

[INTENTIONALLY LEFT BLANK]

Dated this 28 day of May 2024, *nunc pro tunc* May 16, 2024.

BY THE COURT

Robert Gusinsky
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:
AMBER WATKINS
CLERK OF COURTS

By: Melinda Fagerland
Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

MAY 28 2024

Amber Watkins, Clerk of Courts
By MF Deputy

STATE OF SOUTH DAKOTA	)) SS.	IN CIRCUIT COURT
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT

TAMMIE MORIN, Plaintiff, vs. BRIAN BAXTER, Defendant.	)))))))))	51DIV22-106 AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried on April 22-25, 2024 and May 15, 2024. The Plaintiff appeared in person and through her attorney, Debra Watson. The Defendant appeared in person and through his attorneys, Steven Nolan and Emily Smorgiewicz. The Court made findings on the record. Those findings are incorporated herein, but if any of the findings made on the record conflict with the findings or conclusions made herein, the written Amended Findings of Fact and Conclusions of Law shall control.

Court having heard the testimony of the parties and their witnesses and having considered the evidence hereby makes and enters the following:

FINDINGS OF FACT

1. The Plaintiff, Tammie Morin, (hereinafter "wife" or "Tammie") is a resident of Pennington County South Dakota and has maintained such residency throughout the pendency of this proceeding.

2. The Defendant, Brian Baxter, (hereinafter "husband" or "Brian") is a resident of Pennington County South Dakota and has maintained such residency throughout the pendency of these proceedings.

3. Tammie's date of birth is 1966, and Brian's date of birth is 1965. At the time of the trial, Tammie was 57 and Brian was 58 years of age.

4. The parties met in 1989 while attending the University of Montana.

5. The parties dated for approximately six years before getting married on May 20, 1995.

6. Three children were born to the marriage: Joshua, Isaiah, and Alexa. Joshua was born in 1998 in Ohio. Isaiah was born in 2001 in Ohio. Alexa was born in 2006 in Rapid City, South Dakota. Both Joshua and Isaiah have reached the age of majority and both live independently of the parties.

7. Alexa reached the age of majority during the trial in this case, and the parties agree the custody issue is moot.

8. Tammie sought a Protection Order against Brian in December 2023. The Court denied her request.

9. Both parties obtained high school diplomas.

10. Tammie graduated from the University of Montana with a bachelor's degree. She then attended the University of Montana in Missoula for law school, where she obtained her juris doctor in 1992.

11. Tammie was admitted to the Montana Bar and the Michigan Bar. Tammie has maintained her license in Montana on inactive status.

12. Tammie has some work experience. Tammie was employed as an associate at Parker and Parker law firm in Michigan for approximately two and a half years. In that position, she earned approximately $30,000.00 per year. Tammie was then employed in Hanover, New Hampshire as a substitute teacher for approximately six months. Tammie did not seek employment as an attorney in New Hampshire. Tammie and Brian only planned to live in New Hampshire for one year, and that would not have been sufficient time for Tammie to become licensed to practice law in New Hampshire.

13. Brian served in the United States Air Force prior to attending medical school. The Air Force paid for Brian's medical school.

14. Brian obtained his undergraduate degree from the University of Montana. He obtained his MD from the University of New Mexico. He then completed four years of residency in radiology in Ann Arbor, Michigan and one year in a fellowship program in Hanover, New Hampshire.

15. After completing his medical education, Defendant was employed in Centerville, Ohio for four years. This was required to qualify for the funding provided by the Air Force. While employed in Centerville, Brian was also employed part-time in Columbus, Ohio.

16. After Joshua's birth in November 1998, Tammie became a stay-at-home mom and homemaker. The parties mutually agreed to this arrangement. Both parties wanted the children to be raised with a parent at home. The parties agreed that Tammie should fill that role while Brian continued working. Tammie felt staying home to raise her children was important, particularly based on her religious beliefs. Tammie testified that she felt God

called her to be a stay-at-home mother.

17. Tammie has not been gainfully employed outside the home for approximately twenty-seven years.

18. In 2002, the parties moved to Rapid City, South Dakota and have maintained residency in Rapid City through 2024.

19. Tammie has been very involved in her church and community throughout the marriage. She was a bible school teacher for approximately ten years. She currently serves as an assistant supervisor of the children's program in an open bible study program. She attended a bible study fellowship for two years. These positions have all been volunteer based with no compensation or benefits. It is clear that these positions were very important to Tammie and she finds her work in these roles fulfilling.

20. Both parties agree that Tammie added value to their marriage and their life by being a stay-at-home mother and homemaker. The evidence clearly showed that Tammie was incredibly involved in her children's lives. She spent significant time aiding in the children's development, education, extra-curricular activities, and religious involvement.

21. All three children have earned high academic achievements and have succeeded in a variety of extra-curricular activities. All three children live successful lives.

22. The record is also clear that Brian was and continues to be significantly involved in his children's lives. There was no credible evidence that Brian engaged in any behavior that would alienate the children from Tammie.

23. The parties took their children on numerous vacations throughout the marriage, including several international trips.

24. The parties discussed Tammie returning to work after Alexa graduated from high school in 2024, but they never reached an agreement. The Court finds no credibility in Tammie's claims that Brian influenced or coerced Tammie to continue being a homemaker. Indeed, Tammie's testimony was that she feels she is unemployable after having been a stay-at-home mother for almost thirty years.

25. The Court accepts Tammie's testimony that it would be exceedingly difficult for Tammie to become employed as an attorney. However, the Court, noting Tammie's extensive involvement in her church and various charities, finds that Tammie is employable and is qualified for some skilled positions. The Court finds that Tammie could reasonably supplement her income from employment.

26. Brian credibly testified that the parties had a magnificent life, marriage, and partnership together, but that their household began to change to change in 2016. The relationship began deteriorating following the 2016 election, and the parties were no longer able to discuss their moral and political views in a civil manner. This led to much tension and discontent in the household. Specifically, Tammie's closely held religious beliefs and Brian's scientific

education became a point of malcontent. This tension and malcontent persisted for nearly a decade and ultimately led to the irretrievable breakdown of the marriage.

27. The Court finds Tammie's testimony regarding extreme cruelty in the form of sexual abuse not credible. Tammie's testimony had numerous internal and external inconsistencies. In key aspects of the case, Tammie's testimony was contrary to direct evidence presented at trial.

    a. Specifically, the Court finds no merit in Tammie's allegation that her signature was forged on an affidavit filed with the Court. The Court finds notary Nichole Williams' testimony credible on this issue. The Court finds that this contradiction is severe and causes serious credibility concerns.

    b. Specifically, the Court finds no merit in Tammie's allegations that Brian sexually assaulted his daughter, Alexa, after Alexa suffered an injury while boating at Pactola Reservoir. The parties agree on the basic facts of this incident. Alexa was injured while boating and was experiencing significant blood loss from a cut on her labia. Tammie testified that the boat looked like a crime scene when she arrived to pick Alexa up. Both parties testified that the blood from Alexa's injury had soaked through approximately three beach towels by the time she arrived at urgent care. Various medical staff were present during Alexa's exam and none witnessed Brian engage in any inappropriate behavior with Alexa. Further, despite being mandatory reporters, none of the staff present reported the alleged assault. The Court finds Brian's testimony about the Pactola incident credible. Given the severity of the bleeding and the general location of the injury, Brian, who is a physician, asked Alexa's permission to observe the injury. Brian briefly observed the injury from several feet away and did not touch Alexa during the exam. Brian's observation led him to believe they needed to go to the emergency room. Repair of the injury required medication and extensive suturing. There was no evidence presented that Alexa herself accused Brian of inappropriate behavior. The Court finds Tammie's testimony that Brian sexually assaulted Alexa to be contradictory to all other evidence on this topic. The Court cannot find Tammie's testimony credible on this issue.

    c. Specifically, the Court finds no merit in Tammie's allegation that she told Dr. Bechara that Brian perpetrated domestic and sexual abuse upon Tammie. The Court finds no merit in Tammie's allegations that Dr. Bechara failed to document Tammie's reports of abuse in er medical records, because Bechara was trying to protect Brian. The Court finds Dr. Bechara's testimony on this issue credible.

    d. Specifically, the Court finds no merit in Tammie's allegations that Brian alienated their children from Tammie. The texts and audio recordings of Tammie's interactions with the children are strikingly contrary to Tammie's claims. Tammie repeatedly sent the children texts with information about the divorce and custody issues in this case. It is clear that the children did not seek this information out and rarely engaged with Tammie when she sent these kinds of texts. Tammie repeatedly sent unsolicited texts to the children in which she uses strong language to discuss various charged political issues. The children did not engage in these topics. The

Court considered all exhibits that demonstrate this, the following are a few of many examples:

On 1/22/21, Tammie texted Alexa, "Let the murdering begin in ernest! What's a dead baby matter and a woman's life ruined at least it was her choice. Ahhh the Democrats they have their priorities in order don't they? Makes me so proud you're a part of this. Glad I didn't make that choice so we can celebrate your birthday soon."

On 1/14/21, Isaiah texted Tammie regarding scholarship matters. Tammie states "If you think I have forgotten and moved on past the fact that you screwed God, you screwed me, screwed my country, screwed my kids and you screwed my grandkids' future then you have another thing coming." The next text, is sent six minutes later and read "By the way I dropped your shorts off for repair (new zipper)."

On 1/14/21, Isaiah texted Tammie "Mom I love you so much. I value you as a person and I love you." Tammie responded "Don't piss down my back and tell me it's raining." Later in the conversation, Tammie says "No-wait I've got it racism! That's it – that's me! How can you possible love someone as horrible as me – you're a saint."

On 2/26/22, Tammie sent Alexa a link to a web article entitled 20-signs-husband-is-cheating and then Tammie said "The only ones Dad doesn't check are 3 & 10."

On 3/25/22 Tammie texted Isaiah (in part) "[...]I don't know why you're bothering to apply to medical school you're obviously already a board certified psychiatrist[...]I wish I could shower off the filth that was your fake hugs this week[...]I wish I could shower off the filth that was Ashley's fake hugs this week as well. I wish I would have been given a dollar for every time your Dad has said he wished you would dumb Ashley and I have argued against him – I'd be a rich woman[...]You're blocked"

On 3/25/22 Tammie texted Alexa "You should have just interviewed your Dad when you did your report on sec trafficking – he's a good source having participated in it. Screen shot this[...]Sex." Alexa does not respond and several hours later Tammie texts "Are you at track?"

On 7/28/22 Tammie texted a group chat with the children and Brian, saying "Brian, your constant efforts to control and interfere in my life have got to stop. Stay out of our decision to go see my parents, Alexa's grandparents with your fear mongering about Covid. You didn't think twice about hauling her to your dad's or your mom's. Covid is every where – quit using it at your convenience to control Alexa and me. After all your trashing of my church and BSF and all Christian's out there murdering people by spreading Covid don't you find it highly ironic that none of them gave me Covid YOU DID!"

In Exhibit 144A, Tammie is speaking with Alexa. Tammie says, "Who protects me

from you and the evilness that you bring with you towards me? Who's going to protect me from that? [...] Your cruelty and unkindness, your cruelty and your unkindness. One of you guys downstairs is going to come up here and call the police. Come on up, Brian. Come on up. Come on up. Alexa needs protecting. Come on up. Come on up [...]"

In Exhibit 144J, Tammie says to Brian "when your daughter gets married and her husband comes to see you, are you going to say, 'And son guess what? It's okay. Sodomize her all you want. It's okay [...] Sodomize, sodomize, son. I found it quite enjoyable. My daughter would probably like it too."' Alexa was present when Tammie made these statements.

In Exhibit 144L, Alexa advises Tammie to call the police if she is scared of Brian. Tammie responds by saying, "oh fuck you, you little piece of shit!" Alexa stops speaking and Brian asks Tammie to stop. Tammie responds telling Brian he is going to hell and by asking Brian "What? You want to examine her genitals, Brian [...] You want to tell her her mom is mentally ill? [...] You drove her to depression! You drove her to anxiety. You drove her to try to kill herself, Brian! Why don't you stop? You are a danger to her! You are a danger to her in what you've done."

28. Tammie presented evidence that she suffered fecal incontinence, rectocele, and cystocele. Dr. Rochelle Christianson was recognized as an expert witness and testified as to these conditions. Dr. Christianson concluded that the conditions were caused by sexual abuse, specifically, repetitive anal penetration. The Court finds Dr. Christianson's testimony as to her treatment of these conditions credible. The Court finds Dr. Christianson's testimony as to the cause of these conditions not credible. Dr. Christianson admitted that there is no scientific or academic literature supporting her conclusion that the rectocele was caused by sexual abuse. The Court finds Dr. Bechara's testimony that the rectocele is more likely to be the result of multiple childbirths, obesity, or menopause to be credible. Bachara's testimony was more objective and free from subjective comments. Contrastingly, Dr. Christianson's records included subjective comments about observations she made of Tammie and Brian at social events. Such comments include that Dr. Christianson noticed Brain did not attend a children's soccer game once and that Dr. Christianson believed Brian engaged in various extramarital affairs. Dr. Christianson admitted she had no firsthand knowledge that Brian engaged in any extramarital affairs.

29. Tammie alleges that Brian subjected her to repeated and severe sexual abuse throughout their marriage. However, given the credibility issues described herein, the Court cannot find by a preponderance of the evidence that such abuse occurred.

30. Brian moved out of the marital residence on Clarkson Road in March of 2023. The parties have remained separated since then.

31. Tammy served Brian with a summons, complaint, and the South Dakota Parenting Guidelines on May 26, 2022.

32. During the pendency of these proceedings, the parties relationship has continued to be rife

with tension and discontent.

33. Tammie alleges that Brian violated the Court's custody order by removing Alexa from South Dakota for several trips. These trips included travelling to Montana to attend a ceremony honoring Brian's father (Alexa's grandfather), travelling to Texas to visit Joshua, and travelling to Minnesota so that Alexa could attend a college volleyball game. Tammie did not raise these issue prior to trial and never moved the Court to hold Brian in contempt for these trips. The Court finds that the trips did not violate an order of the Court. The Interim Custody Order filed February 23, 2023 states that "[n]either parent will unreasonably withhold authorization to travel out-of-state with Alexa. The parties will consider Alexa's summer activities and high school experiences when scheduling any out-of-state travel or summer vacations." Tammie presented no evidence that the above trips interfered with her parenting time, that the trips were taken for the purpose of evading jurisdiction of the Court, were unreasonably lengthy, or were improper in any other way. The Court finds that all trips were reasonable and were for the purpose of allowing Alexa to attend events that were meaningful to her.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. More than 60 days have passed since the filing of the Summons and Complaint.

3. The parties agree that the grounds of irreconcilable differences apply to this proceeding and the divorce is granted on those grounds. The Court declines to grant the divorce on the grounds of fault by either party. See generally, *Dunham v. Sabers*, 2022 S.D. 65, 981 N.W.2d 620.

4. The real property shall be divided as follows:

   a. The Plaintiff is awarded the marital home at 9151 Clarkson Road.
   b. The Plaintiff is awarded the rental property at 1516 Wood Avenue.
   c. The Defendant is awarded the residence at 7601 Pioneer Circle.
   d. The Defendant is awarded the rental property at 1201 38th Street.
   e. The Defendant is awarded the lot on Pioneer Circle.
   f. The Defendant is awarded the rental property at 5104 Village View.

5. Each party will be solely responsible for and will indemnify the other from any mortgage for their respective properties. Each party is to take all necessary steps to remove the other party's name from any debt documents within 65 days of the Amended Judgment and Decree of Divorce.

6. Tammie shall refinance the mortgage on the Wood Ave. property prior to the date that the loan matures.

7. The vehicles and equipment shall be divided as follows. Each party will receive the awarded vehicles free of any claim by the other.

a. The Plaintiff is awarded the 1991 Caprice, the 1982 Camaro, the 2012 Suburban, the 2001 Suburban, the 2005 F250, the utility trailer, the 2016 Featherlite horse trailer, and the 1981 red horse trailer.

b. The Defendant is awarded the 2004 F150, the 763 Skid Steer, the 1989 Ford Ranger and the 1941 Ford Super Deluxe.

c. The parties agree the 2016 Murano is the property of Isaiah and not a marital asset. The parties agree the 2014 Traverse is the property of Joshua and is not a marital asset. The parties agree Alexa's college car is the property of Alexa and is not a marital asset.

8. Pursuant to the parties' agreement, they shall submit to binding arbitration for purpose of determining the distribution of personal property. Such personal property includes: United frequent flyer miles, household property of Tammie and of Brian, a black hills gold necklace, family photos, and various horse tack, and any other person property not specifically listed on the Joint Property Exhibit.

9. The livestock and pets shall be divided as follows:

   a. The Plaintiff is awarded Cody, Taffy, Sterling, Bojangles, and Kaimaimee.
   b. The Defendant is awarded Tarzan and Buster.
   c. The parties agree the dog, Rue, is the property of Alexa and is not a marital asset.

10. The retirement accounts will be divided as follows:

   a. Schwab One Radiology 401(K) (Brian) is to be divided between the Defendant and Plaintiff, with Defendant receiving $1,087,971.00 and Plaintiff receiving $1,218,847.00.
   b. Vanguard Traditional IRA (Brian) *1159 is awarded to Defendant.
   c. Vanguard Roth IRA (Brian) *1954 is awarded to Defendant.
   d. Vanguard Traditional IRA (Tammie) *1562 is awarded to Plaintiff.
   e. Vanguard Roth IRA (Tammie) *8772 is awarded to Plaintiff.

11. The bank accounts will be divided as follows:

   a. US Bank Personal Joint Checking *6786 is awarded to Defendant.
   b. US Bank BTJIA Checking *6994 is awarded to Defendant.
   c. US Bank Savings *1776 is awarded to Defendant.
   d. US Bank Savings *9832 is awarded to Defendant.
   e. Wells Fargo Everyday Checking *1814 is awarded to Defendant.
   f. Wells Fargo Prime Checking *0087 is awarded to Defendant.
   g. Wells Fargo Prime Checking *9738 is to be divided equally between the parties.
   h. Wells Fargo Savings *1487 is awarded to Plaintiff.
   i. Wells Fargo Savings *9306 is awarded to Plaintiff.

j. Wells Fargo Savings *2126 is awarded to Plaintiff.
k. Highmark *560 is awarded to Plaintiff.
l. Parties agree that US Bank Savings *0566 is the property of Alexa and not marital property.

12. The private equity accounts shall be divided as follows:

a. Fidelity Investment Acct (Brian) *0311 is awarded to the Defendant.
b. Vanguard Joint Brokerage Acct *4202 shall be divided between the parties, with the Plaintiff receiving $1,232,167.00 and the Defendant receiving $845,175.00.
c. Optum Financial HSA *3878 shall be divided equally between the parties.
d. Schwab One *8982 (Joint) is awarded to Plaintiff.

13. Parties agree that a Vanguard 529 account has been set up for the benefit of each child: Vanguard 529 Acct (Joshua) *1328-01, Vanguard 529 Acct (Isaiah) *1328-02, Vanguard 529 Acct (Alexa) *1328-03. The parties agree that these accounts are marital assets and further agree that the value of these accounts shall be excluded from the distribution of marital assets calculation. Despite that all children are adults, Tammie is currently the custodian for these accounts. The Court finds that the evidence clearly shows each child is educated, intelligent, and more than competent to manage their own financial affairs. The evidence is uncontroverted in this regard. Tammie shall transfer custodianship of these accounts to each child, respectively, within 35 days of the Amended Decree of Divorce.

14. The 2023 tax refund shall be divided equally between the parties.

15. Brian shall retain his business interest in the Imaging Center and Radiology Associates.

16. The life insurance policies shall be divided as follows:

a. Jackson National Term Life (Brian) is awarded to Defendant.
b. Protective Life Insurance Term (Brian) is awarded to Defendant.
c. Protective Life Insurance Term (Tammie) is awarded to Plaintiff.
d. UNUM (Dakota Radiology) (Brian) is awarded to Defendant.

17. Each party is allocated and shall be liable for the following debts:

a. US Bank Mortgage for 1516 Wood *0034 shall be allocated to Plaintiff.
b. US Bank Mortgage for 1201 38th Street *0018 shall be allocated to Defendant.
c. US Bank Mortgage for 5104 Village View *2603 shall be allocated to Defendant.

18. Defendant incurred credit card debt from the Chase Visa credit card, the Wells Fargo Visa credit card *8431, and the US Bank kids credit card *0451. These are personal, not marital debts. The Defendant shall be liable for these debts, and they shall not be included in the joint property distribution calculation.

19. Plaintiff incurred $10,000 in debt from a loan provided by Dr. Raymond and $5,000 in debt

from a loan provided by Helsdon. The Plaintiff also incurred $12,512 in credit card debt from Wells Fargo (*3031). These debts are personal, not marital debts. The Plaintiff shall be liable for these debts, and they shall not be included in the joint property distribution calculation.

20. The quote from Farmers Supply LLC for various repairs and replacement to the water system of the marital home is not a presently incurred debt and shall not be allocated to either party.

21. "To determine whether a spouse dissipated marital assets, we have identified that the circuit court should consider "whether the transfers were improperly made to deplete the marital estate." *Pennock v. Pennock*, 356 N.W.2d 913, 915 (S.D. 1984) (explaining that if the spouse made fraudulent transfers, then the property should have been included in the marital estate); see also *Johnson v. Johnson*, 471 N.W.2d 156, 161 (S.D. 1991) ("If the trial court finds, based on the evidence presented at the original trial, that husband fraudulently dissipated marital assets, they should be included in the marital estate and charged against him."). We have explained, however, that "SDCL 25-4-33.1(1) does not require evidence of bad faith or a design to deplete the marital estate[.]" *Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶ 17, 910 N.W.2d 913, 920 (holding the circuit court acted within its discretion in finding the transfer of an account by one spouse to her son for college expenses, without the consent of the other spouse prior to the divorce trial, to be a violation of SDCL 25-4-33.1(1))." *Cook v. Cook*, 2022 S.D. 74, ¶ 31, 983 N.W.2d 180, 191.

22. The Court finds no merit to the Plaintiff's allegations that Defendant dissipated the marital estate. The Court finds Brian's testimony as to how he transferred money and paid bills to be credible. Transfer of assets from one marital account to another is not dissipation. The moneys in dispute were all accounted for in statements for the relevant accounts.

23. The Court finds also finds no merit to Defendant's allegation that Plaintiff dissipated over $300,000 in marital assets. Although the expenses that Defendant points to in support of his claim are extravagant, there is no credible evidence that such expenses were incurred for the purposes of depleting the marital estate. For example, over $62,000 was donated to various charitable boards and religious organizations. While Tammie's donations exceeded historical values, they were not unreasonable in light of the parties' standing. Another example is that Tammie purchased new furniture after Defendant left the marital home. These purchases were not unreasonable. Thus, these expenses do not constitute dissipation.

24. The award to each party is as follows:

[INTENTIONALLY LEFT BLANK]

Tammie		Brian	
9151 Clarkson Road	$823,960	1201 38th Street	$747,623
1516 Wood Avenue	$519,386	7601 Pioneer Circle	$364,407
		Lot on Pioneer Circle	$209,944
		5104 Village View	$338,560
1991 Caprice	$1,000	2004 F150	$4,700
1982 Camaro	$0	763 Skid Steer	$6,944
2012 Suburban	$13,775	1989 Ford Ranger	$0
2001 Suburban	$4,300	1941 Ford Super Deluxe	$19,375
2005 F250	$9,900		
Utility Trailer	$400		
2016 Featherlite Trailer	$18,000		
1981 Red Horse Trailer	$0		
Cody	$2,000	Tarzan	$2,000
Taffy	$2,750	Buster	$1,000
Sterling	$2,000		
Bojangles	$0		
Kaimaimee	$0		
Wells Fargo Savings *1487	$6,165	US Bank Joint Checking *6786	$27
Wells Fargo Savings *9306	$0	US Bank BTJIA Checking *6994	$18,239
Wells Fargo Savings *2126	$1,000	US Bank Savings *1776	$6,918
Highmark *560	$81	US Bank Savings *9832	$732
Wells Fargo Prime Checking *9738	$34,502	Wells Fargo Everyday Checking *1814	$37
		Wells Fargo Prime Checking *0087	$7
		Wells Fargo Prime Checking *9738	$34,502
Schwab One Radiology 401K (Brian)	$1,218,847	Schwab One Radiology 401K (Brian)	$1,087,971
Vanguard Traditional IRA *1562	$138,241	Vanguard Traditional IRA *1159	$268,636
Vanguard Roth IRA *8772	$2,907	Vanguard Roth IRA *1954	$3,389
Vanguard Joint Brokerage Acct *4202	$1,232,167	Fidelity Investment Acct *0311	$6,728
Optum Financial HSA *3878	$45,576	Vanguard Joint Brokerage Acct *4202	$845,175
Schwab One *8982 (Joint)	$16,035	Optum Financial HSA *3878	$45,576
		The Imaging Center	$187,150
TOTAL ASSETS	**$4,092,992**	**TOTAL ASSETS**	**$4,199,639**
Less 1516 Wood Ave. Mortgage	($358,558)	Less 1201 38th Street Mortgage	($295,289)
		Less 5104 Village View Mortgage	($148,639)
		Less 2023 Property Taxes	($21,277)
NET EQUITY	**$3,734,434**	**NET EQUITY**	**$3,734,434**

25. Based on the above distribution of assets, no equalization payment is necessary.

26. Each party shall be responsible for their own attorney fees and costs.

27. "The party requesting alimony has the burden to "'establish that they have a need for support and that their spouse has sufficient means and abilities to provide for part or all of that need.' " *Anderson v. Anderson*, 2002 S.D. 154, ¶ 12, 655 N.W.2d 104, 107 (quoting *Urban v. Urban*, 1998 S.D. 29, ¶ 7, 576 N.W.2d 873, 875). The trial court should consider a number of factors to determine a party's need for alimony and the amount and duration of alimony. *Id.* These factors are "(1) [the] length of the marriage; (2) [the] respective earning capacity of the parties; (3) their respective age, health and physical condition; (4) their station in life or social standing; and (5) relative fault in the termination of the marriage." *Id.* ¶ 12, 655 N.W.2d at 107 (citing *Urban*, 1998 S.D. 29, ¶ 8, 576 N.W.2d at 875; *Christians v. Christians*, 2001 S.D. 142, ¶ 16, 637 N.W.2d 377, 381)." *Hagedorn v. Hagedorn*, 2012 S.D. 72, ¶ 11, 822 N.W.2d 719, 722.

28. The Court awards Plaintiff alimony in the amount of $7,500 per month for a period of three years. Additionally, Defendant will pay Plaintiff's COBRA (Bronze Plan) medical insurance for thirty-six months. This alimony award is appropriate for the following reasons:

    a. The Court has declined to find fault on the part of either party and grants this divorce on the grounds of irreconcilable differences. Thus, the alimony award is not impacted by the fault of either party as fault is but one factor to be considered. However, all other factors that the Court must consider when awarding alimony weigh in favor of the award discussed herein.

    b. Tammie has no recent education or special skills that would allow her to significantly increase her earning capacity.

    c. Tammie has spent the majority of her adult life caring for the needs of the children and Brian. Clearly, this added value to the marriage and to the parties' lives.

    d. Tammie's contributions to the marriage allowed the parties to attain a lifestyle that both parties wanted. But it should also be noted that despite Brian's significant earnings as an interventional radiologist, the parties did not live an extravagant lifestyle. For example, through their entire marriage they purchased only one new vehicle. The parties lived well, saved and invested wisely, paid the children's higher education and enjoyed travel. Brian testified that they had early on decided to forgo the usual rich doctor purchases.

    e. Tammie's contributions as a homemaker and stay-at-home mother substantially enabled the Defendant to complete his medical training and obtain his current career.

    f. The Defendant has the ability to pay the alimony awarded. Exhibit 280 shows the Defendant's monthly cash flow before living expenses is $38,959. The Court finds this amount is somewhat low, considering that it is calculated by budgeting for $73,500 in retirement contributions. Still, even using the $38,959 amount for purposes of determining the Defendant's ability to pay the alimony award, it is clear that the award is within the Defendant's ability.

    g. The Court finds the budget proposed by Brian in Exhibit 266 is reasonable and is

derived from actual past expenditures. Brian's testimony relating to Exhibit 266 was credible. Brian was able to discuss past spending habits with precision, and he demonstrated a thorough understanding of Tammie's financial needs for purposes of establishing a monthly budget.

h. The Court finds Tammie's budget to be wholly unreasonable. Tammie seeks in excess of $30,000 per month in alimony. He budget includes items that are capital expenditures such as a new vehicle payment and monthly payments for attorneys fees. Moreover, Tammie's line items are not based on actual expenditures and significantly exceed the parties' lifestyle.

i. The Court considered that Tammie will receive approximately $1,500 per month in income from the Wood Ave. rental property, and that amount will increase after the mortgage is paid off. Brian credibly testified that the monthly income could be increased if Tammie manages the building herself.

j. The Court also considers that Tammie will receive assets in excess of $3.7 million, to include appx. $2,000,000 in liquid assets as well as a valuable residence without any encumbrances.

k. In determining the duration of the alimony award, the Court has considered that Tammie will be able to access retirement funds before alimony terminates. Conservative calculations show that Tammie will draw approximately $7,000 per month (after tax) from retirement funds. That, taken with the income of the rental property exceeds the monthly budget shown in Exhibit 266.

l. The Court notes that the alimony award only requires Defendant to pay for the Bronze COBRA insurance plan. If the Plaintiff wishes to choose a Silver or Gold plan, she must cover the additional cost from her own funds.

m. Plaintiff has alleged that the Defendant has purposefully diminished his earning capacity over the last year. The Court finds no merit to this claim. The Defendant provided credible testimony as to why his income has somewhat diminished in recent years. The Defendant's business, Radiology Associates, has recently added practitioners and two radiologists have joined the Radiology Associates. These changes have reduced the Defendant's income through no fault of the Defendant.

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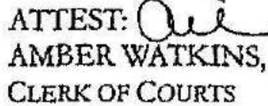
ORDER

Parties are **ORDERED** to execute all necessary transfers and paperwork to effectuate the property awards discussed in these Amended Findings of Fact and Conclusions of Law within 65 days of the Amended Judgment and Decree of Divorce.

Dated this 28 day of May 2024, *nunc pro tunc* May 16, 2024.

BY THE COURT:

Robert Gusinsky
Circuit Court Judge
Seventh Judicial Circuit

ATTEST: 
AMBER WATKINS,
CLERK OF COURTS

By:
Deputy

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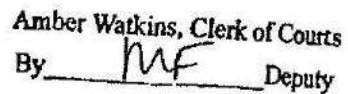
IN CIRCUIT COURT

MAY 28 2024

Amber Watkins, Clerk of Courts
By  Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

TAMMIE L. MORIN, Appeal Nos. 30738 & 30750

Plaintiff/Appellant,

vs.

BRIAN R. BAXTER,

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CUSTER COUNTY, SOUTH DAKOTA

The Honorable Robert Gusinsky
Circuit Court Judge

Notice of Appeal filed on June 21, 2024

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Preliminary Statement

Over the course of a 5-day trial, the circuit court listened to witnesses, gauged their credibility, and considered a plethora of evidence concerning property division, alimony, and the grounds for divorce. At the close of the case, the court entered a thoughtful oral ruling, followed by written findings and conclusions.

The rulings that are challenged by Tammie in this appeal were well within its broad discretion and comport with precedent established by this Court. Her request to overturn those determinations should be denied. To the extent this Court rules in Tammie's favor on the issue of grounds for divorce, it should also reverse the circuit court's denial of Brian's motion to amend his counterclaim to include a fault-based ground for divorce. Additionally, the circuit court's determination that Tammie did not dissipate marital assets is factually and legally inconsistent with its finding that the challenged expenditures were "extravagant." In addition, the circuit court applied the wrong legal standard in determining whether Tammie's conduct constituted dissipation. Therefore, its ruling on that issue should be reversed.

References to the record are designated as "SR," followed by the appropriate page number. References to the Appendix will be referenced as "App." followed by the applicable page number. References to the transcript from the trial will be referenced as "TT" followed by the appropriate page numbers.

Jurisdictional Statement

On May 28, 2024, the circuit court entered its Amended Judgment and Decree of Divorce. SR 2962. Notice of Entry was served on May 29, 2024. SR 2979. Tammie filed a Notice of Appeal on June 21, 2024. SR 2989. On July 11, 2024, Brian filed a Notice of Review. This Court has jurisdiction pursuant to SDCL §15-26A-3.

Statement of the Issues

1. **Did the circuit court err in granting the divorce on the grounds of irreconcilable differences?**

   The circuit court granted the divorce on the basis of irreconcilable differences.

   Most Relevant Authority:

   Dussart v. Dussart, 1996 SD 41, 546 N.W.2d 109.
   Walker v. Walker, 2006 SD 68, 720 N.W.2d 67.
   Dunham v. Sabers, 2022 SD 65, 981 N.W.2d 620.

2. **Did the circuit court err in requiring the parties to transfer the 529 accounts to the children?**

   The circuit court ordered that ownership of the 529 accounts be transferred to the children, who have reached the age of majority.

   Most Relevant Authority:

   Garnos v. Garnos, 376 N.W.2d 571 (S.D. 1985).
   Ahrendt v. Chamberlain, 2018 SD 31, 910 N.W.2d 913.

3. Did the circuit court abuse its discretion in fashioning Tammie's alimony award?

The circuit court ordered Brian to pay Tammie $7,500 per month for three years, plus pay the premium for her COBRA coverage.

Most Relevant Authority:

Kolbach v. Kolbach, 2016 SD 30, 877 N.W.2d 822.

4. Did the circuit court abuse its discretion when it denied Tammie's request for attorney's fees?

The circuit court denied Tammie's request for attorney's fees.

Most Relevant Authority:

Goff v. Goff, 2024 SD 60, 12 N.W.3d 139, as amended (Oct. 16, 2024).

5. Did the circuit court err in excluding Tammie's post-filing debts as non-marital?

The circuit court found that two personal loans incurred by Tammie were not to be included in the marital estate.

Most Relevant Authority:

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

6. Did the circuit court err by not including the water repair estimate as a debt in the marital estate?

The circuit court found that this was not a presently incurred debt and was not allocated to either party.

Most Relevant Authority:

Abrams v. Abrams, 516 N.W.2d 348 (S.D. 1994).

Issues Presented in the Notice of Review

7. Did the circuit court err in denying Brian's motion to amend his counterclaim?

The circuit court denied Brian's oral motion to amend his counterclaim to include a fault-based ground for the divorce.

Most Relevant Authority:

Murphey v. Pearson, 2022 SD 62, 981 N.W.2d 410.

8. Did the circuit court err in finding that Tammie did not dissipate marital assets?

The circuit court found that, although "extravagant," Tammie's excessive post-filing expenditures did not constitute a dissipation of marital assets.

Most Relevant Authority:

Cook v. Cook, 2022 SD 74, 983 N.W.2d 180.
Ahrendt v. Chamberlain, 2018 SD 31, 910 N.W.2d 913.

Statement of the Case

This is an appeal from the Seventh Judicial Circuit, Pennington County, South Dakota, the Honorable Robert Gusinsky. Tammie initiated this divorce action against Brian in May of 2022. SR 18. In her Complaint, as grounds for the divorce, Tammie alleged that "irreconcilable differences have arisen between the parties and grounds exist under SDCL §25-4-2-(7). In the alternative, Plaintiff would reserve the right to move forward on the basis of SDCL §25-4-2(2) extreme cruelty." SR 15. In his Answer, Brian admitted that irreconcilable differences existed. SR 19. In his Counterclaim, Brian sought a divorce on the grounds of

irreconcilable differences. SR 21. In her Reply to Counterclaim (mistakenly labeled an "Answer"), Tammie "acknowledge[d]" Brian's allegation of irreconcilable differences. SR 27.

A court trial was held on April 22-25, 2024 and May 15, 2024. SR 3317-4701. At the conclusion of the final day of trial, the circuit court issued its oral ruling. TT 1204-1219. The circuit court issued its own Findings of Fact and Conclusions of Law and Judgment and Decree of Divorce on May 22, 2024. SR 2938, 2935. Thereafter, on May 28, 2024, the circuit court issued its Amended Findings of Fact and Conclusions of Law and Amended Judgment and Decree of Divorce. SR 2962, 2976.

Statement of the Facts

1. The parties' relationship and family.

Tammie and Brian married on May 20, 1995, after having dated for approximately 6 years. SR 14, 2963, App. 5. Brian served in the Air Force and attended medical school at the University of New Mexico. SR 2963, App. 5. He is currently employed as an interventional radiologist at Dakota Radiology, and has held this position since 2002. TT 665, 667. Tammie obtained her law degree from the University of Montana in 1992. TT 28. She practiced law for a few years after obtaining her JD, but became a stay-at-home mom and homemaker after the birth of the parties' first child, Joshua, in 1998. SR 2963, App. 5.

Tammie was very involved in the children's lives as they grew up and devoted significant time to their education, development, activities, and religious upbringing. SR 2964, App. 6. Brian was also very involved in the children's lives, and his income allowed the family to take several vacations, including international trips. SR 2964, App. 6. At the time of trial, their oldest son, Joshua, was in Texas in an M.D./Ph.D. program, en route to becoming a doctor. TT 37-38. Their middle child, Isaiah, lived in Sioux Falls and had been accepted to several medical schools. TT 38-39. Their daughter, Alexa, had recently graduated from high school and planned to attend Augustana University. TT 39-40.

Brian testified that the parties had a wonderful marriage, and that Tammie was an outstanding mother and remarkable wife. TT 756, 765, 801. However, both parties agree that the marriage began to decline in 2016, when they were unable to civilly discuss political, social, and moral issues and the home became very polarized. TT 99, 753. Tammie had strict religious beliefs that conflicted with Brian's scientific beliefs, which created a great deal of discord and tension in the family. SR 2964, App. 6. "Hot button" issues included abortion, homosexuality, transgenders, and Donald Trump; Brian testified that the "kids would just get brutalized" by Tammie if they knew a gay kid in school or talked about a Democrat. TT 753.

It was undisputed that the parties had not had sexual intercourse since February of 2020. TT 781-782. In June of 2021, Tammie kicked Brian out of the marital bed. TT 777-781. She filed for divorce in March of 2022 and Brian was served with the Summons & Complaint in May of 2022. SR 14-16, 18. Brian moved out of the marital home on March 1, 2023. TT 681-82.

At the time of trial, Tammie had been estranged from the children for quite some time. TT 763-766. She had not had contact with Isaiah since before October of 2023; the only contact she had with Alexa was about the dog; and she had not talked to Joshua since before Christmas of 2023, save for a recent trip she made to visit him in Texas. *Id.*

Brian presented text messages and audio recordings wherein Tammie made horrifying statements to, and around, her children. SR 1854-1886, 1893-1903, 1851: Def's Exhibits 144-F, 144-J, 144-L. Several of these instances are highlighted in the circuit court's Amended Findings of Fact and Conclusions of Law:

> On 1/22/21, Tammie texted Alexa, "Let the murdering begin in ernest! What's a dead baby matter and a woman's life ruined at least it was her choice. Ahhh the Democrats they have their priorities in order don't they? Makes me so proud you're a part of this. Glad I didn't make that choice so we can celebrate your birthday soon."
>
> On 1/14/21, Isaiah texted Tammie regarding scholarship matters. Tammie states "If you think I have forgotten and moved on past

the fact that you screwed God, you screwed me, screwed my country, screwed my kids and you screwed my grandkids' future then you have another thing coming." The next text, is sent six minutes later and read "By the way I dropped your shorts off for repair (new zipper)."

On 1/14/21, Isaiah texted Tammie "Mom I love you so much. I value you as a person and I love you." Tammie responded "Don't piss down my back and tell me it's raining." Later in the conversation, Tammie says "No-wait I've got it racism! That's it - that's me! How can you possible love someone as horrible as me – you're a saint."

On 2/26/22, Tammie sent Alexa a link to a web article entitled 20-signs-husband-is-cheating and then Tammie said "The only ones Dad doesn't check are 3 & 10."

On 3/25/22 Tammie texted Isaiah (in part) "[...] I don't know why you're bothering to apply to medical school you're obviously already a board certified psychiatrist [...] I wish I could shower off the filth that was your fake hugs this week [...] I wish I could shower off the filth that was Ashley's fake hugs this week as well. I wish I would have been given a dollar for every time your Dad has said he wished you would dumb Ashley and I have argued against him – I'd be a rich woman [...] You're blocked"

On 3/25/22 Tammie texted Alexa "You should have just interviewed your Dad when you did your report on sec trafficking – he's a good source having participated in it. Screen shot this [...] Sex." Alexa does not respond and several hours later Tammie texts "Are you at track?"

On 7/28/22 Tammie texted a group chat with the children and Brian, saying "Brian, your constant efforts to control and interfere in my life have got to stop. Stay out of our decision to go see my parents, Alexa's grandparents with your fear mongering about Covid. You didn't think twice about hauling her to your dad's or your mom's. Covid is every where – quit using it at your

convenience to control Alexa and me. After all your trashing of my church and BSF and all Christian's out there murdering people by spreading Covid don't you find it highly ironic that none of them gave me Covid YOU DID!"

In Exhibit 144A, Tammie is speaking with Alexa. Tammie says, "Who protects me from you and the evilness that you bring with you towards me? Who's going to protect me from that? [...] Your cruelty and unkindness, your cruelty and your unkindness. One of you guys downstairs is going to come up here and call the police. Come on up, Brian. Come on up. Come on up. Alexa needs protecting. Come on up. Come on up [...]"

In Exhibit 144J, Tammie says to Brian "when your daughter gets married and her husband comes to see you, are you going to say, 'And son guess what? It's okay. Sodomize her all you want. It's okay [...] Sodomize, sodomize, son. I found it quite enjoyable. My daughter would probably like it too.'" Alexa was present when Tammie made these statements.

In Exhibit 144L, Alexa advises Tammie to call the police if she is scared of Brian. Tammie responds by saying, "oh fuck you, you little piece of shit!" Alexa stops speaking and Brian asks Tammie to stop. Tammie responds telling Brian he is going to hell and by asking Brian "What? You want to examine her genitals, Brian [...] You want to tell her her mom is mentally ill? [...] You drove her to depression! You drove her to anxiety. You drove her to try to kill herself, Brian! Why don't you stop? You are a danger to her! You are a danger to her in what you've done."

SR 2966-2967, App. 8-9.

2. Tammie's allegations of extreme cruelty and sexual abuse.

In support of her request that the divorce be granted on the grounds of extreme cruelty, Tammie claimed that Brian subjected her to sexual abuse over the entirety of their marriage. TT 68. According to Tammie, this came in the form of anal sex,

which she claimed had started with his fingers, then his penis, and later with various objects, such as a child's bubble wand, a frozen banana, and a gun with a condom on it. TT 68-72. Tammie alleged that Brian did these things against her will and over her objection. TT 73. She claimed that the anal penetration caused her to sustain a rectocele,[1] which occurs when the rectum bulges into the vagina, and that this, in turn, caused her to suffer fecal incontinence. TT 78, 611-12. Tammie had surgery to repair the rectocele in March of 2024. TT 78.

Brian denied that he had anything other than consensual intercourse with Tammie. He testified that they had oral sex, vaginal sex, and anal sex throughout the course of their relationship, that it was always consensual, and that their physical relationship was always very loving. TT 800-802. He denied using any "implements" or objects (other than toys purchased by one or both of them). TT 801-802. He believed their sexual relationship was normal and healthy. TT 802-805. Brian testified that if Tammie ever said she did not want to have sex, he never forced her to do anything. TT 806-807.

Three physicians testified regarding Tammie's rectocele. The first was Dr. Marcia Beshara, a retired OB/GYN at Rapid City Medical Center, who treated

[1] In fact, Tammie had both a rectocele and a cystocele. A cystocele occurs when the bladder has dropped into the vagina. TT 610. According to Dr. Beshara, the most common cause of a cystocele is vaginal childbirth. TT 610. Tammie's expert, Dr. Rochelle Christenson, agreed that Tammie's cystocele was "likely caused by her three vaginal deliveries." TT 729.

Tammie. TT 605. At Tammie's annual gynecological appointments in November 2021 and March 2023, Dr. Beshara performed her standard pelvic, bladder, and rectal examinations. TT 608-615; SR 2237-2239, 2261-2263. She noted no cystocele, no rectocele, and found the vagina to be in healthy condition. *Id.* Similarly, Tammie did not complain of any pelvic concerns, vaginal issues, or urinary problems at those appointments, nor did she complain of any incontinence or bowel problems. *Id.* Dr. Beshara testified that the most common cause of rectoceles is vaginal delivery; after that, common causes are chronic constipation, chronic cough, and menopause. TT 616. Dr. Beshara has never seen a rectocele be caused by anal penetration. TT 618.

The second doctor to testify was Dr. Taylor Kapsch, a family medicine physician at Creekside Medical Clinic, who also treated Tammie. TT 641. Dr. Kapsch saw Tammie on Feb. 13, 2020; Feb. 25, 2020; Oct. 26, 2020; Nov. 2, 2020; Nov. 16, 2020; Dec. 7, 2020; Feb. 25, 2021; Mar. 10, 2022; Feb. 1, 2023; Feb. 27, 2023; Mar. 16, 2023; and Mar. 23, 2023. TT 643-651. At none of those visits did Tammie mention anything about fecal or rectal incontinence, although she did report that she was going through a divorce in the March 10, 2022 visit. *Id.* *See also* SR 1188-1231. Dr. Kapsch testified that if a patient reports fecal or rectal incontinence, it is a "red flag" that would be noted in the patient's medical record and would need to be evaluated. TT 649. The first time Tammie mentioned fecal

incontinence to Dr. Kapsch was on April 11, 2023, where she reported she was having urinary urgency, urinary incontinence, and one episode of fecal incontinence after having knee replacement surgery at the surgical hospital. TT 651-652; SR 1233. In a follow-up appointment on May 1, 2023, she reported that the incontinence issues had been resolved. TT 652-653; SR 1237. Then, in a July 24, 2023 appointment, Tammie noted that she had fecal incontinence concerns that were "ongoing for several years now," even though this is the first it was seen in any medical record. TT 653-654. Dr. Kapsch ultimately referred Tammie for pelvic floor physical therapy and a consultation with a gastrointestinal doctor, but as of November of 2023, Tammie had "not yet sought an appointment" for either of those referrals. TT 654-656; SR 1255. Dr. Kapsch agreed that the primary cause of rectocele is pelvic floor dysfunction, which is typically related to vaginal deliveries. TT 657. She also testified that Tammie had vaginal lacerations with each of her three deliveries, which Dr. Beshara had previously explained significantly increased a patient's risk of rectocele. TT 654, 638-39.

Finally, Dr. Rochelle Christensen, an OB/GYN, testified to her treatment of Tammie and her performance of the rectocele and cystocele repair surgery. Dr. Christensen opined that the cystocele was caused by three vaginal deliveries and that the rectocele was caused by anal penetration. TT 729, 730. She admitted that

she did not consult any medical literature or studies that indicate anal penetration can cause a rectocele. TT 743. In addition, Dr. Christensen's records contained subjective observations about Brian, including the following:

- I have seen this patient over the years support her children in soccer, in particular, and I do not think I have ever seen her husband there at these events. TT 739; SR 1112.
- [Her husband] is a physician in radiology and has had affairs over the years. TT 742; SR 1127.

Dr. Christensen admitted she had no first-hand knowledge of any affairs or abuse, and the circuit court found that Dr. Christiansen's testimony about the supposed cause of Tammie's rectocele was not credible. SR 2967, App. 9.

Notably, there is no medical evidence of Tammie suffering from a rectocele or fecal incontinence prior to her filing for divorce.

3. The parties' financial condition.

Tammie, age 57 at the time of trial, has not been gainfully employed outside the home since the birth of Joshua in 1998, but she was very involved in her church and the community during those years. SR 2964, App. 6. Specifically, she has been involved on the Board of Directors for Habitat for Humanity and she has been an Assistant Supervisor of a children's bible study fellowship program for nearly 10 years. TT 238-240. In the bible fellowship program, Tammie trains teachers, develops curriculum, oversees facility security with police and firefighters, purchases supplies, maintains records on student health/medical

conditions, oversees attendance, sets up classrooms, and implemented a first aid training program. TT 240-242.

Brian, age 58 at the time of trial, had a high income as a radiologist, with a 2023 gross annual income in excess of $830,000. SR 2376. In 2023, his net monthly disposable income was just shy of $39,000 per month. SR 2927. Despite his high income, the parties were very frugal with their money during the marriage, with a substantial portion of Brian's income being placed into retirement, savings, and investments. TT 201, 901-903. They did not buy a fancy home, new cars, or any of the like. TT 901 ("[W]e've foregone a lot of things, like new vehicles and, you know, we just - - we didn't spend our money on the routine expensive doctor things most of the time."). This enabled them to amass a marital estate valuing nearly $8,000,000. TT 901.

At trial, Tammie sought alimony in the amount of $30,000 per month until her death. SR 1736. In support of her request, she submitted a budget that included expenses of $30,385 per month. SR 1737-1738. The trial court found that this budget to be "wholly unreasonable." SR 2974, App. 16. Tammie's budget included capital expenditures (e.g., new car, attorney's fees), was "not based on actual expenditures," and "significantly exceed[ed]" the parties lifestyle. *Id.* Several of her line items were "estimates," not actual expenses. TT 404. On the other hand, Brian submitted a budget for Tammie that was based on "actual past

expenditures" and based on prior spending habits of the parties. SR 2974, App. 16; SR 2464. He testified with great precision about the basis for the budget, and the circuit court found his budget to be much more reasonable and credible. TT 879-901; SR 2973-74, App. 15-16.

Dan Burnett, a financial planning expert, testified as to what Tammie would be realizing from the investment and retirement accounts she was receiving in the divorce. One portion of Burnett's testimony related to Tammie's ability to pay her monthly expenses utilizing the investments and retirement accounts. Imputing to her a minimum wage for three years,[2] assuming that she would not receive alimony, and assuming her expenses were $7,500 per month ($90,000/year), Burnett opined that Tammie could draw $7,500 per month from the gains (not principal) in the Vanguard Brokerage account, without penalty. TT 538-543, 550. Then, after a period of two years (upon reaching age 59 ½), Tammie could begin taking distributions from the retirement accounts – the 401(k), traditional IRA, or Roth IRA, without penalty. TT 543-545, 547-550. Projecting forward, and accounting for increased expenses due to inflation, Burnett opined that the investment accounts Tammie would receive in the divorce would generate more than enough gains to cover any "negative cash flow." TT 551-553. In reaching

[2] This is $23,000/year, or $1,916/month. TT 545.

this conclusion, Burnett did not consider the $1,500/month (minimum) rental income Tammie would receive from the Wood Avenue property. TT 565, 909.

Burnett further opined that when Tammie reaches age 67, at which time she can draw social security, the overall value of her asset portfolio would be $3.7 million – and this accounts for Tammie making withdrawals from the accounts every year until that point to cover her negative cash flow, and *not receiving any alimony*. TT 566-567. If Tammie were to receive alimony in the amount of $7,500 per month for three years, then the net value of her accounts at age 67 would be between $6-7 million. TT 568. Projecting out to age 100, if Tammie did not receive alimony from Brian, her net worth at age 100 would be "a shade over 16 million." TT 572. If she did receive alimony from Brian for the first 3 years, then the value at age 100 would be over $22 million. TT 572-573. Burnett testified that these opinions are based on a probability exceeding 90%. TT 572.

Tom Karrow, an expert vocational evaluator, testified that Tammie is definitely employable. TT 475-476. She has transferrable skills and the intellectual capability to perform a number of jobs, including working in a retail store, social service agency, assistant management, customer service, retail/office jobs, etc. TT 476-477, 484-485. Nothing about her age or medical condition prevents her from working, nor did she present any medical evidence that restricts her ability to work. TT 485-486.

4. The 529 college savings plans.

The parties established college savings accounts for their three children by setting up Vanguard 529 Savings Plan accounts. SR 2353. Joshua's has a current value of approximately $123,950, Isaiah's has a value of approximately $134,132, and Alexa's has a value of approximately $81,464. SR 2353. Brian testified that they have not utilized funds from any of the children's 529 plans, and that he and Tammie have thus far paid out of pocket for Joshua's undergraduate and medical school tuition and expenses and Isaiah's undergraduate tuition and expenses. TT 856-857, 859. Even though each child has reached the age of majority, Tammie is the owner/custodian of each account. SR 2353.

The parties agreed that these funds were for the children. TT 14, 1197. Brian requested that the children be named owner of their respective funds, given their age and maturity level. TT 860. Tammie, on the other hand, asked that the 529 funds be "divided equally between the parents to distribute for the children's education." SR 1736. She did not explain how to accomplish that, particularly given the tax consequences of withdrawing funds from a 529 plan.

5. Tammie's lack of credibility.

The circuit court found that Tammie lacked credibility in many respects, noting that her testimony "had numerous internal and external inconsistencies. In

key aspects of the case, Tammie's testimony was contrary to direct evidence presented at trial." SR 2965, App. 7.

One issue that presented "severe" and "serious" credibility concerns for the court involved Tammie's denial of signing an affidavit. SR 2965, App. 7. On the second day of trial, Tammie claimed that her signature had been forged on an affidavit that was filed with the Court by her prior counsel. TT 375-382; SR 2965, App. 7. During her testimony, she even claimed to disagree with the contents of the affidavit. TT 381. On the fourth day of trial, Brian called the notary public, Nichole Williams, to testify about Tammie's affidavit signature. TT 698-702. Ms. Williams stated that her procedure was to obtain an identification from anyone for whom she was notarizing a signature – even if she already knew them. TT 700. Ms. Williams testified that she remembered Tammie from the law firm and was able to affirmatively identify her in the courtroom. TT 701.

Other aspects of Tammie's testimony marred her credibility, including her allegations that Brian inappropriately participated in a medical examination of an injury Alexa sustained to her vaginal area; her claim that Brian alienated the children from him; her claim that Dr. Beshara made certain statements to Tammie about sexual abuse; and, notably, her allegations that Brian sexually abused her during the marriage. SR 2965-2967, App. 7-9.

6. Tammie's post-filing spending.

After the divorce was initiated, and over Brian's objections, Tammie spent an excessive amount of money on unnecessary items. These items are summarized in Exhibit 254 (SR 2524) and include the following:

- ATM withdrawals of $17,160;
- Large, unexplained cash withdrawals of $35,598;
- Charity and tithing of $62,285 over an 18-month period;
- Theatre/play tickets in excess of $10,000 (several in New York);
- Personal training at $11,268 (a cost that only began 1-2 months prior to filing);
- Veterinarian bills of $16,586;
- First-class travel of $13,785 (the parties never traveled first class prior to the divorce);
- Home refurbishments of $33,088;
- Random gifts and purchases, including many for Tammie's parents, in the amount of $23,641;
- New vehicle for Tammie's parents in the amount of $46,211;[3]
- Insurance on Tammie's parents' vehicle of $3,300;
- Massages in the amount of $2,205; and
- Diet food in the amount of $6,085.

[3] The only other new vehicle ever purchased by the parties was in 2004, which was a truck for Brian – and is the truck he currently drives. TT 903.

SR 2524. The total amount of these extraordinary expenditures is approximately $281,212.

Throughout the litigation, Brian repeatedly objected to these expenses. His counsel sent numerous emails and letters about them and raised them in a motion for contempt. SR 2195-2226.

At trial, Brian explained that each of these expenses were out of the ordinary, were not recurring, and were not reflective of the parties' lifestyle. TT 927-949. He produced evidence in the form of spreadsheets, based on actual statements, to establish this. SR 2524-2597. Brian asked the trial court to deduct the amount of Tammie's dissipation from her share of the property. TT 948-949.

Argument

1. The Circuit Court Properly Granted the Divorce on the Grounds of Irreconcilable Differences.

A circuit court's determination of the grounds for divorce is reviewed for clear error. *Evens v. Evens*, 2020 S.D. 62, ¶ 20, 951 N.W.2d 268, 276. "Clear error is shown only when, after a review of all the evidence, we are left with the definite and firm conviction that a mistake has been made." *Id.* (citations omitted).

Pursuant to SDCL §25-4-17.2, the court "may not render a judgment decreeing the legal separation or divorce of the parties on the grounds of irreconcilable differences without the consent of both parties unless one party has

not made a general appearance." However, this Court has held that in cases where a party's complaint (or counterclaim) seeks divorce on the grounds of irreconcilable differences - even if pled in the alternative with a fault-based ground - such is sufficient to constitute "consent" to a divorce on a no-fault basis. *Walker v. Walker*, 2006 SD 68, 720 N.W.2d 67; *Dunham v. Sabers*, 2022 SD 65, 981 N.W.2d 620.

In *Dussart v. Dussart*, 1996 SD 41, 546 N.W.2d 109, the plaintiff, Stacy, alleged irreconcilable differences as the grounds for the divorce in her Complaint, but later filed an Amended Complaint (without leave of court) also alleging fault-based grounds. The trial court granted the divorce based on irreconcilable differences and Stacy appealed, arguing the court should have granted it based on the fault-based grounds because evidence of fault was introduced at trial and was therefore tried by implied consent. This Court disagreed. First, it held that Stacy consented to irreconcilable differences because it was included in her Complaint and she never "legally discarded" it as a basis for the divorce. *Dussart*, at ¶ 5, 546 N.W.2d at 111. Second, the fault issue was not tried by implied consent because "at no time—not during trial, after trial, or even after filing of the judgment—did Stacy move to have the pleadings conform to the evidence on fault to support her contention the issue was tried by implied consent." *Id.* at ¶ 6, 546 N.W.2d at 111. Including fault in her proposed findings was insufficient to "satisfy the requirement

that a motion be made to the trial court to amend the pleadings." *Id.* Thus, the trial court did not abuse its discretion in granting the divorce on irreconcilable differences.

In *Walker*, the facts and procedural posture are strikingly similar to those presented here. The plaintiff, Angela, pled irreconcilable differences as an alternative ground for divorce. At trial, however, she - like Tammie - refused to stipulate to irreconcilable differences. Instead, she "steadfastly sought a ruling in her favor on extreme cruelty" but did not "procedurally withdraw her claim for irreconcilable differences." *Walker*, at ¶ 16, 720 N.W.2d at 72. She never made a motion - orally or in writing - to amend her complaint or "otherwise withdraw her alternative ground of irreconcilable differences." *Id.* at ¶ 17, 720 N.W.2d at 72. As in *Dussart*, though, because Angela did not "legally discard" irreconcilable differences, she consented to it being utilized as a basis for the divorce. *Id.* at ¶ 18, 720 N.W.2d at 72-73.

Here, as in *Dussart*, *Walker*, and *Dunham*, Tammie's complaint alleged irreconcilable differences as the grounds for divorce. SR 15. At no point in time did she legally discard this as a ground for divorce. *See generally* SR. Even though she "steadfastly sought a ruling in her favor on extreme cruelty" at trial, this is insufficient to formally withdraw her consent to a no-fault basis. *Walker*, at ¶ 6, 720 N.W.2d at 72.

As to the issue of fault, the circuit court found that Tammie did not meet her burden of establishing extreme cruelty as a ground for divorce. TT 1205-1207. The basis of her fault claim - sexual abuse - required the court to make a credibility determination between Tammie and Brian. The court found that Tammie lacked credibility: "The Court believes Dr. Baxter. The Court does not find the allegations of sexual abuse in this matter to be credible, so the Court is going to grant a divorce on the basis of irreconcilable differences." TT 1207.

As for Tammie's allegations of parental alienation by Brian, the court noted that it also found those allegations to lack credibility. In fact, the court noted that based on the evidence presented by Brian, it could "only describe the e-mails and text messages [from Tammie] to the children as vile.... [I]f anything, the evidence here points that Ms. Morin has alienated the children with the constant barrage of calling them murderers, liars, you know, being in cahoots with a sex trafficker, so to speak." TT 1206.

In granting the divorce based on irreconcilable differences, the Court found that tension and malcontent between the parties with respect to their moral and political views "persisted for nearly a decade and ultimately led to the irretrievable breakdown of the marriage." SR 2964-2965, App. 6-7. The record is replete with evidence to support this finding.

The circuit court did not abuse its discretion in finding that Tammie consented to irreconcilable differences as grounds for the divorce, that Tammie failed to prove extreme cruelty, and that irreconcilable differences did exist so as to warrant the grant of a divorce on this basis.

2. The Circuit Court Acted within its Discretion in Ordering the 529 Accounts to be Transferred to the Children.

Determinations in the division of property are reviewed under the abuse of discretion standard. *Evens*, at ¶ 21, 951 N.W.2d at 276. "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Evens*, at ¶ 21, 951 N.W.2d at 277.

A trial court has "broad discretion in making a division of property and we will not modify or set it aside unless it clearly appears that the trial court abused its discretion." *Garnos v. Garnos*, 376 N.W.2d 571, 572 (S.D. 1985) (citations omitted). "In making an equitable division of property, the trial court is not bound by any mathematical formula, but is to make the award on the basis of the material factors in the case, having due regard for equity and the circumstances of the parties." *Id.* at 572-73. "These factors include the duration of the marriage, the value of the property of each of the parties, the ages of the parties, their health and competency to earn, and the contributions of each of the parties to the accumulation of the marital property." *Id.* at 573 (citations omitted).

The only apparent opinion issued by this Court respecting 529 savings plans is *Ahrendt v. Chamberlain*, 2018 SD 31, 910 N.W.2d 913, wherein the Court held that the trial court did not abuse its discretion by including a 529 savings account in the marital estate. Wife argued that the account should have been excluded from the marital estate because it was a "completed gift" to her son. This Court disagreed, noting that the account was in the wife's name, the funds were available for her to withdraw (subject to a penalty), and contributions to the plan were made with income she earned during the marriage. *Ahrendt*, at ¶ 15, 910 N.W.2d at 919.

Here, unlike *Ahrendt*, the parties agreed that the value of the 529 funds would be excluded from the marital estate and would be considered funds for the children. At the outset of trial, Tammie's counsel advised the court that "the parties have agreed [these accounts] will be held for the children and that ... those amounts will be excluded from the marital estate." TT 14. She later advised the court, "[O]ur position all along has been that the money should go to the kids." TT 1197.

Thus, the issue to be resolved was who would be the custodian/owner of the accounts. *Id.* Tammie suggested that "each parent be an equal custodian of equal amounts so that they can assist the children in paying those expenses because they're not equal." TT 1197. She later amended that, however, and confirmed

that she only wanted the "monetary amounts divided" between the two parties. TT 1199. She did not explain how this could be practically accomplished.

Brian testified that he wanted the ownership of the accounts to be transferred to the children, as he believed them to be sufficiently mature to handle that responsibility. TT 854. He also expressed concerns about Tammie maintaining ownership of the accounts given the estrangement between her and the children. TT 855-856. By way of example, Brian had proposed that they withdraw some of the funds in 2023 as reimbursement for tuition they paid out of pocket during that calendar year, but Tammie ignored the request, raising questions about her ability to competently manage the accounts. TT 857-860.

The trial court acknowledged Brian's concerns and further noted that the children appear mature and responsible: "I think any parent would be proud to have kids like that. I mean, one in medical school, the other one going to medical school, the third on going to college. ... I can't think of anybody doing a better job raising kids ... What's wrong with them just having control over their own 529 account?" TT 1201. In response, Tammie's counsel did not articulate any concerns with the children's maturity, but rather vaguely stated that because the parents put the money into the accounts, the parents should be in charge. TT 1201.

At the close of the discussion about that issue, the court stated, "What I'm guided by here is that you've all agreed that it's for the kids. You all agreed that you don't want anything from those accounts. I mean, that is in your joint property statement. Both Ms. Morin and Dr. Baxter said we don't want those monies. They're for the kids. So the only question is: Who is the custodian and should those kids be able to exercise control over those funds?" TT 1204. Tammie did not object to any of the court's statements or characterizations of the parties' positions.

The trial court acted within its discretion in ordering that the parties transfer ownership of the accounts to the children, rather than keeping ownership with Tammie - whose relationship with the children is strained, at best - or requiring some joint ownership between the parties, particularly in light of their agreement regarding the intended disposition of the funds. Tammie has pointed to no authority that prohibits a circuit court from directing the transfer of funds in this fashion and under these circumstances.

3. The Circuit Court did not Err in Setting the Alimony Award.

A trial court's alimony determination is reviewed for an abuse of discretion. "In determining whether there was an abuse of discretion, we ask, whether a judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Dejong v. Dejong*, 2003 S.D. 77, ¶ 5,

666 N.W.2d 464, 467 (citations omitted). Findings of fact will not be set aside unless they are clearly erroneous. *Id.*

"When a party requests permanent alimony they must establish that they have a need for support and that their spouse has sufficient means and abilities to provide for part or all of the need." *Kolbach v. Kolbach*, 2016 SD 30, ¶ 16, 877 N.W.2d 822, 828 (cleaned up and citations omitted). "In making the alimony determination, courts should also consider: (1) the length of the marriage; (2) the respective earning capacity of the parties; (3) their respective age, health and physical condition; (4) their station in life or social standing; and (5) relative fault in the termination of the marriage." *Id.* "The court's equitable division of property and spousal support are to be considered jointly because an award of more assets can eliminate or reduce the need for spousal support." *Id.*

The circuit court ordered that Brian pay $7,500 per month for a period of three years, and that he pay the premium for Tammie's COBRA health insurance ($942/month for 3 years). TT 1214, 894. In so ruling, the court made several critical findings and considerations.

First, the court found Tammie's budget to be "entirely unreasonable," "completely unreasonable," and "inappropriate," such that it "loses all credibility for the Court." TT 1212, 1213. Among other things, Tammie's listing of a non-existent car payment and attorney's fees for the divorce were

inappropriate. TT 1212. In contrast, the budget Brian prepared was reasonable, based on actual past expenses, and did not exceed the parties' lifestyle. SR 2974, App. 16.

Second, the court considered Brian's ability to pay based on his monthly cash flow of $38,959. SR 2973, App. 15; SR 2927.

Third, the court considered the expert opinion of Dan Burnett concerning the nature, extent, and income-producing capabilities of the assets that Tammie would be receiving in the divorce. TT 1213-1214. The court also considered the income-producing capacity of the Wood Avenue rental (minimum $1,500/month income), a valuable marital residence with no encumbrances, and eventual access to retirement funds. SR 2974, App. 16. Tammie's immediate access to the Vanguard brokerage account gains, Wood Avenue rental income, and future access to the retirement accounts ensure that she will have enough income to exceed her monthly budget, thus eliminating her need for support. SR 2974, App. 16.

Lastly, the court considered the parties' earning capacities, standard of living (not extravagant), Tammie's employability,[4] and her health.[5] SR 2964, 2967, 2973-2974; App. 6, 9, 15-16.

Tammie argues that the court erred in only awarding alimony for a period of three years. But the court properly recognized that after three years, Tammie would no longer have a need for support given her ability to draw from the retirement accounts. Contrary to Tammie's argument, the three-year period had nothing to do with Brian's planned retirement: "In determining the duration of the alimony award, the Court has considered that Tammie will be able to access retirement funds before alimony terminates. Conservative calculations show that Tammie will draw approximately $7,000 per month (after tax) from retirement funds. That, taken with the income of the rental property exceeds the monthly budget shown in Exhibit 266." SR 2974, App. 16 (Conclusion of Law ¶28(k)). Furthermore, this does *not include* any withdrawals from the Vanguard brokerage account.

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[4] The court found Tammie "is employable and is qualified for some skilled positions. The Court finds that Tammie could reasonably supplement her income from employment." TT 2964, App. 6.

[5] Tammie had fecal incontinence, rectocele, and cystocele, but these were successfully treated. TT 734. Her high blood pressure and hypothyroidism are also treated and controlled through medications. TT 661. She presented no medical evidence that any of her medical conditions prevent her from working.

Tammie asserts that the court erred by not granting her an allowance to make contributions for savings/investments and charitable contributions. She argues that she should be allowed to continue the "marital custom" of depositing a portion of their income into savings and investment accounts, pointing to Brian's stated intention of continuing his practice of saving/investing a portion of his income. But these arguments fail to recognize that the parties are divorcing, and Tammie is no longer entitled to Brian's income. Moreover, she fails to appreciate that she is reaping the benefit of that "marital custom" in the property division, wherein she is receiving retirement, savings, and investment accounts in excess of $2.6 million. SR 2972, App. 14. Unless and until she decides to become employed, she will not have earned income in the future, which may impact her ability to invest in a savings or retirement account. Finally, and perhaps most importantly, Tammie ignores the $1,000 line item in the budget for "savings/ misc." SR 2464. This gives Tammie discretion for saving or donating, as she wishes, but recognizes that she is no longer a direct recipient of Brian's income.

Tammie also argues that the alimony award does not account for property taxes, utilities, property insurance, and medical expenses. This is simply not true. Each of these items is accounted for specifically in the budget (SR 2464) and was explained in Brian's testimony. As for medical expenses, those can be paid via the HSA, of which Tammie is receiving more than $45,000. SR 2972, App. 14.

As explained by Burnett, Tammie's ability to draw from gains in the Vanguard Brokerage account, 401(k), and IRA place her in a position to have a very healthy monthly income and a significant net estate when she reaches age 67.

Each of the court's findings and conclusions pertaining to the alimony are supported by the evidence. Its ruling should not be disturbed on appeal.

4. The Circuit Court did not Abuse its Discretion in Denying Tammie's Request for Attorney's fees.

"Awards of attorney fees are reviewed for an abuse of discretion." *Evens*, at ¶ 21, 951 N.W.2d at 276. "An abuse of discretion 'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Evens*, at ¶ 21, 951 N.W.2d at 277.

At trial, both sides requested an award of attorney's fees and submitted an affidavit of attorney's fees in support of the request. SR 1786, 2789. Neither side submitted a written motion or brief. During this testimony, Brian explained why he felt Tammie should be responsible for his fees, including the multiple ways in which Tammie prolonged the litigation. TT 1024-1030.

On direct examination, Tammie stated she wanted Brian to be responsible for her fees (TT 223), but on cross-examination, she clarified that she was not asking for Brian to pay her legal fees:

Q ... I want to make sure I cover the legal fees before I move on. So it's your testimony that from marital funds how much money was paid to your lawyers? Was it $80,000?

A Yes. Yes.

Q Okay. And you have approximately 147,000 remaining. Is that right?

A Yes.

Q Okay. And you're asking that Dr. Baxter pay those, your fees.

A I'm really asking for access to our joint funds so I can pay them.

Q So if you were to receive one half of the Vanguard brokerage funds, would you be able to pay those fees from that account?

A I think so.

TT 232-233. Based on this testimony, it appears Tammie no longer wanted to pursue an award of attorney's fees against Brian. To the extent she was, however, this Court has "consistently required trial courts to enter findings of fact and conclusions of law when ruling on a request for attorney fees. Without findings of facts and conclusions of law there is nothing to review." *Goff v. Goff*, 2024 SD 60, ¶ 28, 12 N.W.3d 139, 150, as amended (Oct. 16, 2024) (citations omitted). "The trial court is required to make specific findings based upon the factors." *Id.*

At the conclusion of trial, the court held that "[e]ach party shall be responsible for their own attorney fees and costs." SR 2972, App. 14; TT 1210. Brian acknowledges that the trial court apparently did not engage in requisite two-step

analysis and understands remand may be required for further findings regarding the award of attorney's fees.

5. The Circuit Court did not Err in Excluding Tammie's Post-Filing Debts as Non-Marital.

Determinations in the division of property are reviewed under the abuse of discretion standard. *Evens*, at ¶ 21, 951 N.W.2d at 276. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Evens*, at ¶ 21, 951 N.W.2d at 277.

Tammie allegedly incurred two personal loans after filing for divorce. One was a $10,000 loan from Dr. Lou Raymond, a friend. Tammie testified that Dr. Raymond "just offered" her $10,000 to help her with travel plans and gave her a credit card to travel with. TT 125. Tammie presented no objective evidence, or testimony from Dr. Raymond, about the terms of this alleged loan. The second was a $5,000 loan from Dee and John Helsdon, neighbors and friends, who also just "offered" money to Tammie so she could pay a retainer for her lawyer. TT 139-140. As with Raymond, Tammie presented no objective evidence, or testimony from Mr. or Mrs. Helsdon, about the terms of the alleged loan. In its ruling, the circuit court found that these "personal loan[s] ... are also not to be counted as debts." TT 1210.

In her Brief, Tammie claims these loans were for "living expenses" after Brian cut her off from money. But, based on Tammie's testimony, these debts were incurred after the divorce began for Tammie's travel and her lawyer. They were not for living expenses. Further, Brian denied that he ever cut Tammie off from money. TT 838. The court acted well within its discretion in finding that these alleged loans were not marital debts and were Tammie's sole responsibility.

6. The Circuit Court did not Err in Excluding the Water Repair Estimate from the Marital Estate.

Determinations in the division of property are reviewed under the abuse of discretion standard. *Evens*, at ¶ 21, 951 N.W.2d at 276. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Evens*, at ¶ 21, 951 N.W.2d at 277. "On review of a property division, this Court will not attempt to place valuation on the assets because that is a task for the circuit court as the trier of fact." *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 13, 913 N.W.2d 496, 501 (cleaned up and citations omitted). "We do not require exactitude in the [circuit] court's valuation of assets; it is only necessary that the value lie within a reasonable range of figures." *Id.*

Tammie testified that the well water at the marital residence was not safe or drinkable, and had not been since they first moved into the marital home 20+ years ago. TT 135. Tammie preferred to bring in Culligan water for drinking. At trial,

she sought to include as a marital debt an estimate from Farmers Supply to replace several parts of the well, install a chlorination system, and install a new cistern. SR 1763. The amount of the bid for this work was $44,668. *Id.* Tammie did not provide any objective evidence in the form of testing reports, laboratory reports, or expert opinions to support her claim that the water at the marital home was not drinkable.

Brian testified that the proposed work in the Farmers Supply bid was not necessary, nor was it something he agreed to. TT 844. Having lived with the well for many years, Brian explained that aerating the water is the best and easiest way to prevent the water from accumulating minerals and iron. TT 844-845. Brian further testified that over the course of 20-plus years living in the home, they would periodically test the water, and it never tested as being unsafe for consumption. TT 848-849. While Tammie did not like the taste of the well water, Brian testified that he and at least one of the children drank it, and that the family used it for washing dishes, taking showers, and the like. TT 849.

Tammie claims it was error to exclude the Farmers Supply estimate from the marital estate, arguing that the work is necessary for the home to be saleable. But Tammie has presented no evidence from *anyone* that this work would need to be done in order for the home to be marketable or that this work is required to be done in order for the water to be safe for human use or consumption.

In support of her argument that the cost of the work should be deducted, Tammie relies on two sentences included in a note on Ed Dreyer's Comparative Market Analysis:

- "It was shared with me that this property currently does not have a reliable source for potable water without hauling water to the property." SR 2283.

This is incorrect. First, the notion that the home does not have potable water is false. Further, the concept of "hauling water to the property" is misleading. In reality, Tammie simply has 5-gallon Culligan water bottles brought to the property for drinking. TT 849. The phrase "hauling water" erroneously suggests something far more serious or complicated.

- "If this cannot be resolved with water purification methods I would recommend a reduction of price based on what it would cost to drill a new well with potable water for household use." SR 2283.

First, any issues with the water and its mineral content can be addressed via an aeration system, as explained by Brian. Second, again, this is based on the erroneous assumption that the home does not have potable water.

These speculative and vague statements in Dreyer's report are hardly sufficient to establish that the marketability of the home is dependent upon the work proposed by Farmers Supply being completed. This is in stark contrast to the costs at issue in *Abrams v. Abrams*, 516 N.W.2d 348 (S.D. 1994), which were

reasonably ascertainable in nature – i.e., the actual closing costs of the sale, including brokerage commission, real estate taxes, and other fees. *Abrams*, 516 N.W.2d at 350.

Having presented no reliable evidence that the valuation or marketability of the home was dependent upon the proposed work being done, Tammie was not entitled to have the Farmers Supply estimate deemed a marital debt.

7. The Circuit Court Abused its Discretion in Denying Brian's Motion to Amend his Counterclaim.

If this Court finds the circuit court did not err in granting the divorce on the grounds of irreconcilable differences, this issue is moot. If, however, this Court finds the circuit did err, it should also find that the circuit court erred in denying Brian's motion to amend his counterclaim to conform to the evidence presented at trial.

The decision to allow an amendment of the pleadings is reviewed for an abuse of discretion. *Murphey v. Pearson*, 2022 SD 62, ¶ 33, 981 N.W.2d 410, 420. Rule 15(b) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues

> made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

SDCL §15-6-15(b). If a party did not move to amend their pleadings, the question is whether the issue was tried by express or implied consent of the parties. *Murphey*, at ¶ 33, 981 N.W.2d at 420. "[F]ailure to formally plead a claim or make an amendment to a pleading is immaterial if the issue was tried by express or implied consent." *Id.* "Whether an issue was tried by express or implied consent requires a review of the record." *Id.*

"The test for allowing an adjudication of an issue under FRCP 15(b) and SDCL 15-6-15(b) tried by implied consent is whether the opposing party will be prejudiced by the implied amendment, i.e., did he have a fair opportunity to litigate the issue, and could he have offered any additional evidence if the case had been tried on the different issue." *Id.* at ¶ 34, 981 N.W.2d at 420 (citations omitted). "If there has not been a fair opportunity for a party to be heard on the issue and/or additional evidence could have been offered, any implied amendment would be prejudicial and no trial by implied consent exists." *Id.*

Brian testified that he was seeking a divorce on the grounds of irreconcilable differences or, in the alternative, extreme cruelty. TT 749. When he gave this

testimony, Tammie did not object or in any way indicate that she was surprised by this position. TT 749. It was only on the final day of trial, approximately one month later, when Tammie's counsel raised an objection, stating: "I understood Dr. Baxter to testify under oath that he's alleged extreme cruelty in his answer and counterclaim. The answer and counterclaim that was filed with the Court doesn't allege fault so I would object for the grounds. He's never made an allegation of fault." TT 1032. Upon review of the pleadings, the circuit court determined that Brian indeed had only alleged irreconcilable differences, at which point Brian's counsel orally moved to amend to include a fault-based ground of extreme cruelty. TT 1033-1034.

At that time, Tammie's counsel stated, "We object. That should have been amended prior to trial." TT 1034. However, Tammie's counsel did not articulate any reason for the objection, did not indicate that she was surprised by Brian's position, did not identify any prejudice, and did not suggest that she was unprepared to address Brian's allegation of extreme cruelty at trial. *Id.* Nonetheless, the circuit court denied the motion to amend, stating, "the Court believes there should have been notice provided to Ms. Morin so that she can prepare her testimony accordingly. That was not done so the motion is denied." TT 1034.

Brian's allegations of extreme cruelty were clearly covered thoroughly by both parties at trial. His allegations of fault related to Tammie's treatment of him and the children with respect to their diverging political, social, moral, and religious beliefs. Tammie also testified to these matters at length, albeit from her perspective that Brian alienated the children. Brian introduced evidence in the form of audio recordings - which were not objected to by Tammie and to which she had full access and notice prior to trial - that highlighted Tammie's mistreatment of the family. TT 819-825; SR 1852: Def's Ex. 144-J, 144-L, 144-F. He introduced text messages showing Tammie's vile statements to the children, to him, and about the children and him to other people. TT 993-1010; SR 1854-1903 (Def's Ex. 103-106, 110-11, 117-18, 122-24, 127, 135). *See also* TT 277-344, 348-353. He also introduced evidence in the form of photos demonstrating Tammie's irrational and violent behavior - all of which was admitted without objection from Tammie's counsel. TT 1015-1019; SR 2636-2639 (Def's Ex 149-152). The circuit court found much of this evidence compelling and directly contradictory to Tammie's own assertions that Brian alienated the children from her. SR 2965-2966, App. 7-8.

Tammie had a full and fair opportunity to litigate Brian's allegations of extreme cruelty. She did not allege, or make any showing of, prejudice that she would suffer if he were allowed to pursue the fault-based ground.

The trial court erred in denying Brian's motion to amend his counterclaim to conform to the evidence and permit him to state a fault-based ground for divorce because the issue was impliedly tried by the parties.

8. The Circuit Court Erred in Holding that Tammie did not Dissipate Marital Assets.

The automatic restraining order that issues upon commencement of a divorce action prohibits both parties from "in any way dissipating or disposing of any marital assets, without the written consent of the other party or an order of the court, except as may be necessary in the usual course of business or for the necessities of life, and requiring each party to notify the other party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the temporary restraining order is in effect." SDCL §25-4-33.1. "To determine whether a spouse dissipated marital assets ... the circuit court should consider whether the transfers were improperly made to deplete the marital estate." *Cook v. Cook*, 2022 SD 74, ¶ 31, 983 N.W.2d 180, 191 (cleaned up and citations omitted). However, "SDCL 25-4-33.1(1) does not require evidence of bad faith or a design to deplete the marital estate[.]" *Id.* (citations omitted).

The circuit court found Tammie's expenditures on Exhibit 254 to be "extravagant." SR 2971, App. 13. However, it went on to state that there was "no credible evidence that such expenses were incurred for the purposes of

depleting the marital estate." SR 2971, App. 13. But, as this Court has held, neither bad faith nor a design to "deplete the marital estate" is required. *Cook*, *supra*. In *Ahrendt*, the plaintiff transferred nearly $9,000 to her son to help him with rent and other expenses. *Ahrendt*, at ¶ 16, 910 N.W.2d at 919. The funds had originated from a loan against her 401(k), which was a marital asset. *Id.* This Court held that it was proper for those funds to be attributed to her in the property division, as she did not comply with requirements in SDCL §25-4-33.1 related to extraordinary expenditures, even though there was no evidence of an intent to deplete.

Here, too, Tammie not only violated §25-4-33.1, but she also continued to make extraordinary, extravagant, and frivolous expenditures despite Brian's repeated objections. SR 2195-2226 (Ex. 253). The court noted that her charitable donations "exceeded historical values," but found they were not unreasonable. Reasonableness, however, is not the standard. The standard is whether the expenditures were "extraordinary," and the charitable donations clearly were, as were the furniture and other challenged expenditures. *See* TT 946 (Brian's testimony that the challenged expenses were those that were "out of the ordinary").

Despite finding the expenditures to be "extravagant" and "exceed[ing] historical values," the circuit court failed to find that Tammie had dissipated

marital assets in violation of SDCL §25-4-33.1. This finding was clearly erroneous and an abuse of discretion. The court's finding should be reversed, and the value of the dissipated assets should be deducted from Tammie's share of the property division.

Conclusion

Based on the foregoing, Brian respectfully requests this Court to affirm on all issues presented in Tammie's appeal. Should the Court find in Tammie's favor on the issue related to the grounds for the divorce, it should also reverse the circuit court's denial of Brian's oral motion to amend his counterclaim to include a fault-based ground for divorce. Finally, this Court should also reverse the circuit court's determination that Tammie did not dissipate marital assets.

Respectfully submitted this 24th day of January, 2025

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Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4), Appellee's counsel states that the foregoing brief is typed in proportionally spaced typeface in Equity A Tab 13 point. The word processor used to prepare this brief indicated that there are a total of 9,980 words in the body of the brief.

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Certificate of Service

The undersigned hereby certifies that January 24, 2025, the foregoing *Appellees' Brief* was filed electronically with the South Dakota Supreme Court and that the original was filed by mailing the same to:

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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

APPEAL NO. 30738 & 30750

TAMMIE MORIN

Plaintiff/Appellant,

vs.

BRIAN BAXTER

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA
THE HONORABLE ROBERT GUSINSKY PRESIDING

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NOTICE OF APPEAL WAS FILED ON JUNE 21, 2024

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RECORD REFERENCES

References to the record herein by Appellant Tammie Morin ("Tammie") are made in the same manner as in her initial Brief.

LEGAL ARGUMENT

A. TAMMIE DID NOT AGREE TO THE DIVORCE BEING GRANTED ON GROUNDS OF IRRECONCILABLE DIFFERENCES

Brian ignores Tammie's position on appeal. There is no evidence the parties "agreed" to divorce on grounds of irreconcilable differences. Tammie's consent to a divorce based on irreconcilable differences was *conditional* upon the parties reaching a settlement. Since the parties did not reach a settlement, Tammie's sole grounds for divorce at trial was extreme cruelty. Brian's contention that Tammie never "legally discarded" irreconcilable differences as a ground for divorce is therefore meritless.

The circuit court should have granted Tammie a divorce based on extreme cruelty. The evidence supported the finding of extreme cruelty based on Brian's conduct following the 2016 election, where the parties were no longer able to discuss their moral, religious and political views. (R 2964 ¶ 26; Appellant's Brief at pp. 9-10). Brian's relentless verbal attacks on Tammie, name-calling and slurs, viewed in the context of their marriage and Tammie's devotion to Christianity, warranted a finding of extreme cruelty. *Hybertson v. Hybertson* 1998 S.D. 83, ¶ 11, 582 N.W.2d 402, 407; *Goeden v. Goeden* 2024 S.D. 51 ¶ 54, 11 N.W.3d 768 (husband's emotional abuse, name calling and verbal abuse was extreme cruelty).

As Tammie did not consent to divorce on the grounds of irreconcilable differences, the circuit court erred, and the case should be reversed and remanded to the circuit court with directions to grant Tammie a divorce on the grounds of extreme cruelty.

B. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING BRIAN'S MOTION TO AMEND HIS COUNTERCLAIM

The circuit court did not abuse its discretion in denying Brian's motion to amend his counterclaim. *Murphey v. Pearson,* 2022 S.D. 62, ¶ 33, 981 N.W.2d 410, 417.

Brian did not allege extreme cruelty in his pleadings. His June 2022 counterclaim prayed for a divorce solely grounds of irreconcilable differences. (R 21).

The circuit court's denial of Brian's motion was consistent with its strict discovery and disclosure deadline. On August 29, 2023, the court advised the parties that "any evidence, witness, report or exhibit that is not produced by October 31, 2023 deadline will be excluded." (HT August 29, 2023 pp. 21-22; R 987).[1] Had the court allowed Brian to amend his counterclaim, Tammie would

[1]The circuit court applied its strict October 31, 2023 deadline to Tammie as well. At trial, the circuit court prohibited Tammie from presenting the testimony of two witnesses related to her claim of sexual abuse (Dr. Christenson's PA Diane Weber and therapist David Jetson) based on its October 31, 2023 deadline. (T 1183-85; 1193-95).

need to present additional witnesses and evidence to contest Brian's new legal theory – well after the expiration of the court's deadline.

Brian's suggestion that the parties tried the issue of Tammie's extreme cruelty by implied consent is meritless. "[A] court will not imply a party's consent to try an unpleaded claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim.") *Murphey,* 2022 S.D. 62, at ¶ 37. Here, Brian's evidence regarding Tammie's conduct was directed at Tammie's spousal support claim, which Brian had denied. (R 22). Tammie's "fault" was thus a contested issue as it applied to the spousal support claim, not divorce. "[A]n issue has not been tried by implied consent if evidence relevant to the new claim is also relevant to the claim originally pled." *Id.* at ¶ 37.

The circuit court did not abuse its discretion in denying Brian's motion.

C. THE CIRCUIT COURT ERRED BY TRANFERRING THE 529 ACCOUNTS TO THE PARTIES' ADULT CHILDREN

A 529 savings account is the property of the marital estate, not a gift to the parties' child. *See Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶ 15, 910 N.W.2d 913, 919; *Berens v. Berens*, 818 S.E.2d 155, 157 (N.C. 2018). Brian fails to cite any legal authority in South Dakota or elsewhere suggesting that a circuit court has the power to transfer marital assets to a third party (*i.e.* make a gift of assets) in a divorce.

Brian's assertion that the parties had an "agreement" to transfer the 529 accounts to their adult children is clearly belied by the parties' on-the-record

discussions with the court at the end of the trial. (TT 1196-1204). Tammie's counsel set forth Tammie's position that the 529 accounts should either be split equally between the parties or their entire value should be assigned to Tammie's share of the property distribution. (TT 1197-1198). The circuit court inquired of the parties' counsel: "Do you guys have an agreement?" (TT 1199). Tammie's counsel responded: "No. Our position is that the money was put in by the parents. We think [the parents are] in the best position to determine how it should be allocated." (TT 1199). Tammie's counsel further advised: "So my client indicated that if you consider it marital property, she's willing to put it in her column". (TT 1203).

The circuit court lacked authority and discretion to transfer the accounts to the adult children. Accordingly, this issue should be reversed and remanded with instructions that the parties each be awarded 50% of the value of the 529 accounts.

D. THE CIRCUIT COURT'S FINDINGS OF FACT THAT TAMMIE *DID NOT* DISSIPATE ASSETS WAS NOT CLEARLY ERRONEOUS

Brian claims the circuit court's finding of fact that Tammie *did not* dissipate assets in violation of SDCL § 25-4-33.1(1) was clearly erroneous. This contention lacks merit.

Initially, Brian's dissipation claim totaled $302,224.33. At trial, Brian abandoned his $21,000 claim related to Tammie's payment of student loans. (TT 149, 946, 1013). He also abandoned his claim of $49,511.24 related to the parties'

December 2021 purchase of a car and insurance for Tammie's parents. (TT 946, lines 14-17).[2]

In considering the balance of the claimed expenditures of $237,171.39, the circuit court properly considered their reasonableness in the context of the parties' marital history and lifestyle and whether Tammie had expended funds for the purpose of depleting the estate. Over the fifteen-month period of May 26, 2022 to September 2023 (when Brian began providing Tammie with interim monthly spousal support (TT 835)), the parties' net (disposable) income exceeded $45,000 per month.

In considering whether factual findings are clearly erroneous, the evidence is viewed in the light most favorable to the circuit court's findings which may be reversed only if the Court is "left with a definite and firm conviction that a mistake has been made." *Schaefer ex rel. S.S. v. Liechti*, 2006 S.D. 19, ¶ 8, 711 N.W.2d 257, 260.

The circuit court did not err. In ruling from the bench, the court stated: "Ms. Morin, most likely spent more than what she did during the marriage during the pendency of this divorce, but I don't find it to be so out of line as to say that it wasn't necessary for her survival, well-being…." (TT 1210). Further, the court

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[2]On appeal, Brian attempts to ignore his abandonment of this claim (*see* Brian's Brief p. 19), but he cannot do so. *Stemper v. Stemper,* 415 N.W. 2d 159, 160 (S.D. 1987).

found "there [was] no credible evidence that such expenses were incurred for the purposes of depleting the marital estate." (R 2971, App. 13).

Marital Home Improvements & Furniture

Brian's dissipation claim included $33,008.60 of funds used for marital home improvements and furniture. (R 2524 pp. 17-18). Brian asserted the improvements (alarm system, landscaping, trees, window cleaning, garage doors and a horse electric gate) and purchase of appliances (freezer, stove, washer and dryer) constituted an unreasonable dissipation of marital assets. (TT 943; R 2524 pp. 17-18).

The circuit court properly rejected Brian's claim. First, Brian did not introduce any evidence suggesting that these expenses were not reasonable and necessary for the proper maintenance and functioning of the marital home. The appliances were purchased because the existing ones were no longer functional. (TT 150). The use of marital funds to pay reasonable and necessary items does not constitute an improper dissipation of marital assets. *See e.g., Cook v. Cook*, 2022 S.D. 74, ¶ 32, 983 N.W.2d 180, 189 (holding that expenditures for "necessities and replacement of things taken by [wife] out of the marital home" would not constitute improper dissipation of marital assets).

Second, the "[t]he weight of authority holds that the use of marital assets to purchase marital property generally does not constitute dissipation." *Gershman v. Gershman*, 286 Conn. 341, 943 A.2d 1091, 1094 (2008). This is so because the "purchase of marital property is clearly a valid marital purpose" and the funds are

not actually dissipated but "have merely been changed into another form." *Id.* (quoting 2 B. Turner, *Equitable Distribution of Property*, § 6:102, p. 591 (3d Ed. 2005)). *See also Maczek v. Maczek,* 248 App.Div.2d 835, 836–37, 669 N.Y.S.2d 749 (1998) (marital funds spent to maintain marital property not dissipated); *Livingston v. Livingston,* 58 S.W.3d 687, 689 n. 1 (Mo.Ct.App.2001) (funds spent to repair marital property not dissipated). These expenditures were incurred *prior* to the Ed Dreyer appraisal of the home on September 20, 2023 (R 2275) and, were thus factored into the appraised value of the home (which was awarded to Tammie).

An unknown amount of Brian's $33,008.60 claim related to the purchase of furniture. (R 2524 pp. 17-18). Brian presented no evidence that the purchase of furniture was in any way unusual or extraordinary considered in the context of the parties' marital history and lifestyle and the court found Tammie's purchases were not unreasonable. (R 2971, App. 13). Moreover, the parties' property distribution addressed household property. The parties agreed that *no value* be assigned and that any dispute regarding its division be determined in binding arbitration. (R 2969; App. 11).

Charitable Contributions

Brian's dissipation claim also included charitable contributions that Tammie made over the twenty-one-month period of April 18, 2022 through January 11, 2024. (R 2524 p. 9). During the parties' marriage, Tammie regularly contributed to her church, Habitat for Humanity and Compassion International

where she sponsors foreign children. (TT 157-59). Brian acknowledged that Tammie routinely contributed to charitable boards and religious organizations during their marriage. (TT 1097). Nonetheless, Brian urges the Court to find the contributions constituted an unreasonable depletion of marital assets in violation of SDCL §25-4-33.1.

Brian's argument lacks merit. Courts have recognized that "value judgments concerning the nature of discretionary spending during a marriage should be avoided. What seems wasteful to one party may be a treasured source of solace to another…." *Jones v. Jones*, 942 P.2d 1133, 1139 (Alaska 1997), Accordingly, courts have also differentiated between dissipation and discretionary spending – *i.e.*, expenditures "which are wasteful and self-serving and those which may be ill-advised but not so far removed from 'normal' expenditures occurring previously within the marital relationship to render them destructive." *Wiltse v. Wiltse,* No. W2002-03132-COA-R3CV, 2004 WL 1908803, at *4 (Tenn. Ct. App. 2004) (citing Lee R. Russ, Annotation, *Spouse's Dissipation of Marital Assets Prior to Divorce as a Factor in Divorce Court's Determination of Property Division,* 41 A.L.R. 4th 416 (1985)). While "[d]iscretionary spending might be ill-advised . . . unlike dissipation, discretionary spending is typical of the parties' expenditures throughout the course of the marriage." *Larsen-Ball v. Ball,* 301 S.W.3d 228, 234 (Tenn. 2010).

Here, the circuit court found the donations to charitable boards and religious organizations, while exceeding Brian's "norm" as measured by amounts

donated in 2020 and 2021, "were not unreasonable in light of the parties' standing." (R 2971, App. 13). Further, the circuit court found that Brian presented "no credible evidence that such expenses were incurred for the purposes of depleting the marital estate." (*Id.*) There was no evidence of fraud, willful misconduct, bad faith, improper motive or concealment/transfer of marital assets. Contrary to Brian's arguments, this case is not similar to *Ahrendt v. Chamberlain*, 2018 S.D. 31, ¶ 22, 910 N.W.2d 913. There, the circuit court found the wife's post-divorce transfer of $8,776 from a bank account to her adult son from a prior marriage constituted a dissipation of assets; the wife had *never disclosed the existence of the bank account* to the husband during the marriage and, as such, the husband had never previously consented to using the account funds to benefit the wife's adult son.

Here, the benefactor of the donations was not Tammie (or any adult relative). Moreover, while the charitable donations directly benefited the charitable and religious organizations, they also indirectly benefited the parties themselves. In addition to providing a source of comfort and community, the parties deducted $48,532 and $28,000 in charitable contributions from their gross income in their 2022 and 2023 joint tax returns. (R 1593, 2384).

Joint Bank Account Withdrawals

Brian claimed Tammie made several ATM cash withdrawals over the 17-month period of April 11, 2022 through August 2023 totaling $17,160.96. This was not unusual. Tammie testified that during the marriage she regularly

withdrew around $200 each week ($800 per month) so that she would have cash on hand for eating outside the home, going to movies, tipping and other normal living expenses. (TT 156). Further, Brian did not provide any evidence that Tammie was responsible for all the withdrawals which formed Brian's dissipation claim. Prior to September 2023, Brian and Tammie had equal access to their joint account (TT 835) and, as such, could withdraw funds. Accordingly, Brian admitted he was unable to testify as to how much Tammie withdrew from their joint account via ATM withdrawals when they were living together in the marital residence or when they were separated. (TT 1097).

Brian's claim also included joint bank account withdrawals of $35,598.17. (TT 930, 961; R 2524 p. 710). Brian testified he had no idea what these funds were used for (TT 930, 961). Tammie used the funds to pay her attorney. (TT 156).

Horses/Animal Veterinary Expenses

Brian's claim included funds used to pay veterinary expenses from June 2022 through April 2023. (R 2524 pp. 13-15). The parties owned several horses and dogs and Tammie regularly provided foster-care services for several cats. (TT 941, 1099). Brian did not introduce any evidence suggesting that the expenses were not reasonable and necessary for the treatment of the parties' animals. Rather, he claimed that Tammie had dissipated marital funds simply because the bills were $16,586.15 *more* than they had been in prior years. (TT 940, 957).

Tammie testified in response that one of their dogs required major shoulder surgery and another one of their dogs required an ACL repair. (TT 160-161).

Diet Foods/Fitness Trainer

Brian's claim included funds that Tammie used to purchase Profile Diet foods over the 15-month period of September 2022 through December 2023 of $6,085 (R 2524 p 23; TT 947) and the services of Carol White, a personal fitness trainer to address Tammie's physical and medical impairments from January 2022 (five months before the divorce action was commenced) through December, 2023 in the amount of $11,268.56. (TT 940; R 2524 pp. 11-12). Brian testified that he was aware that Tammie had enlisted the services of a personal trainer at a cost of $515 per month some five months before the divorce case commenced. (TT 891-92). At trial, Brian admitted that Tammie had been on the Profile Diet food plan during their marriage (TT 1104) and Tammie's physician had recommended she hire a personal fitness trainer to help her lose weight. (TT 159-60). Brian did not introduce any evidence suggesting that these expenses were not reasonable and necessary for Tammie's physical health and mental well-being.

Brian also objected to Tammie purchasing "massages" over the period of January 2023 through August 2023 of $2,205, approximately $275 per month. (TT 947; R 2524 p. 22). Brian presented no evidence that the purchase of massages was unusual or extraordinary. Brian himself purchased weekly massages during the parties' marriage and Tammie testified that it was suggested to her that she

receive massages to help her cope with the stress of the ongoing divorce. (TT 166).

Airline Tickets

Brian's claim also included Tammie's purchase of first-class airline tickets during the 12-month period of August 2022 through July 2023 and totaled $13,785.47. (TT 958-59, 1076, R 2524 p. 16). This included various trips to New York City and Dallas (to see their son Joshua), and to Montana to visit her parents. (TT 161). Brian presented no evidence that travel by airplane was in any way unusual or extraordinary in the context of the parties' lifestyle. Brian admitted the parties travelled internationally including trips to China, France, Spain, Costa Rica, Mexico and Canada. (TT 1086). Indeed, during the pendency of the parties' divorce, Brian traveled extensively by airplane. During just the six-month period of October 2023 through April 2024 he used 272,283 of the parties' earned airline miles. (TT 1078).

Brian's objection to the purchase of the tickets was not that Tammie traveled by airplane during the divorce proceeding, but that she flew "first class". (TT 941-943). Tammie testified that she purchased first class tickets to provide greater seating because of impairments related to her right knee which needs replacement. (TT 161).

Theater Tickets

Brian's claim also included Tammie's purchase of theatre tickets in the total amount of $10,086.73. (R 2524 p. 10). This included tickets for shows at the

Rushmore Civic Center, Black Hills Playhouse and Broadway play tickets in New York City. *Id.* Brian presented no evidence this entertainment expense was in any way unusual or extraordinary considered in the context of the parties' marital history and lifestyle. Indeed, when Brian and Tammie visited their son in NYC during the ongoing divorce proceeding, Brian *himself* attended the Broadway events. (TT 159).

Holiday & Birthday Gifts

Brian's dissipation claim also included Tammie's "gifting" and "miscellaneous expenditures" from June 2022 through July of 2023 in the amount of $23,641.59. (TT 945-946). Tammie testified that this sum included Christmas and birthday gifts. (TT 149). Brian presented no evidence that the purchase of gifts for family members was in any way unusual or extraordinary considered in the context of the parties' marital history and lifestyle. Brian testified at trial that he pays $1,300 per month for a house in Montana where his mother resides, a gift. (TT 904).

The circuit court's findings that Tammie did not dissipate assets in violation of SDCL § 25-4-33.1(1) was not clearly erroneous. The circuit court properly considered Brian's claim in the context of the parties' marital history and lifestyle and concluded that Tammie had not expended funds for the purpose of depleting the estate.

E. THE CIRCUIT COURT ABUSED ITS DISCRETION IN ONLY AWARDING TAMMIE ALIMONY OF $7,500 PER MONTH AND LIMITING THE DURATION OF ALIMONY TO 36 MONTHS

At the time of the trial, the parties' disposable income was $45,000 per month. (The parties' monthly "cash flow" was $38,959 but that was *net* of $6,125 in monthly contributions to a 401(k)-retirement account. (R 2927, 2973, App 15). The parties also regularly contributed a *minimum* of $250,000 per year, $21,000 per month, into other savings and investment accounts.[3] As a result, the parties had approximately $18,000 per month for bills, unforeseen expenses and discretionary spending.

Tammie's monthly alimony claim (not including three items that should not have been included as monthly expenses),[4] totaled $21,885 (slightly less than 50% of the parties monthly disposable income of $45,000). The circuit court obligated Brian to pay Tammie monthly alimony in the amount of $7,500 and pay her $942 Cobra Bronze health plan premium, a total monthly alimony obligation of $8,442.[5]

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[3]The parties' savings, investment and retirement planning were an integral part of their standard of living during the marriage. As Brian testified, "we made a big effort to save money" and the parties annually invested between $250,000 and $400,000. (TT 905-906).

[4]The three excluded items from Tammie's proposed monthly budget (R. 1737, Exh. 14) are: (1) $5,000 per month for payment of incurred attorney's fees; (2) $2,000 per month for future marital home water well repairs; and (3) $1,500 per month to pay-off Tammie's post-filing debts. These three items, which totaled $8,500, are addressed in the context of the parties' property distribution and Tammie's request for attorney fees, not as alimony expenses. (*See* Appellant's Brief, Arguments E, F and G).

[5]Brian correctly notes the $8,442 alimony award *included* monthly utilities,

Although the parties regularly contributed a minimum of $27,000 per month to savings, investment and retirement accounts during their marriage, the circuit court did not make *any* provision in its award for Tammie to continue to make such contributions and, accordingly, the monthly alimony award of $8,842 represented less than 19% of the parties' monthly disposable income of $45,000.[6] The circuit court's determination that the evidence in the record did not establish that Tammie had a need for spousal support beyond the $8,442 it awarded cannot be justified. Considered in light of the parties' regular monthly contributions to savings, investment and retirement contributions of $27,000, the circuit court's $8,842 award was $13,500 short of Tammie's need. Considered in light of Tammie's proposed monthly budget of $21,855 and its line items, the circuit court's $8,842 award was $13,013 deficient.

From a line item basis, the circuit court's $8,842 monthly alimony award made no allowance for the following major items which were necessary to maintain Tammie's marital lifestyle: (i) $2,000 for donations to charitable

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property taxes and property insurance for the marital home. Tammie's counsel apologizes to the Court and opposing counsel as her initial Brief (pages 26 and 32) was incorrect in this regard.

[6]Brian points out that his proposed monthly budget (adopted by the circuit court) included a $1,000 line item for "savings/misc." (R 2464) and the same was included in the $8,842 alimony award. Whether the court's award included $1,000 for Tammie to deposit funds into a "savings" account or represented some "miscellaneous" expense(s) is unknown. Further, $1,000 does not equate to $13,500 (50% of the parties' monthly savings, investment and retirement contributions of $27,000).

organizations; (ii) $3,000 for contributions to savings, investments and retirement accounts; (iii) $1,493 in out-of-pocket: medical ($583), dermatology ($275), vision ($135), prescription ($200) and counseling services ($300) that would *not* be covered by her Cobra Bronze health plan due to its $7,500 annual deductible (TT 895)[7]; (iv) $2,223 representing a monthly car payment to finance the purchase of a Chevrolet Suburban SUV as Tammie's Chevrolet Suburban had been driven over $300,000 miles, was rusted and had broken down and was in the shop for repairs (again)[8]; (v) $515 to continue Tammie's use of a personal on-line physical fitness trainer (begun five months before the divorce action); and (vi) $415 in denied vacation/travel expense. The circuit court also made no allowance for Tammie's health insurance premiums beyond 36 months (from age 60 to 65), projected to be $1,355 monthly. (R. 1737, Exh. 14).

Brian contends that the circuit court did not abuse its discretion in not making ***any*** provision in its award for Tammie to continue to make monthly

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[7]At trial, Tammie testified she incurred $1,493 of monthly out-of-pocket expenses for medical, dermatology, vision, prescriptions and counseling services. (TT 193-95). The circuit accepted Brian's argument that all this expense would be reimbursed by Tammie's portion of the Health Savings Account. (R 2972, App. 14). However, at the rate of $1,493 per month Tammie's HSA asset will be exhausted in approximately 30 months. As such, Tammie will incur $1,493 of unreimbursed monthly expense from that point.

[8]Contrary to Brian's arguments, a spouse's anticipated future vehicle expense is properly considered in considering spousal support, particularly where, as here, such expense would be normal for someone with the spouse's station and social standing in life. *Fausch v. Fausch,* 2005 S.D 63 ¶ 16-19, 697 N.W.2d 748, 753-54. Brian's arguments ignore the reality that at some point every vehicle does need to be replaced and that time has come for Tammie's 2012 Chevrolet Suburban SUV.

contributions to savings, investments and retirement accounts (and donations to charitable and religious organizations) because the circuit court awarded Tammie $2.6 million in retirement, savings, and investment accounts as part of the property division. (Appellee's Brief at p. 30).

This argument is meritless. First, the circuit court did *not* award Tammie a *greater percentage* of the parties' marital assets to *reduce* Tammie's monthly need to $8,842.[9] The circuit court's property division was made on an equal (50/50) basis based on the parties' equal contributions to the accumulation of those marital assets. (R 2972, App 14).

Second, by disallowing the contributions to savings, investments and retirement accounts from the alimony award (and not increasing Tammie's share of the property division) the circuit court placed Tammie in a disadvantaged position relative to Brian:

> [A]n equitable distribution of the marital estate ensures that both parties reap the benefits of regular saving during the marriage in the form of the marital assets. However, where, as here, the parties' post-dissolution income is sufficient for each party to continue to live the marital lifestyle, if routine saving is not considered in connection with the determination of alimony, the recipient spouse will be forced to rely on the appreciation of current assets while the payor spouse will be able to continue the full extent of the marital lifestyle, including regular saving."

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[9]As noted in *Terca v. Terca,* "the symbiotic relationship in a divorce action between property division and spousal support requires consideration of the two together because ***an award of more assets*** can eliminate or reduce the need for spousal support and vice versa." 2008 S.D. 99, ¶ 28, 757 N.W.2d 319, 326 (emphasis supplied) (citing *Heckenlaible v. Heckenlaible,* 1996 SD 32, ¶ 20, 545 N.W.2d 481, 485).

Openshaw v. Openshaw, 493 Mass. 599, 228 N.E.3d 551, 561 (2024). *See also Lombardi v. Lombardi,* 447 N.J. Super. 26, 40 (App. Div. 2016) ("it is not equitable to require [the recipient spouse] to rely solely on the assets she received through equitable distribution to support the standard of living while [the payor spouse] is not confronted with the same burden").

Based on the foregoing, the circuit court's alimony award should be reversed and remanded. At a minimum, the record evidence established that Tammie was entitled to a monthly alimony award of approximately $19,000, not the $8,842 that was awarded.

In addition, the circuit court's award of alimony for the limited period of 36 months requires reversal as it was predicated on the assumptions that (1) Tammie's monthly need was $8,842; and (2) she would be able, in 36 months, to receive income from the marital assets awarded to her in an amount sufficient to satisfy that $8,842 need. (R 2974, App. 16, Conclusion of Law ¶28(k) (stating that "[c]onservative calculations show that Tammie will draw approximately $7,000 per month (after tax) from retirement funds. That, taken with the income of the rental property exceeds the monthly budget shown in Exhibit 266.") However, Tammie's monthly need is not $8,842 and the duration of an alimony award should not be based on future income projections which may or may not occur. Rather than limiting Brian's obligation to 36 months based on assumed future facts, the obligation should continue until Tammie dies, subject to modification under SDCL § 25-4-41.

F. THE CIRCUIT COURT ABUSED ITS DISCRETION EXCLUDING TAMMIE'S POST SEPARATION DEBTS FROM THE PROPERTY DISTRIBUTION

The circuit court was obliged to make well-reasoned findings of fact regarding whether the post-separation debts Tammie owed to Dr. Raymond ($10,000), the Helsdons ($5,000) and Wells Fargo ($12,512) constituted marital debt or non-marital debt. *Green v. Green,* 2019 S.D. 5, 922 N.W.2d 283; *Taylor v. Taylor,* 2019 S.D. 27, 928 N.W.2d 458. The circuit court failed to do so (and there are no findings of fact supporting any of the arguments Brian has advanced in his Brief).

Accordingly, this issue should be reversed and remanded to the circuit court with instructions to issue findings of fact and conclusions of law regarding each of these debts.

G. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO DEDUCT THE WATER SYSTEM REPAIR ESTIMATE EXPENSE FROM THE MARITAL RESIDENCE VALUE

The issue at trial was whether Tammie's share of the property distribution should be increased to compensate for the future expense associated with the water well/system at the marital home, not whether the quote for that work constituted a "marital debt." The circuit court did not deny the claim on any of the grounds Brian asserts on appeal. Rather, the court denied the claim on the grounds that "[t]he quote from Farmers Supply LLC for various and replacement to the water system of the marital home is not presently incurred debt and shall not be allocated to either party." (R 2971 ¶20).

As the circuit court made no factual findings, this issue should be reversed and remanded to the circuit court for consideration of this claim.

H. THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING TAMMIE'S CLAIM FOR ATTORNEY FEES

There is no evidence that Tammie abandoned her claim for attorney's fees as Brian suggests on appeal. (Appellee's Brief, p. 33). The fact that Tammie agreed with Brian's counsel's entirely irrelevant question as to whether she *could* pay for her attorney's fees out of the proceeds of a marital assets that may be awarded to her by the circuit court is obviously not (even remotely) the functional equivalent of a statement that Tammie was abandoning her right to seek reimbursement of attorney' fees from Brian. At trial, Tammie testified as to why she believed Brian should pay her attorney fees (TT 141-144, 223) and her counsel submitted a post-trial affidavit for attorney fees requesting that Brian reimburse Tammie's fees. (R 1786, 179).

Brian concedes the circuit court abused its discretion by failing to conduct the required two-part analysis (*see* Appellee's Brief p 33-34) and, as such, the Court should reverse and remand to the circuit court for application of the required analysis.

CONCLUSION

Based on the foregoing, Tammie respectfully requests the Court reverse and remand this case to the circuit court with appropriate instructions as set forth herein.

Dated this 24th day of February, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to SDCL § 15-26A-66 that Appellant's Reply Brief complies with the type volume limitation required under SDCL § 15-26A-66(b)(2). Appellant's Reply Brief contains 4,971 words. Appellant's brief contains the type style font of Times New Roman – 13.

Dated this 24th day of February, 2025

Mitchell D. Johnson
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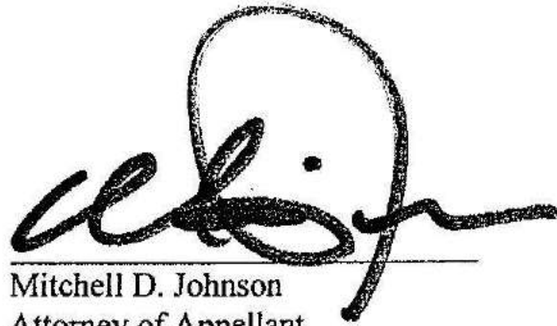
CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2025, I caused the original of the Appellant's Reply Brief to be filed with the Clerk of the South Dakota Supreme Court by enclosing the same in an envelope, securely sealed with first class postage prepaid and deposited in the U.S. Mail, Rapid City, South Dakota; an electronic copy of the Appellant's Reply Brief to be filed with the Clerk of the South Dakota Supreme Court to the email address listed below; and a copy of the Appellant's Reply Brief to be served upon the Appellee's attorneys of record via Odyssey File and Serve.

Shirley Jameson-Fergel,
Clerk of the South Dakota Supreme Court
500 East Capitol

Pierre, SD 57501-5070
Email: SCClerkBriefs@ujs.state.sd.us

Dated this 24th day of February, 2025



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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

TAMMIE L. MORIN, Plaintiff/Appellant, vs. BRIAN R. BAXTER, Defendant/Appellee.	Appeal No. 30738 **Appellee's Notice of Review**

To: Plaintiff/Appellant Tammie L. Morin, and her attorney of record, Mitchell D. Johnson:

Please take notice that the Defendant/Appellee Brian Baxter seeks review of the *Amended Judgment and Decree of Divorce* entered by the circuit court on May 28, 2024.

The Defendant/Appellee seeks review of a) the circuit court's denial of defendant's oral motion to amend his counterclaim to assert a fault-based ground for the divorce, and b) the circuit court's determination that plaintiff did not dissipate marital assets.

Filed: 7/11/2024 4:58 PM CST Supreme Court, State of South Dakota #30738

Dated July 11, 2024.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

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ATTORNEYS FOR DEFENDANT/APPELLEE

CERTIFICATE OF SERVICE

I certify that, on July 11, 2024, I served copies of this document upon the listed people via Odyssey File & Serve:

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mjohn26477@aol.com
ATTORNEY FOR APPELLANT

/s/ Sarah Baron Houy
Sarah Baron Houy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

TAMMIE L. MORIN, Appeal No. 30738

Plaintiff/Appellant,

vs.

BRIAN R. BAXTER,

Defendant/Appellee.

Appellee's Docketing Statement

B. Timeliness of Appeal

1. The date the judgment of order appealed from was signed and filed by the trial court: **May 28, 2024.**

2. The date notice of entry of the judgment or order was served on each party: **May 29, 2024.**

3. State whether either of the following motions was made:

   a. Motion for judgment n.o.v., SDCL 15-6-50(b): **No.**

   b. Motion for new trial, SDCL 15-6-59: **No.**

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

   Plaintiff initiated an action for divorce. In his Answer and Counterclaim, the Defendant also sought a divorce from Plaintiff.

   After a five-day trial, the circuit court granted both parties a divorce on the grounds of irreconcilable differences, determined the nature and extent of the marital estate and divided it between the parties, and awarded alimony to Plaintiff.

Filed: 7/11/2024 4:58 PM CST Supreme Court, State of South Dakota #30738

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.

   a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims? **Yes.**

   b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? **Not applicable.**

6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

   Whether the circuit court erred in denying Defendant's motion to amend his counterclaim to include a fault-based ground for the divorce.

   Whether the circuit court erred in determining that Plaintiff did not dissipate marital assets.

Dated July 11, 2024.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

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CERTIFICATE OF SERVICE

I certify that, on July 11, 2024, I served copies of this document upon the listed people via Odyssey File & Serve:

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ATTORNEY FOR APPELLANT

/s/ Sarah Baron Houy
Sarah Baron Houy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
TAMMIE MORIN,	)	FILE NO. 51 DIV 22-106
	)	
Plaintiff,	)	
v.	)	**AMENDED JUDGMENT AND**
	)	
BRIAN BAXTER,	)	**DECREE OF DIVORCE**
	)	
Defendant.	)	

The above-entitled matter came before this Court through a trial held on April 22-25, 2024, and May 15, 2024. The Plaintiff appeared in person and through her attorney, Debra Watson. The Defendant appeared in person and through his attorneys, Steven Nolan and Emily Smorgiewicz. The Court's Amended Findings of Fact and Conclusions of Law are incorporated herein as a part of this Amended Judgment and Decree of Divorce.

Based upon the Amended Findings of Fact and Conclusions of Law, the Court does now hereby:

ORDER, ADJUDGE and DECREE that the bounds of matrimony heretofore existing between the Plaintiff and Defendant are hereby dissolved and the Plaintiff is granted a divorce from the Defendant on the grounds of Irreconcilable Differences, restoring the parties to the rights, status and condition of single persons; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue of custody is moot by agreement of the parties as their youngest child, Alexa, turns 18 on April 28, 2024 and graduates from Stevens High School on May 26, 2024;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the parties are awarded property as set forth in the Amended Findings of Fact and Conclusions of Law; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the title to the 2016 Murano shall be transferred to the parties' son, Isaiah, and the title to the 2014 Traverse shall be

transferred to parties' son, Joshua. These vehicles are excluded from the marital estate based on the agreement of the parties; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Vanguard 529 accounts shall be excluded from the marital estate by agreement of the parties and designated for the benefit of their children. The Vanguard accounts shall be maintained as 529 accounts and managed by each of the children, respectively, free and clear of any claim or supervision by either parent; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that each party shall pay the debt assigned by the Court in the Court's column on the Joint Property Exhibit, and he/she shall hold harmless and indemnify the other party from any liability therefor. Each party shall take all necessary steps to remove the other party's name from any debt documents within 65 days of the Amended Judgment and Decree of Divorce and shall do so for the Wood Ave. property prior to the date that the loan matures. Neither party shall incur any further liability on behalf of the other party; and

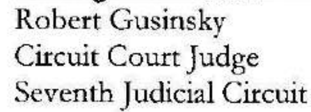
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, beginning on June 1, 2024, Tammie is awarded permanent alimony in the sum of $7,500.00 per month for a period of 36 months, payable on the 1st day of each month by direct deposit into her checking account. As part of the alimony award, Brian is ordered to continue to provide and pay Tammie's health insurance through the COBRA Bronze plan at Radiology Associates for a period of 36 months following the entry of the Amended Judgment and Decree of Divorce, with no changes made by Brian in the current health policy without Tammie's written consent or an order of the Court; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Brian is not required to maintain a life insurance policy to ensure payment of the alimony award.

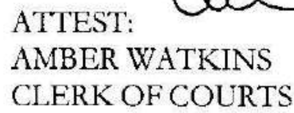
[INTENTIONALLY LEFT BLANK]

Dated this 28 day of May 2024, *nunc pro tunc* May 16, 2024.

BY THE COURT



Robert Gusinsky
Circuit Court Judge
Seventh Judicial Circuit



ATTEST:
AMBER WATKINS
CLERK OF COURTS

By: Melinda Fagerland
Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

MAY 28 2024

Amber Watkins, Clerk of Courts
By MF Deputy