1-3-2020

Griffiths v. Griffiths Appellant's Brief Dckt. 47099

Electronically Filed
1/3/2020 9:26 AM
Idaho Supreme Court
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IN THE SUPREME COURT FOR THE STATE OF IDAHO

DONNA O. GRIFFITHS,

Plaintiff/Appellant**,**

vs.

STAN R. GRIFFITHS,

Defendant/Respondent**.**

Docket No. 47099-2019

Bonneville County Case No: CV-13-5712

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, for Bonneville County

HONORABLE BRUCE L. PICKETT,
District Judge, Presiding

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NATURE OF THE CASE

This is a divorce case. Donna is appealing errors in the District Court wherein the District Court reversed various property and spousal maintenance decisions made by the Magistrate Court.

COURSE OF PROCEEDINGS

Donna and Stan Griffiths were married August 25, 1978. (R. 38) On October 24, 2013, Donna filed for divorce. (R. 27-30) Stan filed an Answer on October 29. (R. 31-34) Pre-trial and post-trial proceedings were lengthy. Trial of the matter was held on June 2, 3 and 4, 2015 and on July 16, 2015.

On June 5, 2015, the Decree of Divorce which was certified pursuant to IRCP 54(b), was entered following a stipulation between the parties. (R. 35) The final day of trial was held on July 16, 2015. Stan filed his Notice on Appeal on March 28, 2016. (R. 61). There were numerous proceedings before the District Court regarding how earnings from the MVH units should be held and/or used pending the appeal, and also regarding Donna's Motion to Dismiss. (R.78-85). The District Court issued its Memorandum Decision on Appellee's Amended Motion to Dismiss on December 14, 2018. (R. 308) The District Court then issued its Memorandum Decision on Appellant's Appeal from the Magistrate Court on April 29, 2019. (R. 320) Donna then filed her Notice of Appeal to the Idaho Supreme Court on June 5, 2019. (R. 338) Stan filed his Notice of Cross Appeal on June 24, 2019. (R. 349)

STATEMENT OF FACTS

Both parties were [redacted] at the time of divorce in June 2015. (R. 38) Donna was a homemaker after the parties' first year of marriage and the parties' children are now adults. (R. 38) Stan has been an orthopedic surgeon since 1989 and practices with two other doctors, with all three having an equal interest in Summit Orthopaedics Management and Consulting, PLLC (SOM). (R. 38-39)

During the marriage, the parties had an opportunity to purchase units in Mountain View Hospital (MVH) prior to its construction. (R.39) The units had to be held in Stan's name individually, because MVH is a physician-owned hospital and ownership was restricted to physicians licensed in Idaho with privileges at MVH. (R. 39, Ex. R. 1035) Stan and the other two doctors formed Summit Orthopedic Equity, LLC (SOE) which sole purpose was to own additional MVH Class A and Class RE units collectively between the three doctors and to pass through the MVH distributions to each of three doctors. (Trial Tr. 74-75).

The parties have had a very high rate of return on their MVH units, with the Class A units appreciating in value at the rate of 34% annually, together with distributions exceeding 14% per year. (R. 41; Trial Tr. 240) The parties have accumulated significant assets during their marriage and do not have any debt. (R. 39-43) After the parties separated, the parties purchased a condo in Idaho Falls, which became Donna's residence. (R. 39).

During the marriage, Donna managed the household and spent approximately $4,500-$6,500 per month which is what Stan "allowed" her to have. (Trial Tr. 255, 256) Otherwise, Stan controlled the finances of the parties. (Trial Tr. 255)

At trial, the value and division of the MVH units were hotly contested. (R. 40) Stan wanted the Court to award him all of the MVH units and adopt the MVH's internal value, and then to discount the same for potential taxes that would take place when he retired, which time was uncertain. On the last day of trial, Stan indicated that he was worried about a recent neck surgery and whether the same would cause him to have to retire if the conditions did not improve. (Trial Tr. 570-571). Stan testified that he did not know how long he would continue to work, but that he needed to continue because of the divorce and the division of property which took away his ability to retire early like he wanted. (Trial Tr. 571) Donna had hired a valuation expert who provided various options on how the MVH could be valued. (Ex. R. 961-963) One of those methods outlined the price that Stan had recently sold 30% of the Class A units for. (Ex. R. 961-963)

After the judgment was entered by the Trial Court, Stan appealed to the District Court, which ordered that all distributions were to be held by a receiver. (R. 75) Stan had already received $133,139.00 in distributions from MVH that he did not turn over to the receiver. (R. 129, 294) Stan did not turn over any funds to the receiver until nearly a year had gone by. (R. 294-295) During this time period, Stan remarried and made significant renovations to the house. (R. 86-85). Also post judgment, $106,666,67 which was reported as distributed by SOE to Stan was not given to the receiver. (R. 295) These funds were reported by Stan's office to have been transferred from SOE to SOM to pay for various overhead, improvements and additional staffing. (R. 232)

ISSUES PRESENTED ON APPEAL

1. The District Court erred by not dismissing the appeal pursuant to Donna's Amended Motion to Dismiss under the Acceptance of the Benefit Doctrine.

2. The District Court erred in in determining that the Magistrate did not correctly determine the value of the Mountain View Hospital Class A Units.

3. The District Court erred by reversing the Trial Court's valuation and directing that it considers further tax consequences.

4. The District Court erred in requiring Equalization Payment to be modified.

5. The District Court erred in remanding Spousal Maintenance back to the Trial Court for additional considerations.

6. The Court should vacate the District Court's award of costs to Stan and award Donna her attorney fees and Costs.

ARGUMENT

1. The District Court erred by not dismissing the appeal pursuant to Donna's Amended Motion to Dismiss under the Acceptance of the Benefit Doctrine.

The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the District Court affirmed the magistrate's decision, we affirm the District Court's decision as a matter of procedure. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)).

The Acceptance of the Benefits Doctrine ("the Doctrine") has been part of Idaho's common law for over 100 years, and has been confirmed in recent authorities as well. The Doctrine is a form of estoppel and/or waiver. It is defined as: "The doctrine that a party may not appeal a judgment after having voluntarily and intentionally received the relief provided by it**.**" *Black's Law Dict.* Abr. 7th Ed. P. 10. (Emphasis added).

The District Court found that Stan has received and accepted substantial benefits under the Judgment herein, including $133,139.00 of distributions from Mountain View Hospital (MVH), distributed *after* the Judgment was entered; $40,140.86 of other MVH distributions; $46,937.20 improvements on the marital home awarded to Stan and a $106,666.67 distribution from Summit Orthopedics Equity (SOE).

The District Court denied Donna's Motion to Dismiss, finding that the above amounts were *de minimus*, and also found Donna failed to prove unconscionability and prejudice. (R. 314-318) The leading Idaho case on this Doctrine is *Bechtel v. Evans*, 10 Idaho 147, 77 P. 212, 213 (1904) which held:

> [I]t appears to us that the test should be this: If the party has collected his judgment, and, in seeking to gain more by the prosecution of an appeal, thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed. If, on the other hand, the appeal is from such an order or judgment as that he could in no event recover a less favorable judgment, and that he incurs no hazard of ever receiving less than the judgment already collected by him, we see no objection to the prosecution of his appeal. *Id.*

Bechtel has been cited subsequently as the "Bechtel Rule." *Basic America, Inc. v. Shantila*, 133 Idaho 726, 745, 992 P.2d 175, 194 (1999). See also, *Stockyard Nat'l Bank of Chicago v. Arthur*, 45 Idaho 333, 262 P. 510 (1927) and *Burnham v, Bray*, 104 Idaho 550, 661 P.2d 335 (Id. App.

1983). *Bechtel* was again cited in *Strother v. Strother*, 136 Idaho 864, 868, 41 P.3d 750 (Ct. App. 2002). The Acceptance of the Benefits Doctrine was explained in that divorce modification case, stating: "If the appellant has collected his judgment, and in seeking to gain more by the prosecution of an appeal thereby incurs the hazard of eventually recovering less, then his appeal should be dismissed…"

The District Court, although discussing *Bechtel*, did not follow this precedent, but instead equated it to certain equitable doctrines including stating: "the Supreme Court held that equitable doctrines like quasi-estoppel have its basis in the acceptance of the benefits doctrine." The District Court was confused as to the difference between "accepting a benefit" as a factual element of quasi-estoppel and the acceptance of the benefits doctrine. Quasi estoppel is defined as "An equitable doctrine preventing one from repudiating an act or assertion if it would harm another who reasonably relied on the act or assertion." *Black's Law Dictionary* (11th ed. 2019). This relates to two or more parties dealing with each other. The acceptance of the benefits doctrine relates to a party *accepting* the benefit of the judgment and *then* still *trying* to appeal. It does not involve the other party.

Contrary to the District Court's assertion, *Mitchell v. Zilog, Inc*., 125 Idaho 709, 874 P.2d 520 (1994) did not involve the acceptance of the benefits doctrine, but was dealing only with quasi estoppel which involved an employee who was attempting to create an employment contract based upon a company issued guide and verbal representations of a supervisor in the company. Likewise, *Alpine Vill., Co. v. City of McCall* case did not involve the Doctrine, but rather was a case wherein a developer was trying to recoup money for purchasing property to comply with a

city ordinance, that was subsequently determined to be unconstitutional.

The District Judge heavily relied upon the case of *Long v. Hendricks,* 117 Idaho 1051, 793 P.2d 1223 (1990) to support his holding that in Idaho, the Doctrine has been relaxed and that it should be based upon fairness. (R. 310). This case is dissimilar in that the holding was that a party cannot receive post judgment interest if the tender of payment is not accepted. *Long v. Hendricks*, 117 Idaho 1051, 1052, 793 P.2d 1223, 1224 (1990). The *Strother v. Strother* case involved the doctrine of accord and satisfaction in which the Court of Appeals discussed the acceptance of a payment under certain circumstances as creating an accord and satisfaction. *Strother v. Strother*, 136 Idaho 864, 41 P.3d 750 (Ct.App.2002). In *Basic Am., Inc. v. Shatila*, the Idaho Supreme Court said nothing about relaxing the doctrine, but reiterated what is one of the accepted exceptions: There is no waiver of a right to appeal if there is no hazard or possibility of the appellant getting less. *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 745, 992 P.2d 175, 194 (1999).

The District Court cited the Court of Appeals case of *Burnham v. Bray*, 104 Idaho 550 (Ct. App 1983) for the proposition that acceptance of only part of the judgment does not preclude an appeal on other parts. (R. 311). This case dealt with an exception to the doctrine of the acceptance of the benefits, not a modification of the doctrine itself. *Burnham v. Bray*, 104 Idaho 550 (Ct. App 1983). Such exception stated that the appeal would not reduce what was accepted, as both parties had acknowledged the appellant's right to the funds accepted and was not part of the appeal. *Id.* In this case, the following discusses the various ways in which Stan has accepted the benefits of the Judgment herein:

A. Improvements to the marital home.

The Court found that Stan had made $46,937.20 of improvements to the home, but did not apply the facts to the Doctrine. (R. 312). The District Court, held that, "It would be impractical to expect a party awarded a house in a divorce action to then not live in the house for fear of losing a right to appeal because he accepted the benefit." The District Court did not correctly apply the doctrine or Donna's position.

The District Court incorrectly found that there is no possibility of the marital home being awarded to Donna. The District Court's rationale is faulty, in that the marital home is very much in the mix for possible redistribution on remand, especially if the value of the MVH units are substantially lowered by the Court and there is the question as how an equalization would take place. As explained below, selling the MVH units would cause waste and the court could look at other property to avoid loss of properties/value. *Hunt v. Hunt*, 137 Idaho 18, 20, 43 P.3d 777, 779 (2002). The District Court's statement that if the house were awarded to Donna, then she "would be the beneficiary of those improvements at no cost to her" is speculation. (R. 313)

Proof of prejudice or unconscionability is not required in applying the Doctrine in Idaho, nor does the moving party have the burden of proving the same. The *Kramer* case out of Texas "The prejudice inquiry considers whether the benefits themselves—or the proceeds from their sale—remain available for redistribution or have been so dissipated, wasted, or otherwise converted as to prevent their recovery." *Kramer v. Kastleman*, 508 S.W.3d 211, 222 (Tex. 2017). Most of the major assets awarded to Stan are not easily subject to attachment. For example, selling Stan's medical practice at a sheriff's sale is not likely to be successful. The MVH units

cannot be held by someone other than a doctor with privileges at MVH. The District Court did not require any bond or cash deposit on appeal. The District Court also gave over $400,000.00 of the funds awarded to Donna to Stan for him to spend however he wanted. (R. 75-76) This creates a deeper financial disparity between the parties. Stan's spending raises significant issues on collection including Stan's statement that the $400,000 is gone, (R. 180) distributions have been spent on business overhead and payroll. Interest has also been accumulating on the equalization obligation for almost four years. Thus, to say that there is no prejudice against Donna is without merit.

The District Judge declared that "there is no evidence before the Court that the money spent on the improvements has exhausted the asset." (R. 314). This statement is an incorrect standard of the Doctrine, as there is no requirement that assets be exhausted. No authority is given by the Court for the statement. The standard in Idaho is whether there is the hazard of the would-be appellant receiving less. *Bechtel v. Evans*, 10 Idaho 147, 77 P. 212, 213 (1904).

B. The Court's declaration that Stan's use of $133,139.00 is a "negligible" or "de minimus" amount is error.

Stan accepted and used $133,139.00 post judgment distributions under claim of right per the judgment. Stan, in his "Affidavit of Stan Griffiths in Support of Motion for Order Directing Receiver to Disburse Funds to Reimburse for Tax Payments by Appellant Stan Griffiths," dated October 4, 2018, declares:

> 4. From before the date that the Decree of Divorce was entered up to the date that the appeal was filed, I had continued to receive some Mountainview Hospital Dividends and Distributions. ***Since the decree of divorce indicated that these were my own separate property, and because no order pertaining to the***

appeal had been entered, that was my belief and remains my belief at this time.

12. …. ***I had every reasonable expectation that I could use the funds from the Mountain View Hospital stock/units for my own purposes, as they had been specifically awarded to me by the magistrate in her Memorandum Decision and Decree of Divorce***. (emphasis added)

Stan's reference to the "decree of divorce" would have to actually be referring to the Judgment entered February 16, 2016, as the Decree of Divorce entered in July 2015 only ended the marriage but did not address property issues.

The District Court failed to explain how $133,139.00 is a *de minimus* amount. The Court indicated that "The parties then tend to agree that the doctrine is one of degree, not of strict benefit." (R. 314). Donna has never stated that it was a "question of degree."

The District Court's concluded that if there is enough assets or money to satisfy the requirements of the judgment, the Doctrine would not apply or in other words, that Donna had to prove that expenditure of $133,139.00 will have an unconscionable or prejudicial effect on her. (R. 315). Under the laws of *de minimus*, the same are not based upon relativity to the value of something else. The doctrine of *de minimus non curat lex* is that the law does not care for or take notice of very small or trifling matters. *Sivak v. State*, 130 Idaho 885, 889, 950 P.2d 257, 261 (Idaho 1997); See also *Skaff v. Meridian North America Beverly Hills*, 506 F.3d 832 (CA 9 2007).

The District Court makes the false premise that Stan used the money to pay for expenses to avoid foreclosure of the property. (R. 316). Apparently, this is supposed to tie into a necessity defense. However, there are no debts owed by the parties, including no mortgage on any of the properties.

C. The Court erred in finding that "Stan's use of distributions from Mountain View Hospital Stock to pay for taxes did not constitute accepting of the benefits.

The District Court stated that:

> . . . in Stan's affidavit and during oral arguments, it was put forth that Stan had used the distributions to pay for taxes. Donna provided no evidence to dispute this claim by Stan, and although Stan provides no evidence to support his claim, for the purposes of the motion to dismiss, this Court will assume that the money was spent on necessary expenses.
> (R. 316)

The District Court twice denied Donna's Motions for discovery to trace the funds. Donna submits it is not fair or proper for the District Court to require Donna to prove something that has never been the requirements in the law (i.e. prejudice and unconscionability), and then to also deny her the ability to collect proof through discovery. The control of discovery is an area within the discretion of the Trial Court. (*Kelly v. Kelly,* 165 Idaho 716, 451 P.3d 429, 445 (2019.)

D. The District Court erred in not finding the Acceptance of the Benefits Doctrine for money distributed to Stan from Summit Orthopedic Equity (SOE), but given by him to Summit Orthopaedic Practice and Management (SOM).

SOE is a holding company whose only assets are MVH Class A and Class RE units. Stan, along with his partners, are the three members of SOE, each with an equal interest. (Trial Tr 74, 393 LL 21- 394 L. 1) SOM is the medical practice of Stan and the same two doctors. In 2018, SOE received MVH distributions that were diverted by Stan and the other common owners and members, to SOM. A K-1 was issued by SOE to Stan, stating that his one-third interest, equaling $106,666.67, had been distributed to him. (Conf. Doc. R. 6).

The District Court accepted Stan's argument that because he was only one of three members, he had no rights to the funds. In support of its findings, The District Court cited a few

cases[1], all dealing with retained earnings kept within the company. (R. 317). The District Court concluded, "Because these dividends were not distributed to Stan, they are not part of the community property and therefore, are not a part of the judgment that entitled Donna to then claim that Stan accepted the benefits of the award." (R. 318). The funds in question were not retained earnings and were in fact distributed.

Donna filed the Declaration of Jason Coles in Support of her Memorandum Supporting Motion to Dismiss Appeal, dated November 9, 2018. Mr. Coles is a CPA who testified that there could not be a transfer from SOE to SOM outside of a Bona Fide Indebtedness Note. SOE is merely a holding company for the purpose of receiving the MVH distributions and distributing the same to its members. Because of the funds being distributed, Stan had the legal ability to assert his rights as a member of SOE to collect his share of the distribution. The officers and members of a legal entity cannot transfer another person's distributions away.

E. The cumulation of all the benefits accepted by Stan are to be considered in determining that the Acceptance of the Benefits Doctrine applies.

The District Court used the various properties accepted by Stan in the singular, stating that each was "negligible" or "de minimus." Donna believes that in the context used by the District Court, each of those properties individually would not be "negligible." However, the Court should, in considering any negligible argument, look at all of the benefits collectively to determine whether they are negligible or *de minimus*. The amount of money Stan received and used for his personal use is a staggering acceptance of the benefit of the property and money he

[1] *Simplot v. Simplot* 96 Idaho 239, 529 P.2d 844 (1974), *Swope v. Swope* 122 Idaho 296, 834 P.2d 298 (1992) and *Neibaur v. Neibaur*, 142 Idaho 196, 125 P.3d 1072 (2005).

received. He cannot enjoy all of these assets, and then pursue an appeal.

2. <u>The District Court erred in determining that the Magistrate did not correctly determine the value of the Mountain View Hospital Class A Units</u>.

In an appeal from a District Court which is sitting in an appellant capacity from a decision made by the magistrate court, the Idaho Supreme Court or Court of Appeals reviews the decision of the District Court to determine whether it correctly applied the applicable standard of appellate review. *Reed v. Reed*, 157 Idaho 705, 709, 339 P.3d 1109, 1113 (2014) *citing Peterson v. Peterson*, 156 Idaho 85, 88, 320 P.3d 1244, 1247 (2014). The District Court is not permitted to second guess factual determinations of the Trial Court. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 828, 41 P.3d 242, 256 (2001).

> "A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous." *Camp v. East Fork Ditch Co., Ltd*., 137 Idaho 850, 856, 55 P.3d 304, 310 (2002). In applying that principle, the appellate court cannot reweigh the evidence, judge the credibility of the witnesses, or substitute its view of the facts for that of the trial court. Argosy Trust ex rel. Andrews v. Wininger, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005). It is the responsibility of the trial court to judge the credibility of witnesses and weigh conflicting evidence. Bream v. Benscoter, 139 Idaho 364, 367, 79 P.3d 723, 726 (2003). The appellate court's role is simply to determine whether there is evidence in the record that a reasonable trier of fact could accept and rely upon in making the factual finding that is challenged on appeal. Miller v. Callear, 140 Idaho 213, 216, 91 P.3d 1117, 1120 (2004)."
>
> *Reed v. Reed*, 157 Idaho 705, 710, 339 P.3d 1109, 1114 (2014).

One of the main factors in determining whether there was an abuse of discretion is "if the magistrate's findings of fact are not supported by substantial evidence or if the magistrate does not correctly apply the law." *Moffett v. Moffett*, 151 Idaho 90, 93, 253 P.3d 764, 767 (Ct. App. 2011).

The District Court abandoned its role as an appellate court to determine whether there is evidence in the record that a reasonable trier of fact could accept and rely upon in support of the decision made. From its Memorandum Decision, it becomes apparent that the District Court did not understand what "substantial and competent" evidence is. For example, the District Court held that, "Furthermore, the Symbian sale is a single sale as admitted to by Pinkerton, and by definition is not substantial evidence" (R. 325) As elementary as it is, the District Court concludes that "substantial" is only a quantitively fact driven solely by the number of occurrences. The District Court did not provide where its "definition" came from that a single transaction is not sufficient to constitute "substantial evidence." Regardless, the value arrived at by the Trial Court is based upon and supported by more than just the Symbian sale as shown below.

"Substantial and competent" evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003*" Keller v. Ameritel Inns, Inc.*, 164 Idaho 636, 639, 434 P.3d 811, 814 (2019)). The trial court found:

> The Court must still then determine the value of the MVH Class A shares. **Donna's own expert and her counsel posit a number of ways in which the shares can be valued. Each method appears to be sound.** However, Pinkerton concludes that the Fair Market Value for the MVH Class A shares is $8272 per unit. Exhibit 8, 13. The **most reasonable valuations, in the Court's opinion, are Pinkerton's conclusion of a Fair Market Value of $8272 per unit and the recent sale price of $9191 per unit**. The actual sale price has two advantages. **The first and foremost is that it is an actual transaction that the Court can rely upon**. Secondly, it falls squarely in the mid¬range of Pinkerton's indications of value using different valuation methods. If you include Evan's formula value, it still leaves the $9191 per unit price in the mid-range of the six different **pre-tax values** the Court was asked to consider. The Court hereby adopts the value of $9191 per unit for the MVH

Class A units. (R. 53) (Emphasis added)

The Trial Court's findings are very sound. As outlined in detail below, the Symbian sale provides a very substantial base to arrive at a value. The sale was recent and involved 30% of the units outstanding, which is significant. Symbian was a well-educated and knowledgeable purchaser and was the largest interest holder in MVH. An appraisal would have had to be done to ensure that the units were purchased at fair market value without any premiums, including premium for a controlling interest. (Conf. Ex. R. 6, 9; Trial Tr. 67; Trial Tr. 234 LL 8-12; Trial Tr. 141 LL 2-10). Other values would be greater or substantially equal to, including the internal value, once the administratively and arbitrarily discount is removed.

Keith Pinkerton, Donna's expert, was the only witness on the value of the MVH units. Chad Evans, the Chief Financial Officer for MVH, testified that the internal value was not reflective of fair market value or even fair, and that MVH "rarely" tries to set the price. (Trial Tr. 546) Kevin Oakey, Stan's expert, provided no testimony as to the value of the MVH units, but only testified as to possible tax ramifications using an internal formula as is starting point.

The District Court did not understand the methods of valuations. As testified to by Mr. Pinkerton, there are three common valuation methods, namely: The income approach, market approach and asset approach. (Trial Tr. 118; R. 961-962; Trial Ex. 13 p 6-7) The District Court stated that "Donna argues in response that the internal formula used by Mountain View is not based on a **fair market approach**, and therefore should be disregarded." (R. 324) (emphasis added). There was no fair market approach involved in this case, nor was that Donna's argument. The various approaches are used to determine fair market value or fair value.

The District Court failed to look at this case as an appellate court, but engaged in supposition and substitution of its own opinion for that of the Trial Court. The District Court held that "The Symbian sale price not only reflects a value of the shares, but an additional value added onto the shares for the purpose of a majority share in Mountain View, which undoubtedly adds values to the share;" and "The Trial Court's reliance on the Symbian sale price was in error as it is not substantial competent evidence concerning the price of the stock. Such was offered to explain how the expert arrived at the fair market value, taking the $9,191 price and then reducing it for a market sale of a minority share." (R. 325) There is no indication that the District Judge reviewed the Trial Court's findings to see if there was either a basis for the Trial Court's decision, let alone to support the District Court's beliefs. The District Court never even mentioned "the first and foremost" reason why the $9,191 was used, which fact is this was an "actual transaction that the Court can rely upon." (R. 53)

There was very substantial testimony, particularly on cross examination, where Stan's attorney attempted over and over again to get Pinkerton to admit that the Symbian offer had a control premium component to it. (Trial Tr. 199-200). Pinkerton was adamant that there was no control premium and that Symbian was purchasing minority (non-controlling) units. (Trial Tr. 199-200) The units owned by Stan, directly or indirectly through SOE, were always minority shares. A sampling of Pinkerton's testimony on this subject includes:

> **Swafford (Stan's attorney)**: All right. The Symbian sale, would you agree with me that they purchased a controlling interest in the Mountain View Hospital when the purchased the bulk transaction for the physician-members?
> **Pinkerton**: Absolutely Not. (Trial Tr. 191-192)
> **Swafford**: Okay. Now, the question is how much did Symbian pay for -- for a

controlling interest, isn't it?
Pinkerton: They didn't.
Swafford: You don't know that, do you?
Pinkerton: Yes, I do.
Swafford: Did you -- did you go meet with Symbian and know how they figured this value?
Pinkerton: I know how they figured the value.
Swafford: You do. You talked to someone there?
Pinkerton: No sir, But I have read the –the offering memorandum, and it's quite clear.
Swafford: Okay. Did you know -- do you know as a matter of your own -- as a matter of fact, that did not consider control in determining the price would pay for stock?
Pinkerton: I don't know what Symbian considered, but I know how they came up with a value.
Swafford: So, you don't know if Symbian added a premium for control or not, do you?
Pinkerton: Yes, I do.
Swafford: And are you speculating? Are you –
Pinkerton: No, I'm not.
Swafford: So you know that as a matter of fact?
Pinkerton: Yes, I do. (Trial Tr. 200 L 11-202 L 9).
. . .
Pinkerton: Dr. Griffiths is in a position to refer business to Mountain View Hospital. You cannot pay for referrals. You cannot pay a control premium when you're buying minority shares. It is forbidden by appropriate statute. There was a fair-market-value determination done by an independent third-party as stated in the offering memorandum, and that's how they arrived at value. They did not pay a control premium. (Trial Tr. 201 L 24-202 L 2). (See also 194 LL 2-8; 195 LL 8-11; 198 LL 10- 13)

Later on, Pinkerton testified that "[Symbian] purchased minority interests, which they assembled into control. They purchased minority interests from various physician shareholders, and to put it all together, they have control. But they didn't pay for control." (Trial Tr. 226 LL 21-25). Chad Evans, the CFO for Mountain View, testified that he didn't know of any premium being paid for the 2014 transaction for control. (Trial Tr. 540 LL 5-15)

The District Court incorrectly understood and/or applied the legal standard that "A trier of fact may not arbitrarily disregard credible and unimpeached testimony of a witness." *Dinneen v. Finch*, 100 Idaho 620, 627–28, 603 P.2d 575, 582–83 (1979). The District Court's stated that "The trial court failed to make any finding that the unchallenged figure of $8,272.00 was inappropriate or that the testimony was otherwise contradicted or inherently improbable." (R. 326). The error in the District Court's reasoning includes: (1) ignoring the qualifying "arbitrarily" and instead requiring strict adherence; (2) not differentiating "disregarding" from the court being bound; (3) not differentiating between testimony and conclusions; and (4) not recognizing that the testimony had been challenged[2], including in this appeal. *Dinneen v. Finch*, 100 Idaho 620, 603 P.2d 575 (1979). The applicable definition for "arbitrary," when referring to a judicial decision, is "founded on prejudice or preference rather than on reason or fact." *Black's Law Dictionary* (11th ed. 2019). The Trial Court did not "arbitrarily" disregard Pinkerton's testimony, but rather applied his report and testimony to form a sound and solid conclusion of value, one more compromising and beneficial to Stan than the evidence showed.

The District Court's Memorandum Decision on Appeal contained little discussion of the facts and mostly stated personal opinions instead of an appellate-oriented review of the evidence, and deferring the weight and credibility of witnesses to the Trial Court. Exhibit 13, discussed the Symbian purchase as follows:

> Because of the disparate nature of the results, I conducted an analysis of the recent purchase of units by the single largest unit holder, Symbion, which occurred in March 2014. In that transaction, Symbion purchased a large

[2] *Papin v. Papin* 2019 WL 6974276 (unpublished).

number of units from the existing owners at a price that **was determined by contemporaneous independent appraisal**. Specifically, Symbion purchased approximately 3,050 units at a price of $9,191 per unit. At the time of the transaction, the internal valuation per unit (performed monthly by MVH staff) was $5,545 per unit; this results in an appraised value (and price actually paid per unit) of approximately 165.8% of the internal valuation amount. Comparing the March 2014 internal valuation of $5,545 per unit to the March 2015 internal valuation of $7,441 shows an estimated increase of 34.2% during the year.
By way of reference to the growth rate of the internal valuation, an implied price of $12,334 per unit is derived for March 2015. . . .

Finally, in the 20-plus years in which I have been a professional appraiser, **it is fairly unusual to have actual transactions involving an actual party to a litigated matter within close proximity to a valuation date.** Approximately one year ago, Dr. Stan Griffiths sold Class A units to Symbion for $9,191 per unit.

The units sold by Dr. Griffiths were a non-controlling interest in the Company. Once aggregated by Symbion, they represented a controlling interest in the Company. Given the historical distribution levels and all other relevant considerations, **I believe an appropriate discount for lack-of-control (DLOC) would be very limited** (not exceeding 10.0%, as shown in Appendix B) and that even a small discount for lack-of-marketability (DLOM) would be inappropriate given that an actual market—albeit thinly-traded—exists for the units…

Given all of the information considered, it is my professional opinion that the minimum FMV per Class A units of Mountain View Hospital is $7,441 as of May 1, 2015. **It is also my professional opinion that there is strong evidence to suggest that the FMV could be substantially higher than this "floor value"** represents. Giving due weight to all of the assumptions, strengths, weaknesses, and other uncertainties, I conclude that the FMV of each Class A unit is $8,272 **as of as of May 1, 2015** on a **minority, non-marketable basis**. (Tr. Ex. 13 p 7-8; R. 962-963) (emphasis added)

The testimony of Pinkerton at trial also provides insight as to the relationship between the $8,272 and the $9,191 among other things, including the following colloquy's:

A: "Yes. And really, quite honestly, the --these two -- the next two lines, the Symbian Transaction Minority Basis, Symbian Transaction Control Basis,

really is the same exact method. **In fact, it only -- it only reflects my – my uncertainty as to what exactly was embedded in the number**. So I took the purchase price that Symbian paid for -- for instance, for Dr. Griffiths' units in March of 2014 –
Q: Which was what:

A: Which was 9191 per unit

Q: Okay.

A: And I reduced that by 10 percent for lack of control, **only because of a bit of uncertainty on my part. Its's likely that the that discount's not there. So—so they're two variations of the same method."** (Trial Tr. 127 L 21 - 128 L 12). (emphasis added)

Q: Now, in your report, did you make any recommendation or a conclusion on one particular valuation method?

A. Yes, I did.

Q. And what method was that and what was the value?

A. Well, **I went with the $8272, which is the Symbian transaction adjusted for control -- for lack of a control, only because I think it's a conservative number**. It's my job not to puff. I don't want to have a value that's too high. When I look at the income approach, there's some -- there's sane numbers there that, you know, I think there's sane real value in parts, but there's a little bit more in terms of assumptions there. **So I tried to go with something that felt more concrete, and what I believe is more concrete**. And I think the 8272 is a realistic number, and that's why I chose it. (Trial Tr. 141 LL 4-21) (emphasis added)

Considering the evidence presented in this case, the Trial Court not only considered, but adopted the testimony, especially when the Court indicated that "The first and foremost is that it is an actual transaction that the Court can rely upon" (R. 53). This mirrors Pinkerton's report and testimony which was not referenced anywhere in the District Court's Memorandum. Idaho caselaw does not require a discount. *Reed v. Reed*, 157 Idaho 705, 714, 339 P.3d 1109, 1118 (2014).

There is a difference between disregarding testimony and strictly limiting the complete testimony or to require the trial judge to have no discretion in deviating from a select portion of that testimony. The Trial Court noted that all of the methods used by Pinkerton were sound, which certainly conflicts with the District Judge's conclusion that the Pinkerton's testimony was rejected. Pinkerton's testimony and report stated that the $9,191 per unit value was based upon an appraised price for minority interests. (Trial Tr. 547 LL 14-16) This fact was confirmed by Chad Evans. (Trial Tr. 547 LL 14-18) The District Court basically assumed a market approach as a comparative sale, and falsely concluded because that because it was a single sale, that it did not constitute "substantial" evidence.

The District Court failed to discuss the fact that the transaction was regulated by the Federal Government under the "Stark" laws and anti-kickback laws. These laws require that transactions between the physician-owned hospital and referring physicians be at fair market value, which is the reason for the appraisal being made before the offer, and the reason why no premium could be paid, both according to Pinkerton and Evans. (Trial Tr. 67 LL17-22; Trial Tr. 539 L20- 540 L 2). Pinkerton when asked the question, "So is it your conclusion and opinion that 9191 was based upon the fair market value?, Pinkerton's answer was "Absolutely." (Trial Tr. 227 LL 5-6) Stark laws and anti-kickback references were noted in the MVH offering documents which show that MVH and Symbian thought that they applied. (Conf. Ex. R. 38, 84).

Another factor that supports the Trial Court's finding is the passage of time since the sale in March of 2014 and the time of trial. Considering the fact that Class A units appreciated 34.2% in one year alone, even if the $8,272 number was used, the $9,191 value of the units at time of

trial would have been in excess of $11,000. The District Judge stated that, "The Trial Court reached the $9,191.00 price by seeking a middle ground between the extreme upper end of the valuations of $12,334,00 and the figure that Pinkerton recommended of $8,272.00, and stated simply that the Court finds that such is 'fair.'" (R. 326). Oddly, in light of the Trial Court's evidentiary basis being the focus of the appeal, the District Court did not recognize the Trial Court's "first and foremost reason" is that it is an actual transaction that the Court can rely upon." (R. 53). It was only a secondary factor that value fell within the middle ground area of the various values. The $9,191 was not pulled out the air and is supported by substantial and competent evidence.

3. The District Court erred by reversing the Trial Court's valuation and directing that it consider further tax consequences.

The first conclusion the District Court reached was that "the Trial Court did not make specific findings of fact as to the tax consequences that Stan will necessarily incur as a result of the equalization payment." (R. 328) Later on, the District Court states,

> The Trial Court's order for an equalization payment created the circumstances that will likely force Stan to sell at the very least a portion of Stan's shares, if not the majority, which also affects his earning capacity as he will not experience the income from those shares that the Trial Court found at trial. (R. 328).

This statement makes several mistaken assumptions, including: 1) That the District Court did not assess tax liabilities in determining value; 2) That there will be a tax liability because of the equalization payment obligation; 3) That only the MVH units are the source of satisfying the full equalization judgment; 4) That the sale would require a very extensive if not a "majority) liquidation of the MVH units; and 5) That Stan's income would be detrimentally impacted which

would be a reason for reversal. All are unjustified and without basis.

The Trial Court *did* consider the tax ramifications of the property division. The Findings of Fact, especially 35-37, are significant. These include:

> 35. Oakey testified that in order to minimize taxes, he would advise the parties to hold their investments until death.
> 36. There was no testimony that either party intended to immediately liquidate, sale or otherwise dispose of any asset.
> 37. It would be entirely speculative and a potential windfall to one party to adopt Oakey's immediate liquidation value of the community estate. Thus, the Court rejects the tax discounted value of the assets.
> (R. 41)

The Trial Court, in settling on the $9,191 value stated "This value is adopted because the Court rejects the after-tax value and both Oakey and Pinkerton agree on the Class RE value pre-tax." (R. 52) Donna advocated for the imposition of a constructive trust which would both eliminate the need to for an equalization payment and for both parties to bear responsibility for the taxes associated with the units given to each of them if and when the units were sold. The trial court, in its memorandum decision, stated:

> Donna urges the Court to impose a constructive trust on the MVH Class A and RE shares, make Stan a trustee, and require him to divide the dividends and proceeds as they occur. This is a tempting option for the Court. It would allow both parties to bear the risk associated with the stock, allow both parties to benefit equally from any increase in value and dividends, ***and allow each party to bear their own tax consequences when and if they occur*** It would also avoid the difficulty of valuing the shares. The Court's problem with such a division is two-fold. First, there is no firm precedent in Idaho case law allowing such a trust to be imposed. Second, the Court is required, to the extent possible, to give each party sole and immediate control of their portion
> …
> If you include ***Evan's formula value,*** it still leaves the $9191 per unit price in the mid-range of the six different ***pre-tax values the Court*** was asked to consider. The Court hereby adopts the value of $9191 per unit for the MVH Class A units.

(R.52-53) (emphasis added)

Stan did not raise the issue of discounting the value for tax liability because of the equalization payment order, until the appeal herein. At the Trial Court level, Stan was seeking to have an immediate tax discount based upon an eventual retirement. The last day of trial was the first time that Stan raised concerns about his ability to practice based upon a recent neck surgery. (Trial Tr. 570-571)

Stan's obligation to Donna is not based, as he asserts on the "vast majority of liquid assets," being awarded to Donna. Rather it is based on the fact that he received, at his request, the majority of the most valuable properties. This included sole ownership of the MVH units, all five businesses, the marital home, recreational real property along with other assets, and more. If the Court awarded Stan more of the liquid assets in addition to what it did, the disparity in property division would be substantial, and would increase proportionately to the additional amounts awarded to Stan.

The District Court's opinion that Stan would be forced to sell the majority of the MVH units, is another clear example that it was not looking for substantial evidence to support the Trial Court's decision, abandoning the appellate review standard. The District Court stated:

> Furthermore, Donna argues that Stan has other assets which he could sell in order to meet the payment, such as the two houses, both valued at a combined $762,500, and the interests he has in five entities with a combined value of $642,539. Together, these values come to $1,405,039; almost a million dollars short of the equalization payment, and still doesn't take into account the tax consequences of selling those assets, as well as the fact that Stan would need to purchase other housing, and therefore would not receive the full 1.4 million dollars. (R. 327).

There is nothing in the record to support the District Court's characterization of Donna's

position. The District Court only mentions a liquidation as the only option, with it immediately discounted because "Stan would need to purchase other housing." (R.327) There is no discussion by the District Court about the numerous ways payment could be made including getting a loan which may involve a mortgage on Stan's real properties if he didn't want to liquidate; the sale of non-essential properties (e.g. the cabin) which would not only raise money, but would save costs of utilities, taxes, maintenance etc. The District Court focused on Stan's supposed entitlements. "[O]nce having made an equal division of community property, the court is not required to speculate about what either of the spouses may possibly do with his or her equal share and therefore to engraft on the division further adjustments reflecting situations rather than facts." *In re: Marriage of Duncan,* 90 Cal. App. 4th 617, 635, 108 Cal. Rptr. 2d 833,846 (2001). There is also the fact that the middle ground value reached by the Trial Court considered the possibility that some of the units might have to be sold and the court built in that possibility in determining the value. "While present value may reflect reasonably foreseeable future uses and changes in neighboring properties, the weight assigned such evidence is committed to the trier of fact." *McAffee v. McAffee*, 132 Idaho 281, 289, 971 P.2d 734, 742 (Ct. App. 1999). The Trial Court was very clear in looking at the various values either "pre-tax" or with taxes.

Stan has no intention of committing waste by killing the golden goose. With a 34% appreciation in value and a 14% distribution each year, it would be foolish to use the sale of the Class A units to pay Donna. Stan wants a fictional tax discount as if the units were sold, but then wants a huge windfall of fully continued appreciation, and then to liquidate only as necessary at some future date using tax minimalization techniques, such as those Jason Coles testified about.

A case very similar in fact and arguments to the present case is a case in North Dakota, *Sommers v. Sommers*, 2003 ND 77, 660 N.W.2d 586 (2003). In that case, the husband was an orthodontist, the wife did not work outside of the home, and the husband brought up possible retirement in the near future and had skin cancer. This court held that:

> Liquidation value, rather than fair market value, may be appropriate under certain circumstances involving distressed conditions," Heggen v. Heggen, 452 N.W.2d 96, 99 (N.D.1990), "[L]iquidation value is the least favored method of valuing any type of marital property in a divorce." Welder v. Welder, 520 N.W.2d 813, 817 (N.D.1994). "Ordinarily, fair market value, not 'liquidation value,' is the proper method of valuing property in a divorce. *Sommers v. Sommers*, 2003 ND 77, 660 N.W.2d 586, 590 (2003).

That court went on to hold that "potential taxes should be considered in valuing marital assets in only limited circumstances and theoretical tax liabilities that are not going to be incurred because there is not going to be a liquidation that should not be deducted." *Id.* at 590 *Citing Kaiser v. Kaiser*, 474 N.W.2d 63, 69 (N.D. 1991).

Lest there be a distraction, much of this discussion is not to find error in the District Court's personal opinions, but rather to point out that the District Court is *expressing* personal opinion, and at the same time to note the substantial and competent evidence to support the Trial Court's findings and decision. Valuation is clearing a discretionary function of the Trial Court.

> Disposition of property—including valuation and division—is a question of discretion, guided by statutory and case law. Chandler v. Chandler, 136 Idaho 246, 249, 32 P.3d 140, 143 (2001). "The disposition of community property is left to the discretion of the trial court, and unless there is evidence in the record to show an abuse of that discretion, the award of the trial court will not be disturbed." Maslen v. Maslen, 121 Idaho 85, 88, 822 P.2d 982, 985 (1991) (citing Koontz v. Koontz, 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980)). In

> "divorce proceedings the determination of the value of community property is within the discretion of the trial court and will not be disturbed on appeal if it is supported by substantial competent evidence." Chandler, 136 Idaho at 249, 32 P.3d at 143 (citing Maslen, 121 Idaho at 90, 822 P.2d at 987; Shumway v. Shumway, 106 Idaho 415, 679 P.2d 1133 (1984)); Martsch v. Martsch, 103 Idaho 142, 645 P.2d 882 (1982).
> *Stewart v. Stewart,* 143 Idaho 673, 677, 152 P.3d 544 548 (2007).

The District Court stated that, "The final determination of a 60/40 division is no longer a 60/40 division after Stan is required to sell his assets in order to meet the equalization judgment." (R. 328). The Trial Court's statement regarding the percentage differences is simply *obiter dicta.* The trial court has the discretion in dividing property, including an unequal division if certain proofs are made. Both the Trial Court and the District Court both found that there was a basis for an unequal division. (R. 330). The Trial Court was tasked with dividing the property in an equitable manner, and did so in this case considering all facts and circumstances.

The District Court concluded that Oakey's testimony went unrebutted (R. 327) which completely ignores the testimony of Jason Coles, CPA. Mr. Coles was called specifically on behalf of Donna to solely and specifically to rebut Oakey's testimony and "talk about the tax implications in that report". (Trial Tr. 612; See also Trial Tr. 610-653) Oakey's testimony was also impeached at trial and questions raised as to credibility regarding incorrect assumptions made by him. (e.g. Trial Tr. 437 LL 8-15; 438 L 4- 439 L 16) To list out all Oakey's incorrect assumptions and impeach testimony would be too extensive to include in this brief. The point Donna makes is that there is no basis for the District Court to conclude that Oakey's testimony went unrebutted and was entitled to undisputed and absolute adherence.

The next area where the District Court substituted its opinion in place of the Trial Court's,

is when it found that Stan's health requires him to retire early, which was based on Stan's testimony. The District Court found such to be unrebutted and therefor had to be accepted as absolute truth. The District Court does not refer to any portion of the record.

There was nothing in the record to indicate that Stan's retirement was imminent. There was no evidence from any health care provider or other professional supporting his claim of poor health. The only thing Stan testified to at trial was that there is nothing "definite" which would affect his employment and he recently had surgery which was still causing some issues, but was not preventing him from working. It was uncertain what his permanent conditions and restrictions would be if any. (Trial Tr. 596-600) How Stan's health care testimony comes about is relevant. The trial was supposed to be completed in June 2015, but because of Stan's accountant finding some information that could be relevant to the tax basis for the MVH units, the trial was continued until July 2015. (Trial Tr. 688-689) During the July proceeding, Stan started to describe his health conditions, medical test results and basically testify as a doctor. (Trial Tr. 597-598) Donna objected to the same, including for Stan failing to provide any prior disclosure to Donna and her counsel that this testimony would be given. (Trial Tr. 595 L 25- 596 L 9) In ruling on the objection, the following exchange took place.

> **COURT**. I'm going to let him testify as to his general health. I'm not going to let him testify as to whether someone's -- someone else has made predictions about how long he can work or –
> **MR. SWAFFORD**: No. We're not going to do that.
> **THE COURT**: -- or anything like that. I'll let him testify as to his general health.
> **MR. SWAFFORD**: **You don't know how long you're going to work, do you?**
> **STAN. No**.

MR SWAFFORD. Maybe I used an improper term, but there's nothing definite about -- definite about how long you're going to work?
STAN No. But I'm worried.
(Trial Tr. 596 LL 14-23; Trial Tr. 597 LL 7-10) (emphasis added).

Exclusion of evidence is a discretionary judgment of the Trial Court.

> The question of whether or not to admit or exclude evidence is a matter of the trial court's discretion, and will not be overturned absent clear abuse of that discretion. Morris v. Thomson, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997). A new trial is merited only if an error in excluding evidence affects a substantial right of one of the parties. Id. In Pau v. Yosemite Park & Curry Co., 928 F.2d 880 (9th Cir.1991).
> *Jones v. Crawforth*,147 Idaho 11, 21, 205 P.3d 660, 870 (2009).

The Trial Court, dealing with another objection after Stan again attempted to bring up objectionable testimony, stated, "I'll allow him to testify as to how he's feeling right now, but he's already testified he doesn't know how long he's going to work." (Trial Tr. 598 LL 15-17) The Trial Court did not ignore or reject Stan's testimony. The Trial Court made several findings regarding Stan's neck and his employment. (R. 38; R.50) The District Court simply did not review the facts to see whether there were substantive facts to support the Trial Court's findings. Of note is Finding of Fact #3 which reads in part, "[Stan] had neck surgery during the pendency of the divorce. He continued his employment after the neck surgery." (R. 38)

Having a "concern" or "worry" is not the same as the necessity to retire. Also, of note is that the MVH ownership restrictions are based upon Stan being a doctor with privileges at the hospital, not on his production as a surgeon. Even if Stan was unable to perform any surgeries, as long as he had a medical license and privileges at MVH, he would still be able to maintain

ownership of the MVH units.

The Trial Court considered Mr. Oakey's rock bottom internal valuation which included at least a 25% administratively determined discount, together with the additional discounts for maximum tax liability, as one of the measures of the Court in finally using the value of $9,191 as being the middle ground. This shows that the Trial Court gave some consideration to the same, together with the higher values that would be well justified. The Trial Court also considered the 34% annual growth in value, in addition to the 14% dividends each year. The Trial Court was very clear that it was using a "pre-tax" value, which shows that the Trial Court considered, but did not accept, the tax discounts Stan wanted. (R. 53) The Trial Court also noted, but did not penalize, for Stan's inappropriate and unilateral sale of 30% of the MVH Class A units. (R. 41-42) This was done in direct violation of the restraining order then in place. The Court would have been justified in making adjustments in the property division based upon this blatant, contemptuous misconduct. The trial court stated:

> Stan disadvantaged the court and counsel by selling approximately $900,000 worth of MVH stock during the pendency of the divorce proceedings and in violation of the temporary restraining order. He did not tell either Donna or his or her counsel that he was selling the stock. He was unable to produce any written record of the sale or disbursement of the proceeds. He testified that he deposited the proceeds from the personal shares of stock into a Bank of Commerce account. He also testified that he paid estimated taxes in the amount of $400,000 in 2014 on the sale of the stock, although there is no written documentation of any of these transactions. FOF 40 (R. 41-42)

The District Court cited only one case in this section, namely *Vierstra v. Vierstra* 153 Idaho 873, 292 P.3d 264 (2012), which the District Court cited as "a similar situation." The District Court held: "A similar situation is established here, where the equalization payment that

was intended to get the parties to the appropriate division carries with it tax liabilities carried by Stan entirely, and therefore the values of the assets are diminished." (R. 328). This case is very different both factually and in the law. The tax liability in question in *Vierstra* was an existing obligation from the year before. The Magistrate in that case gave the wife the first option to get the dairy farm, and if she did not exercise the option, the husband could purchase the property, and if neither of them could purchase the dairy, the dairy was to be sold. *Id.* Whoever got the farm had to pay the taxes. *Id.* The issues on appeal were solely based on jurisdictional and timeliness issues, and had nothing to do with setting precedence on discounts for taxes. *Id.*

The law does not mandate the Court to discount an asset for potential tax implications. *Vierstra v. Vierstra* 153 Idaho 873, 292 P.3d 264 (2012).

The Court needs to give "due consideration" to the same. Idaho Code §32-712. All of the witnesses agree that no taxes will be incurred until such time as the units are sold. Stan only raised questions at trial, which at best, related to only "if" and "when" he retired.

The District Court never discussed Donna's invited error arguments, but only mentioned them. The doctrine of invited error applies to estop a party from asserting an error, when his or her own conduct induces the commission of the error. *Thomson v. Olsen*, 147 Idaho 99, 106, 205 P.3d 1235, 1242 (2009). Stan invited the error by seeking all the property which he was awarded, albeit not the bargain-basement prices he wanted. Now, he seeks relief from the appellate court for the supposed oppression because of the property he received, none of which he would want to give up. It should be noted that transfers between spouses in a divorce proceeding do not create a taxable event. *Dondelinger v. Dondelinger*, 107 Idaho 431, 440, 690 P.2d 366, 375 (Ct, App. 1984).

If, for some reason, the valuation of the MVH is remanded, this Court is requested to provide sufficient direction and relief to reach a fair and equitable division of property. In such a situation, the Trial Court could be faced with the question whether the MVH (and other properties) had to be valued at 2015 values even though the values on the MVH are more than likely to have doubled in value. The concern arises under the law that "In a divorce action, the community property assets are to be valued as of the date of the divorce trial." *Reed v. Reed,* 157 Idaho 705, 711, 339 P.3d 1109, 1115 (2014). If this case is remanded, just adjustments in value based upon values that no longer exist, and injustice would occur as Stan would get a huge windfall and Donna would be severely penalized. If this Court orders or allows a new trial, then the valuation would be considerably different.

There are some Solomon type remedies that the Court should be able to consider including a constructive trust, which, according to what the District Court believes, would be of a short duration because of the supposed imminent retirement. Ordering the sale of all of the units (splitting the baby) would result in each party getting an equal share, but would also kill the "golden goose," which is unfortunately fairer than if Donna was the only party penalized by a tax discount. the units would treat. This would include the ability of the trial court to direct the sale of all or part of the MVH units, and not leave it up to Stan to decide "if" and "when" the units are sold. Then, direct the proceeds be divided in an appropriate manner.

If this Court does reverse the Trial Court's decision, subsequent findings should be done in a manner that is fair to the parties. One of the biggest questions that the Trial Court would face is whether to value the property at its current fair market price or the four-year old price while the

units have been appreciating at the rate of 34%. There is also the question as to whether or not the Court should consider subsequent transactions such as any subsequent sales to Symbian or its successor in interest, if there is a rejection of the past Symbian sale as an "single event" as the District Court held. Stan would undoubtedly want the Trial Court to be bound to relatively ancient values, to receive tax discounts and in essence get the property at a lower fictional value. At the same time, Donna could be denied the time value of her funds, have them static in absence of the court awarding her interest, which Stan would invariably deny. There is also the question as to health issues and whether Stan's actions in the last four plus years would shed any additional light on his ability to work. Such decisions should not be made in a vacuum.

Stan does not intend to sell the units; his intent is to get a tax discount supposedly to pay Donna, but if the value is lowered for taxes as he proposed, (47% discount rate because of his tax rate) he would not need to sell. This creates a potential circular issue in that if he does not need to sell the units to pay the equalization obligation, then there is no need to discount the same for the taxes.

There is no evidence that Stan selling the units is the only option. There is still the option of a constructive trust so that waste is not committed. Undoubtedly, this is why Oakey testified that the units should be held until they die if possible. (Trial Tr. 633 LL 8-10). It should also be noted that Stan wants the Court to value property differently, depending upon who gets the property. A classic example of the disparity in valuation approaches is found in Trial Exhibit O, Lines 14 and 15, which discount the same property for Donna at 23%, but at the rate of 47% for Stan. (Trial Tr. 429 L 22- 430 L 3; Trial Tr. 456 LL5-7; Trial Tr. 513 LL 2-4; Trial Tr. 508 LL

21-23; Trial Tr. 516 L 23- 517 L 1; Trial Tr. 517 LL 23-25)

4. <u>The District Court erred in requiring Equalization Payment to be modified</u>.

Donna generally agrees with the District Court's conclusion that this issue "rests almost entirely upon the value of the Class A shares". (R. 329) The District Court's remand and possible reversal would likely be overturned, and the Trial Court's conclusions affirmed if the Supreme Court determines that the Trial Court was correct in its valuation of the MVH units.

The District Court however went on to discuss various hardships to Stan allow, relying upon the same inaccurate assumptions of fact the District Court made including the supposed necessity to sell the majority of the MVH units and Stans immediate retirement. To preserve Donna's position, she asserts error by the District Court as a minimum.

It is difficult to understand what the District Court is trying to say when it stated "The [Trial] Court acknowledges that Stan had neck surgery, yet does not weigh that fact against the equalization payment. As mentioned above, Stan testified that he was going to have to retire before long as a result of the neck injury. This also drastically affects Stan's future earning capacity and the Court failed to make specific findings rejecting Stan's testimony to that effect." (R. 330). The District Court failed to describe how a neck surgery affects a property division issue. It is uncertain as to whether the District Court is indicating that the Trial Court should reduce the unequal division (which it upheld on appeal), or whether the same was only a lead-in to the District Court's long chain reaction theorized as because—Stan has a neck injury he must retire and when he retires he must liquidate the MVH units, which stops him from having income and if he doesn't have any income, then he can't pay Donna. To summary the faults in the District

Court's reasoning or breaks in the chain: 1) Stan had neck surgery, but the same has not stopped him from performing all of his services as a surgeon; 2) The evidence does not show a permanent disability or inability to work; 3) Income is not the only source for which the equalization can come from, which conflicts with the District Court's belief that the MVH units would have to be sold, and 4) If the MVH units were sold, there would be the proceeds from the sale to use.

5. <u>The District Court erred in remanding Spousal Maintenance back to the Trial Court for additional consideration.</u>

The issue of spousal maintenance may have, or soon will, be rendered moot. Both parties were [redacted] at the time of the divorce per Findings of Fact # 1. (R.38) Both parties will turn [redacted] in 2020, the time specified by the Trial Court for spousal maintenance to end.

As to maintenance, it is unclear what the District Court intended. In its conclusions it states that the award of spousal maintenance was in error, but in the body it states that "This court is not finding that spousal maintenance is not warranted at all, but rather remanding so that the Trial Court may make findings of fact that are substantial and competent to support a finding of spousal maintenance, in addition to the actual amount awarded." (R. 335)

The District Court is again second guessing the Trial Court. There is no evidence referenced that would show that the District Court conducted an abuse of discretion analysis. In *Palayo v. Palayo*, this Court considered the standard of review for awards of spousal maintenance. 154 Idaho 855, 859, 303 P.3d 214 219 (2013):

> When this Court reviews the decision of a district court sitting in its capacity as an appellate court, the standard of review is as follows:
>
> The Supreme Court reviews the trial court (magistrate) record to determine

> whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.
>
> Bailey v. Bailey, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting Losser v. Bradstreet, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)). Thus, this Court does not review the decision of the magistrate court. Id. "Rather, we are 'procedurally bound to affirm or reverse the decisions of the district court.' . . .
>
> Rather, it is bound to affirm or reverse the district court's decision. See Bailey, 153 Idaho at 529, 284 P.3d at 973; Korn, 148 Idaho at 415 n. 1, 224 P.3d at 482
>
> Palayo v. Palayo, 154 Idaho 855, 859, 303 P.3d 214 219 (2013).

In the District's Court's Memorandum, it immediately finds that the "Trial Court failed to address the first step in determining spousal maintenance is warranted." (R. 333) There is no case law cited; merely a naked reading of Idaho Code §32-705 in a literal sense. There is also a failure by the District Court to discuss the Findings of Fact or the Memo of the Trial Court.

The District Court clearly did not understand the standards of spousal maintenance, particularly with long term marriages with high incomes, and only superficially discusses a couple of the factors found in Idaho Code §32-705(2). The District Court says that the Trial Court did not make specific findings regarding the two factors of resources and or income. Finally, what factors the District Court did consider, it applied inaccurate facts regarding the same and injected personal opinions rather than to conduct an appellate review.

The Trial Court correctly perceived the issue as one of discretion. It cited Idaho Code §32-705 in full. It acted within the outer boundaries of its discretion, and acted consistently with legal standards. To determine if an award of spousal maintenance is proper, we must

glean and apply the Legislative intent of Idaho Code § 32-705 and give effect thereto. *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983). “We must not be guided by a single sentence or a part thereto, but must look to the provisions of the entire statute and its object and policy.” *Local 1494 of the International Association of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978

In *Theiss v. Theiss*, 112 Idaho 681, 735 P.2d 992, (1987) this Court concluded that construing the statute as a whole, a spouse is entitled to maintenance if both the property awarded in the divorce decree, and the spouse's potential employment opportunities are insufficient to meet his or her day-to-day needs. The object of a maintenance order is to secure that dependent spouse the same comforts and luxuries of life as likely would have been enjoyed had it not been for the enforced separation. Thus, the Court is to take into account the standard of living established during the marriage. *Campbell v. Campbell,* 120 Idaho 394, 404, 816 P.2d 350, 360 (Ct. App. 1991) See also, *Wilson v. Wilson*, 131 Idaho 533, 960 P.2d 1262 (1998).

“Reasonable needs" is not a formulaic and absolute standard based upon the parties' solvency. There is no identifiable point of how much is "enough" as a matter of law. Rather, "needs" is a relative standard based upon the parties' standard of living during the marriage. The difficultly with the District Court’s decision, is him expressing his opinion that Donna’s share of the property was sufficient. The District Court should have looked at the standard of living enjoyed during this long marriage, but ruled based upon “there is not finding that Donna *could not live well above her means* on the amount awarded to her in the equalization payment or the other assets she was awarded in the divorce proceedings.” (R. 334) (emphasis added) The

"means" test is not the standard in Idaho.

The District Court also found fault in the Trial Court by stating Donna should find at least minimum wage income, even though she has [redacted] and never had a job in decades. She was living a comfortable life and socialization associated with being married to a successful surgeon.

There is a significant tie between Idaho Code §§32-705 and 32-712. Each refers to the other for the reasons stated above. Spousal maintenance in lieu of property division provides payments over time instead of lump sum. The Trial Court herein referenced these statutes. It was also possible that instead of requiring Stan to pay an even larger equalization payment, the Trial Court considered the payment to be in the form of spousal maintenance, which also had the advantage of shifting income from a high income earner (Stan) to a former spouse who is in a lower tax bracket (Donna).

Stan had a greater earning potential over and above his salary, in addition to the many other assets awarded to him. The Trial Court decided not to impose a constructive trust but instead awarded the property and spousal maintenance the way it did. See FOF 61 (R. 44). This shows the Trial Court understood the relationship between the two statutes and applied both in a fair and reasonable manner. (R. 56) Note should be made that this is a temporary maintenance case, not one for permanent maintenance, with the support ending at the earliest retirement age per the Social Security Administration. The same is true in this case, wherein Donna's support was also limited to five years, to allow Donna to adjust her finances and lifestyle, and to prepare

or a reduction in income at age 62, which is Social Security's earliest retirement age. (R. 56)

Stewart v. Stewart, bears some similarity to this case. 143 Idaho 673, 152 P.3d 544, (2007). Mr. Stewart, as here, was a successful physician, and Mrs. Stewart was primarily a homemaker. The court set a value for the good will in the husband's medical practice, in addition to the value of his ownership shares in his medical practice, which was extensive. The Supreme Court held that the wife should not have to sell the community home in order to access the equity to meet her reasonable needs after divorce, because a more modest home would not provide her with the standard of living established during the marriage. *Stewart*, supra, at 680, 152 P.3d at 551. "It was reasonable for the magistrate judge to conclude that Sally should not have to relocate to a significantly less expensive house and make early, penalized withdrawals from her retirement accounts in order to maintain her standard of living." *Id*. While this case was pending, with the cooperation of Stan, a modest condo was purchased, which was awarded to Donna. This, however, does not establish her lifestyle during marriage. The District Court incorrectly opined that "Donna would exhaust all of her assets without the maintenance award. Yet the District Court made no factual finding to support that conclusion.". (R. 334). What the Trial Court found was:

> In this case, the Court has awarded significant assets to both parties. The only evidence submitted to the Court showing what income Donna would have from the interest on any awarded assets was from Diane Barker. Stan did not submit any evidence on this point. Barker noted that the treasury bill interest on any assets would be approximately equal to inflation. This would mean that Donna would have to live off her assets and exhaust them in the process while Stan went forward earning upwards of $500,000 a year by conservative estimates."

Diane Barker's testimony went rebutted, which requires the Court to not disregard the

same, unless improbable or impeached. This standard was used by the District Court several times, but did not cite the above quoted section or consider the testimony and evidence of Diane Barker, which showed how the depletion of resources and income could occur. (Ex. R. 30-81)

Idaho Code § 32-705 and the above quoted court decisions embody Idaho's current law regarding the award of spousal maintenance. The Magistrate Court properly and carefully considered all of the factors contained in this statute. The District Court, on the other hand, failed to do so. In its memorandum decision, the District Court based its conclusion, at least in part, upon the notion that the Magistrate did not find Donna capable of working at minimum wage and imputing that income to her. The District Court stated that "There is no case law that this Court can find that states a minimum wage job is not sufficient enough to be considered when evaluating the financial needs of a spouse seeking maintenance" (R. 334) This statement reflects an incorrect orientation by the District Court. By contrast, the question should have been whether the Trial Court properly exercised its discretion in not requiring Donna to work. That question was never discussed by the District Court. The rationale of the District Court is that if a person is capable of working a minimum wage job, that minimum wage job must be taken into consideration in determining spousal maintenance. There is no case law to support this proposition. Although the District Court announced that it could not find any case law on the subject of supporting oneself through minimum wage employment, there is case law. For example, in *Pelayo v. Pelayo,* 154 Idaho 855, 303 P.3d 214 (2013), this Court dealt with a similarly situated wife as in the present case. In that case, the Trial Court ordered the husband

to pay the wife spousal maintenance until the wife reached the [redacted]. The husband appealed the spousal maintenance award and argued that the wife was capable of earning minimum wage and supporting herself. Another spousal support case found that "before any determination as to the amount of maintenance can be made, consideration must be given to all relevant factors that in the trial judge's opinion lead to a fair, just and equitable award" *Mulch v. Mulch,* 125 Idaho 93, 867 P.2d 967 (1995) See also, *Theiss*, supra, 112 Idaho at 682–83, 735 P.2d at 993–94 (citations omitted) (footnote omitted). See also, Stewart v. Stewart, 125 Idaho 143 Idaho 673, 679, 152 P.3d 544, 681 (2008). The Trial Court found in this case:

> Stan is in the midst of his prime income earning years with a lucrative profession that in addition has enabled him to purchase and own valuable stock. Donna, who has never been employed outside the home, can presently only earn minimum wage. She is at an age where any continued education to position her in the workforce at anything above minimum wage would take longer than her working years are likely to last.
>
> Donna and Stan enjoyed a high standard of living during the marriage. They lived in a large home with a second home in a recreational area to enjoy. Stan benefited from a stay at home wife who kept their two homes cleaned and furnished, his meals cooked, ran his errands and played the primary role in raising their children. Donna enjoyed the lifestyle of a flexible schedule and financial stability

There is substantial and competent evidence to support the Court's findings and the Trial Court acted within the outer limits of its discretion. As an appellate court, it doesn't matter whether the District Court would have decided differently. The District Court needed to, but did not, consider the discretion of the Trial Court.

The District Court's conclusion that Stan's testimony about Stan's imminent retirement is wrong for the reasons stated above. Also untrue was the assertion that the same was

uncontradicted and unimpeached.

Spousal maintenance is modifiable. Idaho Rule of Civil Procedure 60, which was the applicable rules at the time of divorce would have allowed Stan, were he was unable to work he could have filed an appropriate motion with the court. He did not. Stan also could, pursuant to Idaho Code § 32-709 and upon a showing of substantial and material changes in circumstances, seek to modify or eliminate the spousal maintenance obligation. He has not. The District Court expressed speculative opinions without thoroughly reviewing the evidence and testimony creating a disability, where the evidence shows at best a "worry."

The District Court found that the Trial Court did not "recognize and take into consideration Stan's reduced earning capacity as a result of the court's order to pay an equalization payment of over two million dollars." This conclusion is premised upon the previous, but faulty reasoning of the District Court, including the supposed imminent retirement because of health reasons, and the loss of the majority of the MVH unit income which are not true and not part of the District Court acting in an appellate capacity. The District Court also did not correctly frame or discuss the factor of Stan's income. It only considered the matter in terms of lost income to Stan which the District Court opined would occur. The correct standard for this factor is, "The ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance." Idaho Code Ann. § 32-705 (2)(e). Stan never raised the defense that he was unable to provide spousal maintenance. Instead, his arguments were solely directed to Donna and the property she would receive, and the income she

was capable of making. Nor did Stan provide any evidence as to his living expenses. "The court will not presume error where we have no record to assess the merits of the magistrate's treatment of the relevant statutory factors." *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011" *Moffett v. Moffett*, 151 Idaho 90, 94, 253 P.3d 764, 768 (Ct. App. 2011). The failure to provide sufficient evidence is fatal to Stan's case and the District Court's improper conclusions related to the same. There is no evidence to show that Stan was not capable of providing sufficient support for both parties, even if a portion of the MVH units were sold. The District Court also failed to recognize the disability insurance as a possible source of income post retirement.

6. <u>The Court should vacate the District Court's award of costs to Stan and award Donna her attorney fees and costs</u>.

IAR 40 allows costs to prevailing party. The District Court awarded Stan costs based upon its Decision. When this Court decides this matter, Donna anticipates that she will be the prevailing party and Stan will no longer be.

Donna requests attorney fees pursuant to IAR 41 and Idaho Code §12-121 which are available to the prevailing party and upon the Court finding that the appeal was pursued or defended frivolously. Idaho Code section 12-121 provides, "[I]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation." "Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the district court incorrectly applied well-established law." *Smith v. Smith,* 164 Idaho 46, 53, 423 P.3d 998, 1005 (2018), reh'g denied

(Aug. 28, 2018).

Stan has only asked for the District Court to second guess and substitute its opinion for that of the Trial Court. Anticipating that Stan will defend the District Court's second guessing, should result in the award of attorney fees and costs from the District Court to the Idaho Supreme Court as well.

Respectfully Submitted.

DATED: January 2, 2020

/s/ *David A. Johnson*
David A. Johnson, Esq.

CERTIFICATE OF COMPLIANCE WITH ELECTRONIC FILING

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 2nd day of January 2020.

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