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Divorce - Alimony, Allowances, and Disposition of Property - Abuse of Discretion - The Unconscionable Stipulated Divorce Agreement and Rule 60(b)(vi): What about the Children

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DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY—ABUSE OF DISCRETION—THE UNCONSCIONABLE STIPULATED DIVORCE AGREEMENT AND RULE 60(b)(vi): WHAT ABOUT THE CHILDREN?

Crawford v. Crawford, 524 N.W.2d 833 (N.D. 1994)

I. FACTS

In March, 1993, Plaintiff-Appellee, Kenneth Crawford (Kenneth) filed for divorce from his wife, Leslie Crawford (Leslie).[1] Kenneth and Leslie had been married since 1978 and had four children.[2] During their fourteen years of marriage, Kenneth completed his medical education, internships, and residency in Grand Forks, North Dakota.[3] Leslie was diagnosed with having a brain tumor in November 1990.[4] The subsequent surgery was successful and Leslie went on to complete a Bachelor of Arts Degree in Social Sciences in 1992 at the University of North Dakota.[5] Kenneth accepted a position with the Pembina County Hospital and moved the family from Grand Forks to Cavalier, North Dakota, in December 1992.[6] Kenneth and Leslie purchased a home in Cavalier.[7]

After filing for divorce, Kenneth moved into a rental apartment.[8] Leslie remained in the home with the children until June 1993.[9] Kenneth received a Notice Before Foreclosure in June 1993, and told Leslie that there was a danger of losing the house.[10] For this reason, Kenneth moved back into the home and took custody of the children, and Leslie went to live in Kenneth's apartment.[11]

1. Appellant's Brief at 2, Crawford v. Crawford, 524 N.W.2d 833 (N.D. 1994) (No. 940080).
2. Crawford v. Crawford, 524 N.W.2d 833, 834 (N.D. 1994).
3. Brief for the Appellee at 1, *Crawford* (No. 940080).
4. Appellant's Brief at 3, *Crawford* (No. 940080).
5. *Id.* at 1, 3.
6. *Crawford*, 524 N.W.2d at 834.
7. *Id.*
8. *Id.*
9. *Id.*
10. Appellant's Brief at 2, *Crawford* (No. 940080).
11. *Crawford*, 524 N.W.2d at 834. Leslie explains why she moved into Kenneth's apartment:

> "Kenneth came to me and convinced me to move from our marital home. He convinced my [sic] by telling me that we had received a Notice of Foreclosure and that if I did not move so that he could live in the home and pay the bills, we would lose our home as well as our vehicle.
> "I believed him. I saw no other alternative. The foremost thought in my mind was for my children to remain in their home. As a child, I never experienced a permanent home and neither had my children.
> "I wanted to assure that they could remain in their home and believed the only way to achieve that would be for Kenneth to move into the home."

Id.

Originally, Leslie had retained counsel for the divorce,[12] but prior to the final proceedings, she dismissed her attorney[13] and entered into a stipulated agreement with Kenneth without benefit of counsel.[14] The stipulation agreement awarded their home and custody of all four children to Kenneth.[15] "Leslie was given visitation rights and ordered to pay $15 per month in child support."[16] At the time of the divorce, Kenneth was earning $130,000 per year as a physician, and Leslie was employed at a local grocery store as a meat wrapper earning $300 per month.[17]

At the divorce hearing,[18] Leslie indicated to the district judge that she agreed, voluntarily and of her own free will, to the terms of the stipulation.[19] The trial court found that the stipulated agreement was valid, and entered the terms of the agreement into the judgment.[20]

Five months after the divorce judgment was entered, Leslie retained an attorney and filed a motion under Rule 60(b) of the North Dakota Rules of Civil Procedure,[21] which allows a party to vacate and obtain relief from a final judgment.[22] Leslie's Rule 60(b) motion alleged that there was newly discovered evidence.[23] In support of her motion, Leslie

12. Brief for the Appellee at 1, *Crawford* (No. 940080).

13. *Id.* at 3. Leslie's attorney advised her against proceeding without counsel. *Id.* Leslie informed her attorney that she and her husband had come to an agreement concerning the disposition of the property and she no longer required any legal representation. J.A. at D2, *Crawford* (No. 940080). It was the opinion of Leslie's attorney that she lacked the capacity to fully understand the legal ramifications of her signing a separation agreement. *Id.* at D3.

14. Brief for the Appellee at 3-4, *Crawford* (No. 940080).

15. *Crawford*, 524 N.W.2d at 835.

16. *Id.*

17. *Id.* at 834. North Dakota "child support guidelines are based upon the obligor income model. Consequently, Leslie's income was relevant for determining her support obligation. However, the guidelines did not require disclosure of Kenneth's income, because Kenneth, as the custodial spouse under the stipulation, was not obligated to make support payments." *Id.* at 835 n.1.

18. Brief for the Appellee at 4, *Crawford* (No. 940080).

19. *Id.*

20. *Id.*

21. *Crawford*, 524 N.W.2d at 835.

22. Rule 60 provides relief from judgment or order, and section (b) states that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment or order in any action or proceeding for the following reasons:
>
> (i) mistake, inadvertence, surprise, or excusable neglect;
>
> (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (iv) the judgment is void;
>
> (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (vi) any other reason justifying relief from the operation of the judgment.

N.D. R. CIV. P. 60(b).

23. Brief for the Appellee at 4-5, *Crawford* (No. 940080). A motion for a new trial can be made

filed an affidavit stating that she was coerced into signing the stipulation and that the brain tumor operation in 1990 rendered her incapable of fully understanding the legal effect of the stipulation.[24] Leslie also alleged that Kenneth used fraud and coercion to take advantage of her reduced mental capacity during the formation of the stipulation agreement.[25]

On January 19, 1994, a hearing was held on the evidence relevant to the Rule 60 motion.[26] The trial judge felt that Leslie had asked thoughtful questions at the divorce hearing and recognized the legal ramifications of the stipulated agreement.[27] The trial court found no medical evidence to indicate any incapacitation or memory lapses.[28] In addition, there was no evidence that Kenneth had used fraud, deceit, coercion, or misrepresentation to induce Leslie into signing the stipulation.[29] The trial court found no extraordinary circumstances which would warrant the reopening of the case since Leslie knowingly and willingly entered into the stipulation.[30] Thus, the trial court denied Leslie's Rule 60(b) motion for a relief of judgment.[31]

Subsequently, the case was brought before the North Dakota Supreme Court who reversed and remanded the case.[32] The court *held*, in a 3-2 decision, that the stipulation agreement was so one-sided that it was unconscionable.[33] The Court relied on Rule 60(b)(vi) of the North Dakota Rules of Civil Procedure[34] which allows the court to vacate the stipulated divorce agreement in order to "accomplish justice."[35]

II. LEGAL HISTORY

"The problem of when to allow relief from a civil judgment after the time for an appeal has run is one that has plagued courts and rule-makers since the beginning of court systems."[36] "Typically, American

within six months of entry of judgment, upon the ground of newly discovered evidence, under N.D. R. CIV. P. 59(c)(1).

24. *Crawford*, 524 N.W.2d at 835.

25. Brief for the Appellee at 6, *Crawford* (No. 940080).

26. *Id.* at 5.

27. *Id.* at 4.

28. *Crawford*, 524 N.W.2d at 835. Leslie could not provide the trial court with any medical testimony or evidence to substantiate her claim of a diminished mental capacity as a result of the brain tumor surgery. Brief for the Appellee at 6, *Crawford* (No. 940080).

29. *Crawford*, 524 N.W.2d at 835.

30. Brief for the Appellee at 5, *Crawford* (No. 940080). Leslie was given opportunities to have her own counsel review the stipulation, but made it clear that she wished to proceed without counsel. *Id.*

31. *Id.*

32. *Crawford*, 524 N.W.2d at 836.

33. *Id.* at 835.

34. N.D. R. CIV. P. 60(b)(vi).

35. *Crawford*, 524 N.W.2d at 836 (quoting Kinsella v. Kinsella, 181 N.W.2d 764, 769 (N.D. 1970)).

36. Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30

courts have placed finality before truth in the hierarchy of values."[37] Since 1948, Rule 60(b) provided litigants with six principal methods to reopen final judgments.[38] This comment deals with clause six, arguably "[t]he most controversial provision" of Rule 60(b),[39] and its application to stipulated divorce agreements.

A. FEDERAL INTERPRETATION OF RULE 60(B)(VI)

Historically, the Federal Court System has not applied Rule 60(b)(vi) absent extraordinary circumstances, even though relief from the judgment might have been obtained had an appeal been taken.[40] The requirement of extraordinary circumstances to justify reopening a judgment was first developed by the United States Supreme Court in 1949 in *Klapprott v. United States*.[41] *Klapprott* involved an action to set aside a four-year-old default judgment that had canceled the petitioner's certificate of naturalization on the ground that the certificate had been obtained fraudulently.[42] Klapprott, a German citizen, was in jail for conspiracy in violation of the Selective Service Act, and was thus unable to attend his denaturalization proceeding.[43] In setting aside the judgment, the Court found that clause six was applicable, noting that Klapprott was entitled to a fair hearing.[44] Clause six was seen as a residual clause to cover unforeseen contingencies, and as such it was intended to be a means for accomplishing justice in exceptional situations; and, so confined, did not violate the principles of finality of judgments.[45]

HASTINGS L.J. 41, 41 (1978) (footnote omitted).

> An early English statute dealing with judgments provided that any judgment entered from the assizes should in no way be amended or altered. II Henry 4, ch. 3 (1409) (Eng.). Provision for some relief was made in later centuries through the use of various writs. The issue whether relief was warranted in a given case, however, remained an important and difficult one. *See, e.g.*, Cannan v. Reynolds, 119 Eng. Rep. 493 (K.B. 1855).

Id. at 41 n.2.

37. *Id.* at 41. *But see* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 11.2 (2d ed. 1977) (noting that "modern procedure gives greater weight" to fully developing the evidentiary possibilities and contentions of the parties).

38. N.D. R. CIV. P. 60(b).

39. Kane, *supra* note 36, at 43 (discussing Rule 60(b) of the Federal Rules of Civil Procedure, and general observations and problems associated with Rule 60(b)).

40. 7 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.27[1] (2d ed. 1983) (citing Ackermann v. United States, 340 U.S. 193 (1950); *In re* Imperial "400" Nat'l, Inc., 391 F.2d 163 (3d Cir. 1968); Stewart Sec. Corp. v. Guaranty Trust Co., 71 F.R.D. 32 (W.D. Okla. 1976)).

41. 335 U.S. 601 (1949); *see* Kane, *supra* note 36, at 50 (noting that extraordinary circumstances requirement began with *Klapprott*).

42. Klapprott v. United States, 335 U.S. 601, 602-03 (1949).

43. *Id.* at 604-08.

44. *Id.* at 615.

45. *Id.* at 614-15; *see* 7 MOORE, *supra* note 40, ¶ 60.27[2].

One year later, the United States Supreme Court dealt with precisely the same subject matter in *Ackermann v. United States*.[46] In another denaturalization judgment, Mr. and Mrs. Ackermann did not appeal an adverse judgment due to the cost involved.[47] At the same time, Mrs. Ackermann's brother, Mr. Keilbar, under the same charges, appealed to the Fifth Circuit Court of Appeals and prevailed.[48] The Ackermanns filed a motion under clause six for a relief from judgment, asserting "that the denaturalization judgment was erroneous."[49] The Supreme Court denied the motion for relief and affirmed the lower court's decision.[50] Comparing *Ackermann* to *Klapprott*, the Court found that Mr. and Mrs. Ackermann had been given a free choice to appeal their case and were represented by competent counsel, unlike the situation in *Klapprott*.[51] Therefore, the purported excuse for not appealing the judgment was not so extraordinary as to bring *Ackermann* within *Klapprott* or clause six.[52]

The United States Supreme Court has struggled with the question of truth or finality of judgment, and how to employ and limit clause six.[53] The Court in *Ackermann* made it clear that, although the lower court ruling was erroneous, finality must control, stating that "[t]here must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."[54] Drawing on this language and the limited number of "extraordinary circumstances," federal courts have focused on whether a fair and deliberate choice has been made.[55] Thus, despite

46. 340 U.S. 193, 196 (1950); *see also* Kane, *supra* note 36, at 52 (comparing *Klapprott* to *Ackerman*).

47. Ackermann v. United States, 340 U.S. 193, 196 (1950).

48. *Id.* at 195; Keilbar v. United States, 144 F.2d 866, 866 (5th Cir. 1944) (per curiam) (dismissing the case on its merits).

49. *Ackermann*, 340 U.S. at 197.

50. *Id.* at 202.

51. *Id.*

52. *Id.*

53. For a view of the federal court's use of Rule 60(b)(vi), see *Loucke v. United States* which states:

> [T]his rule was not designed to supersede the normal and ordinary channels of relief. Nor was it intended to invest the court with an omnipotence whose boundary is defined only by the court's conscience. Considerations of judicial administration and of the stability of the law no less than the obligation of doing individual equity must be balanced and adjusted.

21 F.R.D. 305, 308 (S.D.N.Y. 1957).

54. *Ackermann*, 340 U.S. at 198; *see also* Atkinson v. Prudential Property Co., 43 F.3d 367, 373 (8th Cir. 1994) (holding that exceptional circumstances are relevant only when there is inadequate redress, not every time a party has suffered unfavorable consequences as a result of a judgment); 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 2864, at 359 (Charles Allan Wright et al., eds. 1982) (stating that the power of clause six does not relieve a party of free, calculated and deliberate choices).

55. *See* Romania v. Wildenstein & Co., 147 F.R.D. 62, 66 (S.D.N.Y. 1993) (holding that Romania failed to demonstrate extraordinary circumstances in not complying with discovery procedures; but that Romania's actions's were deliberate litigation strategy); *see also* DeLong's, Inc. v. Stupp Bros. Bridge & Iron Co., 40 F.R.D. 127, 130 (S.D.N.Y. 1965) (refusing to grant relief to plaintiff who had

the use of clause six, litigants still have a duty to take proper steps to protect their legal interests.[56]

Although the United States Supreme Court has not dealt directly with the question of extraordinary circumstances in a divorce settlement, the Court in *Klapprott*[57] emphasized the grave consequences of deportation which may require the use of clause six, as opposed to a divorce or default judgment involving simply money.[58] Thus, the federal courts are more likely to apply clause six in cases that require justice for persons who are being deprived of a fundamental constitutional right where the consequences of that depravation are extraordinarily severe or unfairly rendered.

B. NORTH DAKOTA INTERPRETATION OF RULE 60(B)(VI)

Rule 60(b) of the North Dakota Rules of Civil Procedure, relief from judgment or order, is modeled after Rule 60(b) of the Federal Rules of Civil Procedure.[59] Over the past thirty years, the North Dakota Supreme Court has refined its definition of an extraordinary circumstance relating to a stipulated divorce agreement. On several occasions, the court has relied upon federal rulings regarding civil procedure when the applicable rules are identical.[60]

In 1966, the North Dakota Supreme Court dealt with the issue of an extraordinary circumstance relating to a divorce agreement and Rule 60(b) in *Zundel v. Zundel*.[61] In this case, Mr. Zundel filed a Rule 60(b) motion to vacate a previous stipulated divorce agreement, alleging at that time he was incompetent and unable to understand the divorce proceedings.[62] Mr. Zundel filed several medical affidavits from two doctors to support this motion.[63] The North Dakota Supreme Court concluded that Mr. Zundel did not exhibit any form of mental incapacitation during the divorce proceedings and noted that he was represented by adequate counsel.[64] The court stated that the judgment would be

made a calculated choice to dismiss two defendants in order to gain an earlier trial setting).

56. 3 BARRON & HOLTZOFF, *supra* note 54, § 2864, at 359.

57. 335 U.S. 601 (1949).

58. Klapprott v. United States, 335 U.S. 601, 611-12 (1949).

59. N.D.R. CIV. P. 60(b)(vi). "Rule 60 is nearly identical to Rule 60, FRCivP, except for minor changes to conform to the court system of North Dakota and addition of a provision to subdivision (b) regarding obtaining leave from an appellate court to make a motion for relief." N.D. CIV. P. 60(b) (explanatory note).

60. *See, e.g.*, Zundel v. Zundel, 146 N.W.2d 896, 901 (N.D. 1966) (citing Erick Rios Bridoux v. Eastern Air Lines, 214 F.2d 207, 210 (3d Cir. 1954), and holding that the trial court abused its discretion in refusing to set aside a default judgment for defendant that was not properly represented by counsel) (other citations omitted).

61. 146 N.W.2d 896 (N.D. 1966).

62. Zundel v. Zundel, 146 N.W.2d 896, 898 (N.D. 1966). At the time of the divorce, Mr. Zundel was on a prescribed dosage of Valium. *Id.* at 902.

63. *Id.* at 898-99.

64. *Id.* at 900.

disturbed only if there was an abuse of discretion by the trial court.[65] Finding that Mr. Zundel had exercised a deliberate choice entering into a stipulated agreement, he was thus precluded from any claim of extraordinary circumstance.[66]

In a decision following *Zundel*, the North Dakota Supreme Court did allow a motion to vacate under clause six in *Kinsella v. Kinsella*.[67] In a hearing which neither Mrs. Kinsella nor her attorney attended,[68] the trial court terminated child support payments that were past due, as well as future support for her and her child, thus modifying a prior 1956 divorce agreement made by the parties.[69] Mrs. Kinsella motioned to vacate the order under Rule 60(b)(vi) of the North Dakota Rules of Civil Procedure, stating that if the default judgment was permitted to stand, her minor daughter would suffer.[70] In vacating the prior decision, the court expressed its concern for the welfare of the child and emphasized that a father's duty to support his children is continuous.[71] The court in *Kinsella* stated that clause six should be liberally construed and applied because of its remedial nature.[72] Applying clause six, the court vacated the judgment to protect the interests of the child's welfare.[73] The concern shown in *Kinsella* for the interest of the child could infer that the welfare of the child in a divorce action might rise to the level of an extraordinary circumstance within the meaning of *Klapprott* and *Ackermann*.

Although Rule 60(b) does provide a means to vacate a judgment when an extraordinary circumstance exists, courts in North Dakota have generally used the rule in conjunction with contract law to vacate stipu-

65. *Id.* at 901.

66. *Id.*; *see* Horace v. St. Louis S.W. R.R. Co., 489 F.2d 632, 633 (8th Cir. 1974) (stating that Rule 60(b) provides for extraordinary relief which may be granted only on an adequate showing of exceptional circumstances); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651 (1st Cir. 1972) (holding that Rule 60(b)(vi) is not a substitute for an appeal, but should be used as a residual clause only where exceptional circumstances exist); Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967) (stating that "trial judges must be allowed to exercise their sound discretion in granting or denying relief from a final judgment"); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir. 1952) (noting that "a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change"); Loucke v. United States, 21 F.R.D. 305, 308 (S.D.N.Y. 1957) (authorizing relief under Rule 60(b) may not be justified where the party failed to appeal prior adjudication due to lack of financial means).

67. 181 N.W.2d 764 (N.D. 1970).

68. Kinsella v. Kinsella, 181 N.W.2d 764, 766 (N.D. 1970). At the time of the hearing in Cass County District Court, Mrs. Kinsella was living in California. *Id.*

69. *Id.* at 766-67.

70. *Id.* at 769.

71. *Id.*

72. *Id.*; *see* Sioux Falls Constr. Co. v. Dakota Flooring, 109 N.W.2d 244, 247 (N.D. 1961) (holding that Rule 60(b) providing for relief from default judgment is remedial in nature and should be liberally construed).

73. *Kinsella*, 181 N.W.2d at 769. For further cases where a Rule 60(b)(vi) motion was granted, see, for example, *Brakke v. Brakke*, 525 N.W.2d 687, 690 (N.D. 1994) (citing Crawford v. Crawford, 524 N.W.2d 833 (1994), and holding a motion for relief under Rule 60(b)(vi) was timely), and *In re Braun*, 145 N.W.2d 482, 484 (N.D. 1966) (holding Rule 60(b)(vi) should be invoked for the best interest of the minor).

lated agreements.[74] For example, in *Galloway v. Galloway*[75] the North Dakota Supreme Court dealt with the competency of marital parties to contract.[76] Mrs. Galloway was an alcoholic who agreed to give custody of their minor children and most of the marital property to her husband, an attorney.[77] The court vacated the stipulated agreement under clause six, holding that where the competency of one of the spouses is a significant element in suits for divorce, any settlement agreement should be thoroughly scrutinized before it is accepted by the trial court.[78] Thus, combining Mrs. Galloway's incompetency with the Rule 60(b)(vi) motion, the court vacated the stipulated agreement relating to contractual matters of custody, property division and alimony.[79]

Since the *Galloway* decision, the North Dakota Supreme Court has been reluctant to rewrite valid divorce agreements, absent any statutory grounds governing rescission, in order to effectuate the parties' intentions.[80] However, these contracts have been modified regarding support provisions or alimony when warranted by extraordinary circumstances.[81]

Recently, the North Dakota Supreme Court denied a Rule 60(b)(vi) motion in a divorce proceeding involving a stipulated agreement.[82] In *Clooten v. Clooten*,[83] a stipulated divorce agreement granted Julie Clooten the family business, custody of their child and the family home; Robert Clooten received a vehicle, $25,000, and was ordered to pay child support.[84] In denying Mr. Clooten's Rule 60(b) motion, the court relied on two earlier decisions, *Fleck v. Fleck*[85] and *Wolfe v. Wolfe*,[86] and

74. N.D. CENT. CODE § 9-09-02 (1987) (allowing a party to a contract to rescind if the consent of the party rescinding was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds).

75. 281 N.W.2d 804 (N.D. 1979).

76. Galloway v. Galloway, 281 N.W.2d 804, 807 (N.D. 1979).

77. *Id.* at 805.

78. *Id.* at 807.

79. *Id.*

80. *See* Wolfe v. Wolfe, 391 N.W.2d 617, 619 (N.D. 1986) (recognizing that when competent parties have voluntarily stipulated to a disposition of property, a court should not decree a distribution that is inconsistent with the parties contract); Peterson v. Peterson, 313 N.W.2d 743, 744 (N.D. 1981) (holding that a court's authority to make a just and equitable distribution of property under N.D. CENT. CODE § 14-05-24, does not allow the court to rewrite a valid written separation agreement absent statutory grounds for a rescission under N.D. CENT. CODE § 9-09-02).

81. Peterson v. Peterson, 313 N.W.2d 743, 745 & n.8 (N.D. 1981); *see* Nugent v. Nugent, 152 N.W.2d 323, 331 (N.D. 1967) (distinguishing Sinkler v. Sinkler, 194 N.W. 817 (N.D. 1923)); *see also* N.D. CENT. CODE § 14-05-24 (1991) (providing permanent alimony and division of property guidelines); Kack v. Kack, 169 N.W.2d 111, 113 (N.D. 1969) (holding that where parties enter into a property settlement agreement, the court, in fixing alimony and support payments and in making equitable distribution of real and personal property of the parties as part of its decree, is not bound by provisions of such agreement but may determine whether the agreement as made by the parties is fair, just, and equitable).

82. *See* Clooten v. Clooten, 520 N.W.2d 843, 847 (N.D. 1994).

83. 520 N.W.2d 843 (N.D. 1994).

84. Clooten v. Clooten, 520 N.W.2d 843, 845 (N.D. 1994).

85. 337 N.W.2d 786, 790 (N.D. 1983) (denying wife's motion for relief from a divorce judgment

concluded that the trial court had no duty to investigate the terms of a valid contractual agreement between the parties.[87] Furthermore, in recognition of the public policy favoring prompt and peaceful resolution of disputes in divorce matters, the court in *Clooten* stated that the trial court was under no obligation to determine if the agreement was even objectively fair and equitable.[88] Referring to *Fleck*, the court found that even though Robert was not represented by counsel at the time he entered into the written stipulation, this by itself was not a sufficient justification for relief.[89] The court in *Clooten* concluded that a party must show justification for setting aside the agreement under the law of contracts and that ignorance of the law is not enough to vacate a judgment under Rule 60(b) of the North Dakota Rules of Civil Procedure.[90]

Notwithstanding the *Clooten* decision, the North Dakota Supreme Court has redefined what may qualify for relief under Rule 60(b)(vi) with regard to stipulated divorce agreements.[91] The inflexibility and strictness of the *Clooten* decision was the impetus behind a more liberal construction and application of Rule 60(b)(vi) in *Crawford v. Crawford*.[92]

III. CASE ANALYSIS

In *Crawford*, the North Dakota Supreme Court liberally construed Rule 60(b)(vi) on the basis that the divorce stipulation was unconscionable.[93] The court examined whether the trial court had abused its discretion by acting in an arbitrary, unreasonable, or unconscionable manner.[94] Although Leslie did not file a motion under clause six to vacate the judgment, the court reversed and remanded on the disputed issues of spousal maintenance and child custody, relying on Rule 60(b)(vi) of the North Dakota Rules of Civil Procedure.[95]

under Rule 60(b), holding the stipulated agreement of the divorce should stand barring adequate statutory grounds for recision).

86. 391 N.W.2d 617, 621 (N.D. 1986) (holding that the trial court did not abuse its discretion in denying husband relief from stipulated divorce agreement under Rule 60(b), since there was no justification for setting the contract aside).

87. *Clooten*, 520 N.W.2d at 846.

88. *Id.* (citing Wolfe v. Wolfe, 391 N.W.2d 617, 620 (N.D. 1986)).

89. *Id.*

90. *Id.*

91. *Id.* at 843; *see* Crawford v. Crawford, 524 N.W.2d 833, 836 (N.D. 1994) (stating that Rule 60(b)(vi) may be used to vacate a judgment when the court determines that the circumstances uncovered reveal that the stipulated terms were "rankly" unfair).

92. 524 N.W.2d 833 (N.D. 1994).

93. Crawford v. Crawford, 524 N.W.2d 833, 836 (N.D. 1994).

94. *Id.* at 835; *see also* Dvorak v. Dvorak, 329 N.W.2d 868, 870 (N.D. 1983) (defining an abuse of discretion as an action by the lower court in an arbitrary, unreasonable, or unconscionable manner) (citing Coulter v. Coulter, 328 N.W.2d 232, 238 (N.D. 1982)).

95. *Id.* at 836.

Writing for the majority, Justice Levine clarified an earlier statement made in *Wolfe v. Wolfe*[96] regarding an absence of a duty on the trial court to determine if the terms of a stipulated agreement were objectively fair and equitable.[97] The court noted that, although adoption of stipulated agreements is promoted by public policy, there still remains a duty of the trial court to use its discretion to avoid injustice.[98] Therefore, Rule 60(b)(vi) provided the court with "the ultimate safety valve to avoid enforcement by vacating a judgment to accomplish justice."[99]

Justice Levine regarded the stipulated agreement to be so one-sided that it created an unconscionable hardship on Leslie.[100] The court underscored the importance of not allowing one marital partner to use the trust inherent in a marriage to take unconscientious advantage over the other.[101] Thus, determining whether or not the parties agreed to the terms of the stipulated agreement was irrelevant, since upholding the judgment would damage the reputation of the courts to do justice.[102] In the majority's view, judgments that are unconscionable should be treated in the same manner as agreements that are illegal.[103] Therefore, the court stated that relief under Rule 60(b)(vi) should be liberally construed and applied in order to prevent hardship or injustice.[104]

Justice Neumann, in a dissenting opinion, stated that absent statutory grounds for rescission under North Dakota Century Code chapter 9-09,[105] the court had no authority to rewrite a valid separation agreement.[106] Justice Neumann urged that absent any finding that

96. 391 N.W.2d 617 (N.D. 1986).

97. *Crawford*, 524 N.W.2d at 835-36; *see* Wolfe v. Wolfe, 391 N.W.2d 617, 620 (N.D. 1986) (determining that a trial court did not abuse its discretion by denying husband's motion from relief of judgment); *see also* Fleck v. Fleck, 337 N.W. 786, 791-92 (N.D. 1983) (holding that failure to include in the divorce judgment any findings of fact pertaining to values of property or equities of the parties was not error where the divorce was not contested, there were no conflicting versions of facts in regard to division of property, and the parties had reached an agreement on all matters pertaining to division of property); Peterson v. Peterson, 313 N.W.2d 743, 745 (N.D. 1981) (holding that property settlement agreement incorporated in divorce decree may not later be modified by trial court if the agreement is intended to adjust finally all property rights of the parties).

98. *Crawford*, 524 N.W.2d at 836.

99. *Id.*

100. *Id.* at 835.

101. *Id.* at 836.

102. *Id.*

103. *Id.*

104. *Id.* (quoting Cliche v. Cliche, 466 A.2d 314, 316 (Vt. 1983)); *see also In re* Estate of Jensen, 162 N.W.2d 861, 876 (N.D. 1968) (concluding that the trial court has discretion in vacating a judgment which will not be disturbed on appeal except for abuse); Sioux Falls Constr. Co. v. Dakota Flooring, 109 N.W.2d 244 (N.D. 1961) (discussing a defendant who received service at the time of pressing business and just before his wife became seriously ill, causing him to disregard his business affairs, was entitled to have a default judgment set aside upon showing of a meritorious defense).

105. This chapter provides for the extinction, rescission, alteration, and cancellation of contracts and obligations. N.D. CENT. CODE ch. 9-09 (1987).

106. *Crawford*, 524 N.W.2d at 836; *see* Peterson v. Peterson, 313 N.W.2d 743, 745 (N.D. 1981) (holding that the court's authorization to make a just and equitable distribution of properties does not allow it to rewrite a valid contract absent statutory grounds governing rescission). The code

Leslie's consent was given by mistake or obtained through duress, menace, fraud, or undue influence, the court should not vacate the judgment.[107] Justice Neumann felt the court should confine its decision to the issue of whether the trial court abused its discretion in determining if there were sufficient grounds for disturbing the finality of judgment.[108] As Justice Neumann noted, the majority decided the case on an unconscionability standard applied to the underlying stipulated contract of the parties.[109]

Although the dissent agreed that the stipulation had left Leslie on the "very short end of [the] material stick,"[110] absent a de novo review of the record and overturning prior law, the judgment should stand.[111] Relying on the fact that the trial court found no coercion by Kenneth, or medical evidence to show Leslie's mental incapacity, the dissent noted that it was not up to the court to provide an escape from a free, but misguided, choice.[112] Justice Neumann stated that the majority opinion invites judges to meddle in proposed stipulations to determine what is fair and right.[113]

While both the majority and the dissent agreed that the stipulation agreement was unfair, the majority decision expanded the use of clause six to include a stipulated divorce agreement that produces an unconscionable effect on one of the parties. Here, the dissent disregarded an underlying fundamental constitutional right of natural parents in the care, custody, and management of their children.[114] Here, the majority determined that Leslie's bargaining away of her property and custody

authorizes courts to make equitable distributions of property and provide alimony. N.D. CENT. CODE § 14-05-24 (1991).

107. *Crawford*, 524 N.W.2d at 836.

108. *Id.* (citing Clooten v. Clooten, 520 N.W.2d 843 (N.D. 1994)); *see* Fleck v. Fleck, 337 N.W.2d 786, 789 (N.D. 1983) (stating that the function of the court is limited to determining if the trial court abused its discretion in finding insufficient grounds for disturbing a final judgment); First Nat'l Bank v. Bjorgen, 389 N.W.2d 789, 794 (N.D. 1986) (denying motion for relief under Rule 60(b)(vi) when partial summary judgment was entered less than ten days after granting of creditor's motion to amend complaint on the grounds that creditor improperly proceeded on note without first foreclosing real estate mortgage).

109. *Crawford*, 524 N.W.2d at 837.

110. *Id.*

111. *Id.*

112. *Id.* at 836-37.

113. *Id.* at 837.

114. *Id.* at 836-37; *see* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that it is no less important for a child to be cared for by its parent when that parent is male rather than female. Further, a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised"). *See generally* Bowen v. Gilliard, 483 U.S. 587, 612 n.4 (1987) (stating "[t]hese cases reflect appreciation of the fact that the parent-child bond is a fundamental relationship that requires protection regardless, and perhaps especially because, of the misfortune and caprice that inevitably beset human affairs"); Smith v. Organization of Foster Families, 431 U.S. 816, 846-47 (1977) (acknowledging fundamental liberty interest of parents whose child had been placed in temporary foster care).

rights was not fundamentally fair, and thus within the scope of Rule 60 (b)(vi).

IV. IMPACT

By vacating the decision in *Crawford* under Rule 60(b)(vi), the North Dakota Supreme Court expanded the definition of "extraordinary circumstances" to include an unconscionable stipulated agreement. For the first time in North Dakota law, the court applied an unconscionability standard to a divorce settlement agreement, a standard which has escaped definition even within the carefully crafted Uniform Commercial Code.[115] In *Crawford*, the court has failed to clearly define an unconscionable agreement and under what circumstances lower courts should invoke Rule 60(b)(vi).[116]

In a vast majority of cases dealing with unconscionability, the court has examined essential elements of unequal bargaining power, excessive price, disclaimer of warranties, or lack of choice.[117] In *Crawford* however, the North Dakota Supreme Court has used clause six as an all encompassing equity power, or a "safety valve" for injustice.[118] Whether or not an unconscionable contract concerning money and property between a husband and wife can rise to the level of an "extraordinary circumstance" within the meaning of *Klapprott* and *Ackermann* is questionable. However, the unfair bargaining away of the fundamental liberty interest of child custody could certainly be seen as an "extraordinary circumstance."

At first glance, *Crawford* would appear to be a case of judicial activism in a purely contractual matter. However, it was apparent to the court that Leslie did not possess the wherewithal to bargain with Kenneth regarding either the property or the custody of her children.[119] This

115. *See generally* U.C.C. § 2-302, cmt. 1 (1972) (stating that "the basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract").

116. *See Crawford*, 524 N.W.2d 833. Perhaps the most durable dictum on the meaning of "unconscionability" is found in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965), which stated that "[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *See also* E. ALLAN FARNSWORTH, CONTRACTS § 4.28 (2d ed. 1990) (discussing further aspects of unconscionability).

117. *See, e.g.*, Construction Assocs. v. Fargo Water Equip. Co., 446 N.W.2d 237 (N.D. 1989). *See generally* Richard J. Hunter Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145 (1992) (discussing the historical development of the doctrine of unconscionability).

118. *Crawford*, 524 N.W.2d at 835-36. "If courts get into the business of enforcing domestic contracts between husband and wife, they will almost certainly have to do so with an expanded view of the doctrines of unconscionability and overreaching." R.H. Helmholz, *Comment: Recurrent Patterns of Family Law*, 8 HARV. J.L. & PUB. POL'Y. 175, 181 (1985).

119. *Crawford*, 524 N.W.2d at 835-36. Following remand, Leslie Crawford obtained primary custody of her four children. Interview with Patti J. Jensen, Attorney for Leslie Crawford, in East

prompted the court to step in and effectuate a just and fair decision concerning property distribution and Leslie's fundamental constitutional right of raising her children using Rule 60(b)(vi).

The North Dakota Supreme Court must continue to refine its definition and use of Rule 60(b)(vi) in order to avoid any inconsistencies regarding the *Crawford* decision in the district courts.[120] A two-step process for the lower courts to follow is suggested. First, the courts should determine the validity of a constitutional right or extraordinary circumstance that exits; and second, the courts should determine the fairness of that process in light of all of the circumstances involved in the bargaining process.[121] This two-step approach could alleviate much of the confusion associated with the application of Rule 60(b)(vi) in a stipulated divorce agreement.

Lou McPhail

Grand Forks, Minn. (Sept. 10, 1995).

120. *E.g.*, Weber v. Weber, 548 N.W.2d 781, 783 (N.D. 1996) (holding that the district court apparently misinterpreted *Crawford* to apply only when there exists a relationship of trust between the parties as they prepare to divorce).

121. For example, the Wisconsin Supreme Court has established three requirements for the determination that a pre- or post-nuptial agreement is equitable: "each spouse has made fair and reasonable disclosure to the other of his or her financial status; each spouse has entered into the agreement voluntarily and freely; and the substantive provisions of the agreement dividing the property upon divorce are fair to each spouse." Button v. Button, 388 N.W.2d 546, 548 (Wis. 1986) (concluding that a marital agreement was inequitable under WIS. STAT. § 767.255(11)). Furthermore, the Wisconsin Supreme Court has also employed the following four factors for determining whether each spouse had fair and meaningful choice during contracting: "whether each party was represented by independent counsel, whether each party had adequate time to review the agreement, whether the parties understood the terms of the agreement and their effect, and whether the parties understood their financial rights in the absence of an agreement." *Id.* at 551. An analogous reasoning process could be developed in North Dakota.