

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

SHIRLEY KRUEGER,)	
)	Supreme Court No. 20070196
APPELLEE,)	
)	
vs.)	
)	
ALBERT KRUEGER,)	
)	
APPELLANT,)	

**APPEAL FROM THE DISTRICT COURT OF SHERIDAN COUNTY
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 51-05-C-1025-1
THE HONORABLE SONNA ANDERSON, PRESIDING**

APPELLANT BRIEF

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Should the court have allowed permanent alimony in the amount of \$1,500 for ten years and \$1,000.00 per month thereafter?

1. Unfairness of result
 2. That the income does not support such a result.
 3. In the property settlement most of the debt went to Albert
 4. Resulting in a Serious cash flow problem
- II. The court should have taken into account the debts for purchasing farm equipment from the estate in determining the split instead of assessing the debts to Albert and not counting them in the split even though the equipment purchased is part of the equipment which must be split and sold with both receiving one half of the proceeds?

II. STATEMENT OF THE CASE

I. Nature of the Case.

5. This is an action for divorce. The parties were married on October 24, 1970. Shirley had four children from a prior marriage and two with Albert. All of the children are grown and supporting themselves. Both parties are of retirement age, Albert being Age 62 and Shirley Age 65 at the time of trial.

II. Course of proceedings and Disposition Below.

6. This case was commenced by a Summons and Complaint dated 10/12/05.

7. The trial was before the Honorable Sonna Anderson on 2/21/07. There was notice of Entry of Judgment on 6/25/07 and Notice of Appeal on 6/26/07.

III. SUMMARY OF ARGUMENT

8. In this Divorce action it is contended that there should be no spousal support since both parties are of retirement age and wish to retire. The nature of the property settlement which the court imposed was to have the property split. The husband proposed that all assets be sold and the wife only objecting because of the tax consequences. As determined the assets are to be sold making it impossible to continue as before.

9. If either party wanted to continue to work, they could but the earnings have not been great before. It was a small tax service run from towns near the farm. Logically if either wanted to work, they should go to the larger cities if they are not farming and work for a salary.

10. The amount of total income for the last two joint years was \$27,460.00 in 2004, and in 2005- \$24,146.00. In 2006, Albert filed married filing separately and showed that his income was a total income/loss of -\$2,138.00 prior to figuring in any deduction for support. There is simply not enough income to pay this spousal support. In order to do so all his income would have to go to the ex-wife to be added to her earning from her half of the assets which is almost the same amount. In this case there is no logical reason to not allow the couple to sell their assets and live on the income. By not doing so the court is imposing a type of slavery on the husband which is an abuse of discretion.

11. In addition, there were \$77,000.00 of debts which were given to the husband to pay which were not considered in the Judge's determining if the split of the property was equal. This should be given equally to both sides to allow for a reasonably even distribution of the assets.

IV.

STATEMENT OF FACTS

12. Albert Krueger, Age 62, and Shirley Krueger, Age 65 (T P 72 L14), were married on October 24, 1970. She had at that time four children from a prior marriage. Together they had two more children, Dustin in 1972 and Shane in 1976. (Transcript P 75-76). All of the children including her four children with the earlier husband were treated alike. (T P 171 L 3-7).

13. She received a degree from the Aaker's Business School in business and had been working at various accounting jobs (T P 74 L 9-23). At the time of her marriage to Albert she was a bookkeeper for the Drake Bank. (T P 74 - 76). Albert was at that time farming in the area and had a bookkeeping and tax service in Harvey, North Dakota.

14. After the marriage, Shirley and Albert started working together at the tax office and on the farm. She started working full time, especially during the tax season in about 1984. They had various tax offices and one of them was under her name, Computer Accounting, and others under his name. All of these were small operations, Harvey being the largest having between 200- 600 clients from 1982 on. (T P 86 testimony of Shirley Krueger). Shirley Krueger continued to do the computer processing and/or bookkeeping until the day she left the farm and moved to Bismarck and started this action at which time she quit doing any work. (Transcript Shirley Krueger, P 88).

15. Since then she was living off an emergency support order of \$3,000.00 per month until the decision on this case. Albert was left with the farm and had to run it and was shorthanded in tax and accounting services.

16. During the early years of their marriage Albert's folks heavily subsidized

the marriage by providing farm equipment and land without charge. (Shirley T P 172-173). Furthermore his father Leo Krueger until his death worked on the farm for free. (Shirley T P 174).

17. It was contended at trial that this resulted in more than \$100,000.00 that Albert's folks put into their farming operations.

The tax returns for tax years 2004, 2005 and 2006 were all put in as (Exhibits 1, 2 and 26).

18. Concerning the amount owed for equipments which were items No. 60-86 debts for equipment purchased on the Rule 8.3 Property Listing they had been disclosed and Shirley was asked concerning them.

19. The Debts listing equipment purchase from the Krueger estate Shirley stated she had no knowledge of any of these loans. (T P 137 L 7-25). She further stated that as to the accounts payable Nos. 88-122 on the right-hand column referring to the Rule 8.3 accounting she didn't know if they were accurate or not. (T P 138 L 7-16). She agreed and the record showed that both of these had been submitted to the court and she would have been aware of these figures long before the trial. (T P 139 L 16-19). She also had the accounting records from 2004, 2005 and 2006 having them up to the year to day bookkeeping. (T P 159 L 10-15).

20. At that time Albert was examined as to the various debts. She admitted this was the case but cannot remember if the accounts payable were asked about individually. (T P 160 L 14-25, TP161 L1). She certainly cannot state that she disagrees with it. At best she seems to say that she cannot remember. When asked if she knows if any of these figures are incorrect she stated that she didn't

know without looking back at the bookkeeping. As to any of these figures being incorrect she stated she did not know. (T P 163 L 4-21).

21. Additional questions were made and as summarized by the judge the best that could be determined is Shirley disagrees with some of the figures but does not know why (T P 180 L 9-11).

22. Albert was asked also about the debts from the Rule 8.3 Property Listing 60 - 86 and he pointed out that all these debts had been given to Shirley and her attorney at the deposition as well as the back up data. (T P 255 L 16-25). Albert pointed out for instance on item 60 (T P 269 L 24-25 and P 270-276) where the debts were disclosed and how they were now.

23. First of all the items purchased were on the depreciation table. There were no formal promissary notes but they were reflected in the depreciation sheets for the tax returns starting in 2004 and forward. (T P 271 L 1-10). It was also pointed out that the Bremer Bank has the documents to support each of these and they are the Trustees who have the duty to collect them. (T P 273 L 1-10). The principal on all of these notes or the interest was paid each year and there were records of this in the accounting that he supplied. (T P 275 L 5-17).

24. It was also mentioned as to these accounts that they had all been checked by Brady Martz who worked for the Bremer Bank to verify the amount owed. (T P 289 L 3-13). In addition, it was pointed out that there was no one contending that these debts were not owed including himself. It also shows up in all of Albert and Shirley's bookkeeping because it is double entry bookkeeping and would unbalance the books if not shown. (T P 289 L 24-25 and P 290 L 1-17). It also mentions that the ones having the record and able to check them is Bremer Bank.

25. As to the year 2004 Shirley Krueger admitted it had been a good year. (T P 181 L 9-14). As to the tax years 2005 and 2006 for the 1040 Shirley admitted that she had no reason to disagree with the figures. (T P 182 L 16-22).

26. On the Ehrman land it is agreed by Shirley that Albert only had a one-sixth (1/6th) interest. (T Shirley P 117 L 13-18).

V. **ARGUMENT & AUTHORITY**

27. Albert and Shirley are both of retirement age and there should be a division of the assets during the marriage. The only question in this should be if there should be an additional amount awarded to Albert because a good portion of the assets were accumulated due to donations from his folks.

28. This was decided against him and possibly can be accepted as within the area of the Judge's discretion.

29. There is a disagreement with any alimony being awarded where both parties were ready to retire and the assets were accordingly split up making it almost impossible for either in the long run to continue the business.

30. This is especially true where the earnings, as reflected in the tax return before the division of assets, in 2004 which he recalls were at their best \$27,460.00 (Ex 1) and 2005 \$24,146.00 (Ex 2) with the income going down to (-\$2,138.00) (Ex 26) in 2006 for him and roughly the same for her. This would be the year they started to live apart and the assets were being split and he no longer had her working at the tax business.

31. Albert Krueger disagrees that the Court should have awarded any alimony and believes the Judge abused her discretion in a case where the assets were being divided out and further the amount and duration based on the income is totally

unreasonable.

VI.

ISSUE I

32. Should the court have allowed permanent alimony in the amount of \$1500.00 for ten years and \$1000.00 per month forever thereafter?

- A. Inequitableness of the awarding of alimony & lack of justification under the Ruff Fisher Guidelines
- B. That the income does not support such a result
- C. In the property settlement most of the debt went to him resulting in a serious cash flow problem.
- D. Cash Flow

A. Inequitableness of the awarding of alimony & lack of justification under the Ruff Fisher guidelines.

33. Under N.D.C.C. § 14-05-24(1), the district Court must make an equitable distribution of the parties' marital property and debts. Holden v. Holden, 2007 ND 29, 728 N.W.2d 312; Kostelecky v. Kostelecky, 2006 ND 120, 714 N.W.2d 845. In distributing marital property, the district court must consider all of the parties' assets to ensure the division is equitable. Donlin v. Donlin, 2007 ND 5, 725 N.W.2d 905; & Kostelecky, above.

34. After including all of the parties' marital assets, the court must consider the Ruff-Fischer guidelines in its distribution of the parties' assets. See also Bladow Bladow, 2003 ND 123, ¶ 7, 665 N.W.2d 724. Under the Ruff-Fischer guidelines, the court must consider:

the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their

station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Property division and spousal support are interrelated and intertwined and often must be considered together. See Kostelecky v. Kostelecky, 2006 ND 120; 714 NW 2d 845. In making a spousal support determination the court must consider the relevant factors of the Ruff-Fischer Guidelines. See Glander v. Glander, 1997 ND 192; 569 NW 2d 262 (ND 1997).

35. The relevant Ruff-Fischer considerations in this case are all of them.

Although the courts are not required to delineate each factor, in this case it would be helpful. In examining these factors for this case we have as follows.

Guideline	Albert	Shirley
Earning Ability tax returns	2004 \$27,460.00 joint 2005 \$24,146.00 joint 2006 (\$2,138.00) separate	Joint Joint retired
Duration of Marriage	1 st marriage 36 years raised 6 kids 2 his	2 nd marriage 36years 6 child 4 Prior
Conduct During Marriage	Good Nothing in the transcript as to any problems	Good Nothing in the transcript as to any problems
Station in Life	Music degree. No formal training in accounting	Akers college business degree no formal training accounting
Circumstances & Necessity of Each	Wanted to retire so proposed selling all assets and business so they could retire and live on retirement money	Wanted to retire so left the business and stopped working in the last year of the business.
Health	Health problems very high blood pressure	good but 4 years older

Financial
Circumstances

Under the divorce both have been given one half of the marital estate. If he can get 7% return will have as much money as in 2004 and 2005 on his one half share of \$300,000.00 plus ½ cattle & equipment

If awarded the one half she also has \$ 300,000.00 in assets plus ½ cattle and equipment. If invested at 7% she will be earning \$ 24,000.00 or more, which is the same or more that he earns if working.

Other
Considerations

Much of the assets that they are splitting up come from Albert Krueger's side as his father did a lot of work and donated the use of the equipment to the estate. It was pointed out during the trial that this easily exceeded a \$ 100,000.00 contribution to the Marital estate. This is being ignored in the 50-50 split
Both are of retirement age

At the end of the first marriage she had nothing so things look much better. She did spend 36 years in a marriage & both are now ready to retire. No amount being brought in by her family is known of in the transcript. Her reason for not working is she wants to retire not that she cannot work further.

Spousal Support

36. There have been a number of cases involving where it is appropriate to award spousal support but this seems to be unique in that we are having a determination that basically liquidates the business of two parties ready to retire neither of which has major medical problems or other problems.

37. Allowing it here does not make sense and virtually forces the one it is awarded against to continue working or liquidate his share of the assets to pay off the other. It is the uniqueness of the situation with small earnings both wishing to retire and basis liquidation the results of the Judges' decision are so unfair as to be an abuse of discretion.

38. In considering the case of Ratajczak v. Ratajczak, 1997 ND 122; 565 NW 2d 491 the facts are quite similar to those in this case. The court addressed the Ruff-Fischer

guidelines and considered the standard of living of the parties. It was noted that the husband's standard of living was much higher than hers. At page 497 the court said:

"In ND we attempt to avoid such inequities after a long-term marriage and try to balance the burden created by a divorce when it is impossible to maintain two households at the pre-divorce standard of living Factors we consider include continuance of a standard of living for the disadvantaged spouse's lack of adequate retirement savings Ervin suggests that Beverly can use her property settlement to cover living expenses. However, Beverly should not have to dissipate her property award to survive."

B. THE INCOME DOES NOT SUPPORT THE RESULTS

39. This case is different in that both parties are ready to retire and the only reason there is no income for Shirley is that she decided to quit working and retire. This forced Albert to keep working so a reasonable division of the assets can be made without loss.

40. Based on the earnings unless one or the other wishes to work for nothing, instead of getting their social security they should both retire. The earnings are not that great and the amount of assets are such that both can make as much from renting out the land, and investing the cash. It is reasonable that they should be able to earn 7% on the capital each will have with the dissolving of this marriage.

41. The court estimates the value of the estate at \$300,000.00 each not counting the cattle grain and machinery which they are to sell so that each would have an additional \$ 100,000.00. If they make 6% from these investments they would be earning as much from these investments as they earned before from farming and the accounting business.

Indeed looking at the tax returns and we can see Albert & Shirley were earning by working at the two businesses less than this.

42. Albert is old enough (62) to receive Social Security and was it not for the divorce he would be able to retire and make more money than he would from working. Shirley is already on Social Security. Based on the last two years tax return's Albert's total income would go to partially paying Shirley's alimony payment while she can use her share to have additional money.

43. In addition, the settlement under the decision has destroyed Albert's ability to do the farming work since all of the equipment and tools are to be sold and the money divided. This means he has no tools to do farming and both Albert and Shirley must either rent out the land or reinvest in tools. This would cause him to have to invest additional money.

44. He also would have to keep the assets awarded him in the accounting business and based on the small earnings the only justification to keeping the accounting business in a small town like Harvey would be if you had another job such as farming for the off season work.

45. In Glander v. Glander, 1997 ND 192; 569 NW 2d 262 (ND 1997) the Supreme Court considered spousal support in a case where the wife was unable to work because of disease and other factors. The court awarded Shirley ½ the assets. At this time Albert and Shirley have both attained retirement age and at the point in their lives where they would both like to retire, but the court still referred to Shirley as the disadvantaged spouse, (one-half of her husband's net income). Page 266 at head note [17] it states:

"When, however, there will be a substantial disparity between the parting spouses' incomes that cannot be readily adjusted by property division or rehabilitative spousal support some jurisdictions have approved indefinite spousal support that resulted in equalizing post-divorce income. See Guiel v. Guiel, 682 A.2d 957, 958 (Vt. 1996) (lengthy marriage, age, poor health, and inability to find full time work justified "permanent equalization of incomes" for a disadvantaged spouse While arbitrary equalization of income between parting spouses would be questionable we conclude the circumstances here justified it"

46. All Albert Krueger was attempting to do was have the property split so that each would have an equal share of the assets and could then live on them. In this case if anyone has a health problem according to the transcript it is Albert having a heart condition not Shirley. The Split of all assets including all the business assets leaves both in an equal position to farm or do tax work if they wish.

47. Both have been in the business many years and should be able to do so. The amount earned by the tax business based on the tax returns is not that much over the minimum wage and it is understandable that neither wish to be forced to work longer.

48. In Zuger v. Zuger, 1997 ND 97; 563 NW 2d 804 our Supreme Court addressed the issue of spousal support and set out the two kinds as rehabilitative and permanent and the purpose of each. Also see Shields v. Shields, 2003 ND 16; 656 NW 2d 712.

49. In awarding spousal support, the court must consider the needs of the disadvantaged spouse and the supporting spouse's ability to pay. See Schoenwald v.

Schoenwald, 1999 ND 93; 593 NW 2d 350; and Amsbaugh v. Amsbaugh, 2004 ND 11; 673 NW 2d 601.

In Christianson v. Christianson, 2003 ND 186; 671 NW 2d 801, the Supreme Court on page 5 states:

"Equalization is not a goal of Spousal support and equalization of income between divorcing spouses is not a measure of Spousal support although it is a factor that can be considered."

50. In all of the forgoing cases where Spousal support was awarded we had one spouse with a clear majority of the income and the ability to earn money. In none of these cases did we have both individuals ready to retire and wanting to have the assets split putting them basically out of business with the court still awarding a large amount of Spousal support to one of them. In none of these cases do we have it where the Spousal support exceeds the gross net income of the one being required to pay it based on the tax returns.

51. This case seems to be unique in that it gives the spouse one half of the assets and then all the income from the other half for her life. It would appear that all Albert can do would be gradually liquidating his assets to pay for her Spousal support. In all of the case's one can clearly see where one of the spouses are disadvantaged while here if any is disadvantaged it is the one who is paying the Spousal support.

In Quamme v. Bellino (Quamme), 2002 ND 159; 652 NW 2d 790, our Supreme Court on page 3 states:

"While temporary spousal support to rehabilitate a disadvantaged spouse is preferred, spousal support may be required indefinitely to maintain a spouse

who cannot be adequately retrained to independent income status"

Laude v. Laude, 1999 ND 203; 600 NW 2d 790, states on page 851:

"The trial court has discretion, after hearing the testimony and applying the Ruff-Fischer guidelines to award spousal support. In awarding spousal support the trial court should consider the disadvantaged spouse's income and needs and the supporting spouse's ability to pay"

Also see Lohstreter v. Lohstreter, 1998 ND 7; 574 NW 2d 790 as it pertains to

rehabilitative spousal support to restore an economically disadvantaged spouse to an independent status or to equalize the burden of the divorce.

52. The only justification that can be seen in this case for rehabilitative spousal support is that there is three years before Albert reaches age 65 and it could be that she should have something figuring that he should have to work during these three years. This seems to be a stretch but at least could be a rationalized.

53. Certainly if there was to be spousal support awarded in this case it should be of the rehabilitative type for a short period of time. Neither plans to go into another occupation. The wife had an educational background in business management and more schooling it then her husband being a graduate from Ackers college though without a full degree and having experience in bookkeeping. The only reason she stated seems to be that she does not want to work any further.

C. PROPERTY DIVISION

54. Property division and spousal support go together as pointed out earlier. Property division need not be equal to be equitable. See Hogan v. Hogan, 2003 ND 105; 665 NW 2d 672, and N.D.C.C. 14-05-24.

55. All of the property of the parties is to be considered by the trial court and distributed by it in an equitable manner with the origin of the property as one factor. See Bladlow v. Bladlow, 2003 ND 123; 665 NW 2d 724. Though in the current case the fact that much of the property came from gifts from Albert's family is being ignored.

56. "North Dakota law does not mandate a set formula or method to determine how marital property is to be divided; rather, the division is based on the particular circumstances of each case." Holden, 2007 ND 29, ¶ 10, 728 N.W.2d 312 (citing Ulsaker v. White, 2006 ND 133, ¶ 14, 717 N.W.2d 567). We have recognized that a long-term marriage supports an equal distribution of property. Holden, at ¶ 10 (quoting Donlin, 2007 ND 5, ¶ 11, 725 N.W.2d 905). We have also recognized that liquidation of an ongoing farming or business operation is ordinarily a last resort. Gibbon v. Gibbon, 1997 ND 210, 569 N.W.2d 707. "We have upheld the distribution of farm assets to one spouse with an offsetting monetary award to the other spouse." Gibbon,

57. Where the assets have been split up in such a way to clearly result in the farming and accounting being terminated and the equipment sold off it is only reasonable that we consider both the parties as having reached the retirement age and that there should be no Spousal support forcing one of them to continue to engage in work to support the other even though both should be retired.

58. This is especially true where there are enough assets for each to retire on their share and neither one is in bad health. When considered the Ruff-Fischer

guidelines as shown above there is no justification for giving an award that divides the assets then subjects the other half to what amounts to a drain of all the income for the other.

59. Regarding the parties' conduct during the marriage, there is no finding that either party alleged abuse on the part of the other.

60. The courts have generally said that liquidation of an ongoing farming operation is a last resort in dividing marital assets. In this case the only excuse for doing so was that both parties wished to retire and therefore it would have made sense.

61. With the liquidation of the land as done here the primary use of the land must become rental property. If the court is determining to have alimony, it should be laboring to maintain the farm assets intact despite for an ongoing farming operation. We know from the tax returns what Albert's monthly or yearly income was.

62. The Supreme Court has explained the relationship between the district court's consideration and award of property division and spousal support:

Property division and spousal support are interrelated and intertwined and often must be considered together. Spousal support determinations are findings of fact, and the district court's decision on spousal support will not be set aside unless it is clearly erroneous. In making a spousal support determination, the district court must consider the relevant factors under the Ruff-Fischer guidelines. Wagner v Wagner 2007 ND 33, 728 NW 2nd 318.

63. It is contended by Albert Krueger that the award of spousal support should be reversed and either a different amount determined, or reversed and remanded for the district court's award of spousal support for consideration under the relevant factors of the Ruff-Fischer guidelines.

64. That the trial Court's award of spousal support was induced by an erroneous view of the law: That there is no, or insufficient, evidence to support the Trial Court's determination that Shirley's circumstances are appropriate for an award of permanent spousal support, if that is what the Court did or the duration thereof is for permanent support that there is no, or insufficient, evidence to support the Trial Court's determination of the amount of spousal support awarded to Shirley.

65. Albert further contends that this Court should be left with a definite and firm conviction a mistake has been made as concerns spousal support. For those reasons, Albert asserts that the Trial Court's award of spousal support was clearly erroneous.

65. Permanent spousal support is appropriate "when the economically disadvantaged spouse cannot be equitably rehabilitated to make up for the opportunities and development she lost during the course of the marriage." Staley, 2004 N.D. 195, 688 NW 2nd 182. "Permanent spousal support is awarded to provide traditional maintenance for a spouse incapable of adequate rehabilitation or self-support."

66. Greenwood v Greenwood, 1999 ND 126, 596 NW 2nd 317 "Rehabilitative spousal support is awarded to equalize the burdens of divorce or to restore an economically disadvantaged spouse to independent status by providing a disadvantaged spouse an opportunity to acquire an education, training, work skills, or experience to become self-supporting."

67. Further at the trial Shirley did not put in any evidence as to what she would need in support and the only knowledge would be from an earlier hearing that is not part of this record. A parties seeking supports to maintain a standard of living must

prove what that standard of living is and what it will take to maintain it.

D. **CASH FLOW**

68. A third factor which should be considered is the difficulty that the husband will face to his cash flow due to this decision. Based on his tax returns which no one disagrees with he has a limited amount of income. Indeed after in looking at the 2006 tax return which there was more than adequate discovery done concerning he has a negative cash flow even before the \$ 39,000.00 in spousal support is considered.

69. He has against his share the majority of the debts. Even without any spousal support he is in a precarious position since if he has a bad year he will have to borrow to make the payment. It cannot be done by agricultural loans since he will not be able to farm unless he purchases the farm equipment. If he does this he will have increased his amount of debt and further endangered his cash flow.

70. The way this is divided it forces Albert to strongly consider trying to maintain his business at least until he has completely liquidated his properties to avoid being caught where he cannot make the payments. In reality this result sets up a situation of forced slavery on him since he does not dare stop working even though all the benefit other than meeting the payment goes to his wife for fear of a foreclosure and losing it all.

VII **ISSUE II**

II. Should the court have taken into account the debts for purchasing farm equipment from the estate in determining the split instead of assessing the debts to Albert and not counting them in the split, even though the equipment purchased is part of the equipment which must be split and sold with both receiving one half of the proceeds?

71. The original finding of facts, conclusion of law and Order for Judgment in the appendix shows the split of the assets. There is an amended one but it is very difficult to follow from the amended one and all it accomplishes is to include one stipulation form to make sense out of one of the farm houses.

In doing this report the court made and signed three sheets labeled Court Exhibits A which are made part of this report for ease of understanding.

72. The area we are concerned with is on page 3 line 60 to 83. These are further broken down on the rule 8.3 Equipment Liabilities item 60-86 which are in the amount of \$ 77,199.20 which are for the purchase of the farm equipment from his parents' estate. They are listed as assessed to Albert but not used to reduce his share. See the financial sheets used by the court in the next three pages.

73. The only part of the findings of facts seeming to have to do with this is item 11 and 15, " Albert stands to benefit significantly from his parent's estate, or at least have the use of a great deal of property for the duration of his life. Albert was the Trustee of trusts created by his parents, but has apparently not handled those trust accounts and trust assets in the best manner.

74. His actions have cast uncertainty and doubt on the value of his interest and any possible debt owed by Albert to the Trusts or Estate or to the co-beneficiary of the Trust and Estate, Albert's sister Carol. All of this uncertainty is of Albert's doing, and any uncertainty resulting from his handling of the estate and trust will be Albert's sole responsibility."

75. This statement other than being an assertion in the finding of facts has no basis in the trial. If it had been brought up in the trial undoubtedly the current bank trustees or Albert who was Co- Trustee with his sister before the bank was brought in due to a dispute could have been put on the stand to refute it. However there is nothing in the transcript that indicates that Albert did anything wrong anywhere in handling the trust matter. I can not find even where there is any mention of such an assertion being made and certainly no evidence of Albert Krueger doing anything wrong or causing uncertainty or doubt on the value of his interest.

76. The equipment ended up having been purchased by him from the estate and would be the very equipment which they used to farm the estate. This is the same equipment that should be sold and the proceeds divided between the parties each getting one half. There was not during the trial any indication as to why the debts should not be included.

77. Concerning the amount owed for equipment which were items no 60-86 debts for equipment purchased on the Rule 8.3 Property they had been disclosed and she was asked concerning them.

78. These Debts listing equipment loans to the Krueger estate Shirley stated she had no knowledge of any of these loans. (T P 137 L 7-100). She further stated that as to the accounts payable nos 88-122 on the right-hand column referring to the Rule 8.3 accounting she didn't know if they were accurate or not. (T P 138 L 7-16). She agreed and the record showed that both of these had been submitted to the court and she would have been aware of these figures long before the trial.

79. (T P 139 L 17-19) She also had the accounting records from 2005 and 2006 having the current, and most up to date bookkeeping. (T P 159 L 10-15) At that time Albert was examined as to the various debts. She admitted this was the case but cannot remember if they were asked about individually. (T P 160 L 14- 25 and page 161 L1-16) She certainly cannot state that she disagrees with it at best she seems to say she cannot remember. When asked if she knows if any of these figures are incorrect she stated that she didn't know without looking back at the bookkeeping. As to any of these figures being incorrect she stated she did not know, (T page 163 L 4-21)

80. Additional questioning was done and as summarized by the judge the best that could be determined is she disagrees with some of the figures but does not know why. (T P 180 L 9-11)

81. Albert of course was the one who put them on the Rule 8.3 and was very aware that they were owing.

82. Albert was asked also about the debts from 60 -86 and he pointed out that all these debts had been given them at the deposition as well as the back up data and they had it. (T P 255 L16-25) Albert pointed out for instance on item 60 (T P 269 L 24-25 and P 270 -276 where the debts were disclosed and how they were known.

83. First of all the items purchased by these loans were on the depreciation table made up by Shirley. There were no formal promissary notes but they were reflected in the depreciation sheets for the tax returns in 2004 on. (T page 271 L 1-10) It was also pointed out

that the Bremer bank has the documents to support each of these and they are the trustees who have the duty to collect them. (T P 273 L 1-10) The principal on all of these notes or the interest was paid each year and there was a record of this in the accounting that he had supplied. (T P 275 L 5-17) It was also mentioned as to these accounts that they had all been checked by Brady Martz who worked for the bank to verify the amount owed. (T P 289 L 3-13)

84. In addition, it was pointed out that there was no one contending that these debts were not owed including himself. It also shows up in all the bookkeeping because it is double entry bookkeeping and would unbalance the books if not shown. T P 289 L24-25 and P 290 L 1-17) It also mentions that the ones having the records and able to check them is Bremer Bank who has the records.

85. As to the year 2004 Shirley Krueger admitted it had been a good year. (T L 8-14) As to the tax years 2005 and 2006 for the 1040 Shirley admitted that she had no reason to disagree with the figures. (T P 182 L 16-22)

86. On the Ehrman land it is agreed by Shirley that Albert only had a one-sixth (1/6th) interest. (T Shirley Page 117 L 13-18).

87. By not considering these debts but having Albert pay them it lowers his share down by the entire \$77190.20 lowering his share by this amount. When the amounts are then considered it becomes far from an equal split which seems to be at worst called for. Indeed as discussed before if there is one who should be favored under the Ross Fisher guidelines it should be Albert not Shirley due to the contribution of his parents.

88. If as stated, Item 15 in the finding of fact seems to accuse Albert of steeling money by keeping cattle proceeds.

“Specifically as to accounts payable, the accounts appear to be farm accounts payable, and Albert has been managing all of the income and expenses of the farm during the parties’ marriage and extended separation. He also sold cattle during the separation and kept the proceeds of that sale. He shall be responsible for debts 88-114 on the 8.3 listing.”

89. Albert was questioned on this and pointed out that yes he sold calves but it was all

used for farm expenses and he did not get any but used it to pay farm debts and all items were in the accounting. (T P 277-279). Specifically he pointed out that he disclosed these cattle sales at the deposition where he had given the rest of the accounting records and they had the data and could trace where the proceeds went themselves. (T P 279 L 24-25). All of the proceeds went to the bank and pay bills. (T P 280 L 7).

90. The attorneys for Shirley and Shirley herself who is a trained bookkeeper had the records and had been advised of the disposition of the records and were not able to come forward with any evidence that these items had not been included in the books and records that they had received and therefore they were able to trace out where these items were. Even if there were no attorney an experienced bookkeeper is not going to fail to check if these items are there and would have been able to show that they were not included if they were missing. It is noted that the other sides were quiet on this matter.

VIII.

CONCLUSION

91. There should be a determination That Shirley is not the disadvantaged spouse in this case and that there should not be any alimony or spousal support awarded or if any should be awarded only until Albert reaches age 65 which is the same age as his husband was as of the divorce. As this Court was held in the case of Staley vs. Staley, 2004 ND 195, 7, 688 N.W. 2d 182, 184.

A spousal support award is clearly erroneous when the award is induced by an erroneous view of the law, there is no evidence to support it, or this Court convinced, based on the entire record, a mistake has been made.

92. It is Albert's position that (1) the Trial Court's award of spousal support was induced by an erroneous view of the law; (2) that there is no, or insufficient evidence to support the Trial Court's determination that Shirley's circumstances are appropriate for an award of permanent spousal support, if that is what the Court did, or the duration thereof otherwise; and (3) that there is no, or insufficient, evidence to support the Trial Court's determination of the amount of spousal support awarded to Shirley further asserts that this Court should be left with a definite and firm conviction a mistake has been made as concerns spousal support. For those reasons Albert asserts

that the Trial Court's award of spousal support was clearly erroneous.

93. Further the debts from the purchase of the farm assets should be charged equally against both parties so that each has a fair share of these debts.

94. Accordingly the court should outright make such a determination or remand the case to the trial court for redetermination of the property division and spousal support in accordance with the direction of the supreme court.

Dated this 24th day of September, 2007

/s/ Michael Ward

Michael Ward, ID NO. 02830

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SHIRLEY KRUEGER	}	SUPREME COURT NO. 20070196
	}	CIVIL COURT NO. 42-05-C-1025-1
PLAINTIFF-APPELLEE,	}	
	}	
vs.	}	<u>CERTIFICATE OF SERVICE</u>
	}	
ALBERT KRUEGER	}	
	}	
DEFENDANT-APPELLANT.	}	

I hereby certify that on 24th day of September, 2007, the following documents:

**APPELLANT APPENDIX
APPELLANT BRIEF**

were filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

David Bliss at dbliss@blisslaw.com

I certify that a copy of the foregoing documents and the Notice of Electronic Filing will be mailed by first class mail, postage paid, to the following no-ECF participants:

Dated: September 24, 2007

/s/ Michael Ward
Michael Ward
Attorney for the Defendant