

Case No. 20050405  
Dunn Co. No. 03-C-00018  
IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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BOB L. DVORAK,  
Plaintiff, Appellee, and  
Cross Appellant.

v.

KATHLEEN A. DVORAK,  
Defendant, Appellant, and  
Cross Appellee.

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APPEAL FROM THE ORDER OF THE DUNN COUNTY  
DISTRICT COURT DATED SEPTEMBER 27, 2005  
THE HONORABLE ALLAN L. SCHMALENBERGER

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**BRIEF OF THE APPELLANT, KATHLEEN A. DVORAK**

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SUZANNE M. SCHWEIGERT (#05480)  
Smith Bakke Oppegard Porsborg Wolf  
116 North Second Street  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
(701) 258-6498 (fax)  
Attorneys for Appellant, Kathleen Dvorak

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**STATEMENT OF THE ISSUES**

- I. Whether the District Court erred in denying Kathleen Dvorak's request to move the children to New Mexico?
- II. Whether the District Court erred in the division of the marital property?
- III. Whether Kathleen Dvorak is entitled to her attorney fees?

**STATEMENT OF THE CASE****I. Nature of the Case**

3 This is the second appeal in this divorce/custody case by the Defendant, Kathleen  
A. Dvorak (hereinafter “Kathy”), with the first appeal resulting in the case being  
“Affirmed in part, reversed in part, and remanded” for “...further proceedings on the  
issues of the relocation of the children, distribution of marital property, and payment of  
attorney’s fees.” *Dvorak v. Dvorak*, 2005 ND 66, ¶34, 693 N.W.2d 646. In the original  
Divorce Judgment, the district court granted Kathy custody of the parties’ five minor  
children, subject to reasonable visitation by the Plaintiff, Bob L. Dvorak (hereinafter  
“Bob”). The district court ordered Bob to pay child support and also awarded him the  
right to claim the children as dependents for tax purposes. The district court ordered  
Kathy and the children to return to ND from Albuquerque. The Court awarded Bob  
property with a net value of \$881,744 and awarded Kathy property with a net value of  
\$8,715.92 and gave Kathy an additional monetary award of \$114,190. The Court also  
awarded Kathy spousal support of \$1,000 per month for four years.

4 On remand, without any further evidence being presented the district court again  
denied Kathy’s request to relocate the children to NM, but did increase Kathy’s property  
settlement by \$98,810 thereby awarding her a total cash settlement of \$213,000.  
Additionally, the district court also granted Kathy her reasonable attorney fees.

**II. Course of Proceedings and Disposition Below**

5 The procedural history of this case begins with the Summons and Complaint,  
dated March 28, 2003, whereby Bob sought a divorce. App.8-10. Kathy was served the

Summons and Complaint on April 9, 2003 (App.8) and submitted her Answer on April 21, 2003. App.16-19. Kathy brought a Motion for Interim Order on April 25, 2003. R.6. On May 2, 2003, Bob sought to amend his Complaint to ask for custody of the children (R.11) which Kathy contested. R.20. The Hon. Allan Schmalenberger was appointed on May 20, 2003. (R.24). On June 30, 2003, Kathy brought a Motion For Permission To Move Out-Of-State With Minor Children. R.46. An Interim Order was entered on August 13, 2003 giving Kathy custody of the children and allowing her to remain in NM during the pendency of the divorce. App.76. Bob was granted visitation and ordered to pay child support of \$590 per month. App.89. The Court ordered the parties to select a custody investigator. App.80. Francine Johnson of Johnson & Johnson Investigations, Inc. of Bismarck was appointed as Custody Investigator on September 18, 2003. App.80-82.

6 The divorce trial took place on March 16, 2004. Tr.1. Both parties were present with counsel, Ronald Reichert for Bob and Diane Melby for Kathy. *Id.* The District court issued its Memorandum on April 27, 2004 awarding Kathy 1)custody of the children, 2)ordering Kathy to move back to ND, 3)granting Bob reasonable visitation, including “every other weekend”, 4)ordering Bob to pay child support and giving him the right to claim the children as dependants for tax purposes, 5)dividing the marital property giving Bob property with a net value of \$881,744 and giving Kathy property with a net value of \$8,715.92 and giving Kathy an additional monetary award of \$114,190, and 5)ordering Bob to pay Kathy spousal support of \$1,000 per month for four years. App.193-201

7 Kathy substituted the undersigned counsel on May 12, 2004. App.202-203. The Divorce Judgment was entered on June 10, 2004 (App.223-229) and Noticed on June 17, 2004. App.230-231. Kathy filed her Notice of Appeal on July 30, 2004 and ordered a transcript on that same day. App.232&234. Kathy also sought a Motion for Stay Pending Appeal on that same day asking that she and the children be allowed to stay in NM, that the child support stay at \$590, that the income tax dependency exemption stay with her and that the property settlement be stayed pending the outcome of the appeal. App.237-238. Bob resisted and made a Request for Temporary Remand to the North Dakota Supreme Court on August 13, 2004 requesting temporary custody of the children. R.154. The North Dakota Supreme Court issued an Order of Temporary Remand for the limited purpose of determination of temporary custody. App.699. Kathy resisted on August 18, 2004. R.155. On August 30, 2004, the district court issued its Memorandum, granting Kathy a stay on all issues requested, but her request to remain in NM. App.243-245. Kathy filed a Motion for Reconsideration (R.158) on September 2, 2004, which was granted on November 2, 2004 (App.246-247) allowing Kathy and the children to remain in NM pending the outcome of the Appeal. The Order for Stay Pending Appeal was granted on November 2, 2004. App.248-249.

8 The Supreme Court issued its Opinion on March 23, 2005, affirming in part, reversing in part and remanding for further proceedings on the issues of the relocation of the children, the distribution of marital property, and payment of attorney's fees. App.250-258. On remand, without any further evidence or hearings, the district court issued its Memorandum, dated June 24, 2005, again denying Kathy's request to relocate the children to NM, but increasing Kathy's property settlement and awarding Kathy her

reasonable attorney fees. App.260-359. Judgment was entered on September 27, 2005 (App.383-389) with Notice of Entry of Judgment dated September 27, 2005. App.390. Kathy filed her Notice of Appeal (App.395-396) and Motion for Stay Pending Appeal on November 28, 2005. R.225; App.397-398. Bob filed a cross appeal on December 2, 2005. App. 412-414. The case was temporarily remanded on December 22, 2005 to address the contempt issues that were before the district court at the time the appeal was initiated. App.422. Kathy's Motion for Stay Pending Appeal was denied by the District court on December 22, 2005 (App.437-439) and thereafter submitted to the Supreme Court for consideration and denied on January 17, 2006. App.440. Finally, as the issue of Kathy's attorney fees was not finalized at the time of the appeal, the Supreme Court again remanded the case on March 10, 2006 for the limited purpose of addressing the attorney fees on appeal. App. 465.

### **III. Statement of the Facts**

9 The parties were married on September 8, 1990 and were married for 13½ years at the time of trial. Tr.14,7-10. The parties lived together for 2½ years prior to the marriage. App.193. The parties were together for approximately 16 years. During the relationship and marriage, the parties had five children. App.8-10. The parties lived together on the family farm in Manning for the entire relationship. Tr.236,1-3.

10 Bob is a self-employed farmer and rancher. He was 43 years old at the time of trial. Tr.6,24-25. He attended high school through the tenth grade, but did not graduate. Tr.7,9-12. He also attended auctioneer school, but did not pursue work in that area. App.170. Bob owns and operates the family farm north of Dickinson where he grew up and has worked since he was a child. Tr.7,1-4;14-18.

11 Bob testified that his dad gifted some of the land to him and his sister in “like 1980” and his brother already had an interest in the land “back in 1976” and when he died, Bob’s “sister-in-law took it over—had an ownership of an undivided interest in it.” *Id.*@6-15. However, according to Bob’s “Summary of Land Purchase”, which he entered into evidence, Bob was not gifted any property until “1983 and 1984” and some more in “1986”. App.135. It is not clear from the record, but it appears that Bob may have had an ownership interest, which included some “undivided interests”, in approximately 800 acres at the time that Bob and Kathy started living together. Tr.11, 9-25;12,1-11 and App.135-136. At the same time, according to his “Interim Balance Sheet”, Exhibit No.53, he had debt owing of approximately \$174,630. App.134.

12 Today, according to Bob, the farm/ranch operation consists of “a cow-calf operation with small grains – a diversified operation.” Tr.16,10-12. At the time of trial, the parties owned 3400 acres of land and Bob rented another 1200 acres. Tr.98,3-22. At that same time, Bob had approximately 248 or 247 head of cows, 25 bulls and 60 bred heifers. Tr.16,13-25;17,1-2 and App.161. Bob also had in his possession a “full range of farm and ranch equipment”, which had been acquired throughout the marriage. Tr.17,3-7. According to the Rule 8.3 Property and Debt Listing and the Findings used by the Court, which were Bob’s values, the “real property” valued at \$917,000, “farm assets” valued at \$308,350, “financial assets” of \$2,516 and “vehicles” of \$45,750. App.205. At the time of trial the parties had “Total Assets” of \$1,278,091 and “Total Debts” of \$389,716 for a “Total Net Worth” of \$890,409.92. *Id.*

13 Kathy is 46 years old. Tr.288,9-10. She attained a GED, got a dental assistant degree and received a two-year business degree. Tr.234,12-19. Kathy began working for

the Social Security Department in Montana in 1983. Id. at 235,3-4. She transferred within the agency to various locations throughout Montana and eventually transferred to the Dickinson office in 1986. Id. at 7-13;17-20. At that time, Kathy owned a home in Dickinson and several miscellaneous household goods and furnishings, including furniture. Tr.265,8-20. She also owned a 1986 Chevy car and several savings bonds, as well as having a Civil Service Retirement in excess of \$10,000 from her position with Social Security. Tr.265,8-20. The parties cashed in Kathy's retirement in approximately 1989 or 1990 and purchased a van for the family. Tr.237,18-25;238,1-6. Bob informed Kathy that "the farm would be all the retirement that she needed." Tr.237,21-22. Kathy also received an inheritance in excess of \$20,000 from her grandmother during the marriage, which was used to remodel the marital home. Tr.265,21-25.

14 At the time that the couple met in the late 1980's, Kathy was working full-time at the Social Security Office in Dickinson. Tr.14,11-14. The parties started dating in approximately December, 1987 and Kathy and Cassidy moved in with Bob in June, 1988. Tr.13,10-21. Tracy was born in August 1989 and the parties married in September 1990. Tr.14,7-10. Kathy continued to work full-time at Social Security from 1988-1991. Tr.14,13-18. After the birth of Elizabeth in March, 1991, they decided Kathy would stay home to raise children. Tr.14,19-21. Bob assumed primary responsibility of the farm/ranch duties and Kathy assumed primary responsibility of caring for the children and home.

15 Kathy was involved in the children's school and extra-curricular activities. The children went to a private school in Dickinson. App.186,Tr.35,14-19. Kathy was in charge of getting the children to and from school and their extra-curricular activities. The

children were involved in numerous school, church and sports related activities such as piano, CCD, basketball, Odyssey of the Mind Competitions, etc. Tr.95,22-25;96,1-25;97,1-2.

16 Bob focused his attention on farming and was not involved in most aspects of the children's lives, both personally and academically. Tr.95,10-23. Bob himself admitted that he was very busy and did not have much time to spend with the children to attend their school functions. Tr.94,2-16. He admitted that family and friends would joke that "Kathy has kids, Bob has cows." App.171. He admitted he never attended one of the children's parent teacher conferences (Tr.94,17-22), he only attended one of the children's piano recitals (Tr.95,22-25;96,1-10) and he only went on three family vacations with the family during the marriage. Tr.93,20-25;94,1.

17 Beginning in the fall of 2002, the couple began discussing Kathy's desire to obtain a degree in massage therapy. Tr.239,5-22. Kathy found a school in Albuquerque that offered a six-month program, rather than the typical two-year program. Tr.238,7-25;239,1-4. The couple agreed that Kathy would attend the school and that the children would accompany her. App.182,Tr.20,1-6. Bob signed a written statement approving of the children going to Albuquerque. App.27.

18 In December 2002, Kathy and the children moved to Albuquerque. Tr.238,7-25. Kathy's mother, who resides in Arizona, signed a lease agreement for a four-bedroom, two-bath house for Kathy and the children to stay in while they were in Albuquerque. *Id.*@239. It was originally Kathy's intent that she and the children would return to ND in August 2003 after completion of her training program. App.167.

19 In March 2003, while Kathy and the children were in Albuquerque, Bob filed for divorce. *Id.* This was a complete surprise to Kathy, who thought she was getting loan papers in the mail, not divorce papers. Tr.239,24-25;240,1-10. Kathy testified that after Bob filed for divorce, she began to think about staying in Albuquerque with the children. Tr.241,6-25;242,1-6. With job opportunities for her, and the children settled into their routines and doing well in school, Kathy thought it would be disruptive and expensive for her and the children to move back to ND, especially not having a home to move back to, a job for financial support or any family support close by. *Id.*

20 An Interim Order was granted on August 13, 2003, giving Kathy custody of the children and allowing her to remain in NM with the children. App.76. Bob was granted visitation, which consisted of summertime visitation, with Bob picking the children up in Albuquerque and Kathy picking them up in Manning. *Id.* The court also required Bob to have a competent caregiver in the home for six days per week when the children were with him. *Id.* The Court ordered Bob to pay child support of \$590 per month. *Id.* The Court allowed unlimited telephone calls between the parents and children. *Id.* The Court also ordered the parties to select a custody investigator. App.78. Francine Johnson of Johnson & Johnson Investigations, Inc. of Bismarck was appointed on September 18, 2003. App.80-82.

21 Kathy was not given any temporary spousal support for the interim. App.76-79. Kathy testified the five-year average annual living expenses for the household “were a little over \$50,000 in North Dakota”. Tr.261,7-15. She also testified her monthly expenses for the children and herself in NM were approximately \$5,600. Tr.262,21-

25;263,1-8. On the farm, the parties did not have any mortgage payment on the house, therefore, the expenses are similar in both NM and ND.

22 Bob's child support for the interim was \$590. App.77. In the first appeal in this matter, the Supreme Court agreed with the district court that based on Bob's income, his child support obligation was \$510 per month. App. 250-258. Kathy is responsible for feeding, clothing and providing medical care for the children. Tr.249,20-25;250,1-25;251,1-14. Kathy was attending school at the time of trial and therefore, her only income was loans from her mother. App.173. In order to support the family and finish her degree, Kathy had to borrow over \$20,000 from her mother. Tr.251,15-20.

23 Kathy completed her massage therapy degree in July, 2003. Kathy had a home-based, massage therapy business, which she was just starting to grow. Tr.241,21-25;242,1-6. She charged \$45 per hour and worked her schedule around the children's school schedule. Tr.242,7-25;243,1-25;244,1-25;245,1-8.

24 As for Bob's visitation, his first visit to see the children after they left in December, 2002 was not until May, 2003. Tr.255,24-25;256,1-4. During the first visit, Bob informed the children he was going to take the children back to ND with him and he was going to call the police to assist. Tr.256,5-25;257,1-16. Kathy reported Bob's threats to the custody investigator and she recommended the children not stay overnight with Bob at the hotel. Tr.257,1-16. Kathy has allowed unlimited telephone contact between the children and Bob, which the children confirmed to the custody investigator. Tr.257,17-25;258,1-11; App.175-176. Kathy has never prohibited the children from seeing Bob. Tr.258,16-18. The custody investigator confirmed "The children seem well adjusted in this environment" and recommended that Kathy have custody of the children

“throughout the school year and that Bob Dvorak have the summer visitation time.” App.176-177. With that recommendation, she advised that Bob would need to either adjust his schedule or hire “suitable assistance in the supervision of the children while he is farming.” App.177.

25 The district court originally awarded Kathy custody of the children, but denied her request to stay in NM and further granted Bob visitation of “every other weekend”, alternating holidays and “six weeks during the summer”. App.224. Kathy appealed. App.232. Kathy was granted a stay pending appeal to remain in Albuquerque during the first appeal. App.248-249. The outcome of the appeal reversed and remanded the District court on the issue of the relocation of the children for further proceedings. R.181, App.258.

26 In regard to the relocation of the children, the Supreme Court held that the district court erred as “...the district court did not enunciate its analysis of the noneconomic benefits of the move, and it did not set forth its analysis of the three remaining relocation factors...” *Dvorak v. Dvorak*, 2005 ND 66, ¶19. The Supreme Court reversed and remanded for further proceedings on that issue. In that regard, the district court, without any further evidence, held as follows:

“Based on the findings, the Court concludes there is no prospective advantage of the move in improving the custodial parent’s and children’s quality of life.... There is also no noneconomic advantage for the children compared to North Dakota. Although the children are involved in activities in Albuquerque, New Mexico, they were involved in a substantial number of activities in North Dakota, both off the farm and on the farm. In addition, three of the children wanted to come and live with Mr. Dvorak...The Court finds and concludes that Mrs. Dvorak’s motive for relocation is highly suspect...This conclusion is based on the fact that she decided to relocate only after the divorce was filed by Mr. Dvorak...Mr. Dvorak expressed a genuine interest in being close to the children and having them involved with him on the farm...Considering the distance

between Albuquerque, New Mexico, and the North Dakota farm, it would have a negative impact on his relationship with his children.”

App.352-354. The district court ultimately concluded that “Considering all four factors, the Court still comes to the same conclusion and denies the request for the move to Albuquerque.” App.354.

27 In regard to the appeal of the property division, the Supreme Court remanded for further proceedings, holding as follows:

“The district court did not articulate its reason for using the net income amounts, and it did not explain why there was a substantial disparity in the property amounts...Bob Dvorak argues that if the district court had awarded any more property to Kathleen Dvorak, it would have put the farm under financial duress...In its findings of fact and conclusions of law, however, the district court does not enunciate the financial hardship to the farm. When we cannot discern from the findings of fact or the record before us whether or not the property distribution is clearly erroneous, we must remand the case for further specific findings on the issue.”

R.181,App.255-256,¶23.

28 On remand, the district court made specific findings on each of the *Ruff-Fischer* guidelines, with most of the emphasis on ninth factor of when the property was accumulated. App.354-359. In particular, the district court held,

“Plaintiff’s Exhibit 54 is a summary of the land purchases and the date of acquisition. According to the summary, about 1,280 of the 3,400 acres were acquired during the marriage. Exhibit 53 sets out the value of the property at the time the parties started living together. It is from this document the Court found Mr. Dvorak’s net worth at \$644,647.”

App.356,¶9. Exhibit 54 itself actually evidences that more than 1,280 acres were acquired during the marriage. App.348-349. The district court compared the net worth on 04/07/88 to the net worth on 03/16/04, arriving at an “Increase in farm net worth” of \$233,757.00. App.357. In explaining the disparity in the distribution, the court stated,

“A substantial part of the assets and land were acquired prior to the marriage. It would be inequitable to divide the assets equally because it would destroy his ability to earn a living and provide the necessary support to Mrs. Dvorak...it has been difficult for him to earn a living from this farm/ranch operation, and his living expenses have come from the equity in the property...Although he clearly needs the farm assets to continue his farm and ranch, consideration must be given to Mrs. Dvorak for the 13 years of marriage and assets brought to the marriage, including her inheritance from her grandmother. In addition, 1,200 acres of land were acquired during the marriage.”

App.358. Exhibit 54 evidences that “a substantial part of the assets” were not acquired prior to the marriage. There were not 1,200 acres acquired during the marriage, but more, and there is no evidence that Mr. Dvorak’s ability to earn a living would be destroyed if the assets were divided equally. App.301,12-14.

29 As to the final property distribution, the district court held as follows:

“According to the Court’s findings, the real estate has a current value of \$269.74 per acre. If that were applied to the 1,280 acres acquired during the marriage, that property would have a current value of \$345,267.20...Considering all of these factors, findings, and transfers, the Court awards total cash of \$213,000 to Mrs. Dvorak. Previously, the Court awarded her \$114,190. Thus, this would be an additional \$98,9810(sic) under the same terms and conditions.”

App.358-359,¶12. The court refers to the number of acres as 1,280, but yet earlier in the same paragraph, the court finds there were 1,200 acres. *Id.* The actual acres acquired during the marriage were 2,600 and using the court’s math, the current value of the property would be \$701,324.

30 The Supreme Court also remanded the issue of attorney fees on appeal for the district court to consider. App.257-258. Upon consideration, Kathy was awarded her reasonable attorney fees, which amount has been submitted for approval, but not yet approved by the court. App.441-453.

## STANDARD OF REVIEW

31 A trial court's decision whether a proposed move to another state is in the best interests of a child is a finding of fact, which will not be reversed on appeal unless it is clearly erroneous. *Dickson v. Dickson*, 2001 ND 157, ¶18, 634 N.W.2d 76. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence, we are left with a definite and firm conviction that a mistake has been made. *Keller v. Keller*, 1998 ND 179, ¶10, 584 N.W.2d 509

32 A trial court's findings on matters of property division will not be set aside on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a), or they are induced by an erroneous view of the law. *Hogan v. Hogan*, 2003 ND 105, ¶18, 665 N.W.2d 672, citing *Wald v. Wald*, 556 N.W.2d 291, 294 (N.D.1996).

## ARGUMENT

### **I. The district court committed clear error in denying Kathy's request to change the children's residence to New Mexico.**

33 The present case is different from most in that Kathy and the children had been living in Albuquerque for approximately 15 months prior to the trial taking place. App.23. They had been living in Albuquerque with Bob's permission for over three months prior to Bob commencing the divorce. App.27. Moreover, the district court allowed Kathy and the children to remain in NM for the interim (App.76) and the district court in the first appeal granted Kathy a Stay Pending Appeal, allowing her and the children to remain in NM during that time. App.248-249. Although the district court and the Supreme Court denied Kathy her Motion for Stay Pending Appeal in the present appeal, the district court did grant Kathy permission to keep the children in NM until they are out of school, per the district court's Contempt Order, dated February 7, 2006. App.464. At this time, Kathy and the children are in NM and have been there for over three years.

#### **A. The district court's determination is not supported by the law or record and is therefore clearly erroneous.**

34 In every relocation dispute, the court must try to accommodate the competing interests of the custodial parent who desires to seek a better life for herself and the children in a different geographical area; the child's interest in maintaining a meaningful relationship with the noncustodial parent; the noncustodial parent's interest in maintaining a meaningful relationship with the child; and finally, the state's interest in protecting the best interests of the child. *Oppegard-Gessler v. Gessler*, 2004 ND 141, ¶6, 681 N.W.2d 762 (N.D.2004) citing *Stout v. Stout*, 1997 ND 61, ¶32, 560 N.W.2d 903. In determining

whether a custodial parent should be allowed to relocate with a child to another state, the *best interests of the child is the primary consideration*. *Id.* citing *Negaard v. Negaard*, 2002 ND 70, ¶7, 642 N.W.2d 916. (emphasis added).

35 The relevant factors in evaluating whether a custodial parent should be allowed to move children out of state were enumerated in *Stout* and refined in *Hawkinson v. Hawkinson*, 1999 ND 58, 591 N.W.2d 144. They are: (1)The prospective advantages of the move in improving the custodial parent's and child's quality of life; (2)The integrity of the custodial parent's motive for relocation, considering whether it is to defeat or deter visitation by the noncustodial parent; (3)The integrity of the noncustodial parent's motives for opposing the move, and (4)The potential negative impact on the relationship between the noncustodial parent and the child, including whether there is a realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is allowed, and the likelihood that each parent will comply with such alternate visitation. *Hawkinson*, at ¶¶6,9. No single factor is dominant, and a minor factor in one case may have a greater impact in another. *Hentz v. Hentz*, 2001 ND 69, ¶7, 624 N.W.2d 694. Furthermore, a trial court that fails to give sufficient credence to the importance of keeping the custodial family intact commits reversible error. *Tibor v. Tibor*, 1999 ND 150, ¶11, 598 N.W.2d 480 (quoting *Hawkinson*, 1999 ND 58, ¶11, 591 N.W.2d 144). The decision of the District court is clearly erroneous based on the evidence presented and set out below.

**1. The prospective advantages of the move in improving the custodial parent's and child's quality of life.**

36 Under the first factor, the trial court must weigh the advantages of the move "while recognizing the importance of maintaining continuity and stability in the custodial

family." *Tibor v. Tibor*, 1999 ND 150, ¶11, 598 N.W.2d 480 (quoting *Hawkinson*, 1999 ND 58, ¶11, 591 N.W.2d 144). Both the economic and noneconomic advantages of the move must be given due weight. In analyzing the first factor, the District court in the present case held as follows:

“Based on the findings, the Court concludes there is no prospective advantage of the move in improving the custodial parent’s and children’s quality of life. The Court had previously discussed there was no economic advantage. There is also no noneconomic advantage for the children compared to North Dakota. Although the children are involved in activities in Albuquerque, New Mexico, they were involved in a substantial number of activities in North Dakota, both off the farm and on the farm. In addition, three of the children wanted to come and live with Mr. Dvorak.”

App.352-353.

37 Contrary to the first factor requirements, the ruling does not take into consideration the importance of maintaining continuity and stability in the custodial family. Kathy and the children have made up the custodial family since December, 2002 when they moved to NM. They have now been there for over three years and have made a life for themselves and are established in their schools, church and neighborhood. The children are all excelling at school and their extra-curricular activities. The district court did not give the continuity and stability of the custodial family due weight. In making its decision, the district court appears to have compared the number of events the children were involved in ND and NM and since they were similar, declared there is “no noneconomic advantages” to the move. App.352.

The district court, as additional findings, attached to the memorandum, transcript testimony of Bob, describing why the children should live with him in ND, “Because I think they’ve got more opportunity and more life experience, or they can get more life

experience out there. There's a lot more to do." App.278,5-10. When further asked what kind of lessons they are going to learn on the farm, he answered,

"...I guess they could learn honesty, and trustworthiness, and, I mean, I guess experiences as far as driving..."

App. 279,1-9. The things Bob feels are important for the children, "the life experiences" and learning "honesty and trustworthiness" can be learned wherever the children are. It depends on the parent that is going to take the time to teach them such examples and give them the experiences, which Bob had not done in the past. Furthermore, everything Bob talks about experiencing on the farm, "having horses, riding 4-wheelers, helping with the livestock and learning how to drive" can all be experienced by the children when they are with Bob during visitation. The children are with Bob for an extended period over the summer, when much of that activity would take place

38 This Court has previously held that the children's best interests are inextricably interwoven with the quality of life of the custodial parent, with whom they live and upon whom they rely emotionally. *Oppegard-Gessler v. Gessler* at ¶10. A move which benefits the health and well-being of a custodial parent is certainly beneficial to the parent's child, and is consequently in the child's best interests. *Id.* "[T]he benefits a network of close family members would provide" are also considered under the first factor. *Id.* citing *Stout*, 1997 ND 61, ¶ 45, 560 N.W.2d 903. A child's preference is relevant in assessing the first factor, and a court may consider it in determining the best interests of the child in the context of a motion to remove the child from the state. *Tishmack v. Tishmack*, 2000 ND 103, ¶¶ 21- 22, 611 N.W.2d 204.

39 One of the main things that the district court did not consider is the health of the children and Kathy. The evidence presented showed that Tracy's allergies cleared up

upon moving to NM, which is a noneconomic advantage. Tr.142,12-15; Tr.249,2-7. Aric has had speech problems and is in speech in Albuquerque and doing exceptionally well. Tr.249,7-19. Kathy also testified that she no longer got migraines, which leads to a better quality of life for Kathy, and ultimately for the children. App.241. Kathy further testified that the quality of the children's health and her health had improved since they moved to NM due to the milder climate. *Id.* Thus the increased health of Kathy and children should have been considered and weighed in favor of the relocation. The court erred in not doing the same.

40 Another non-economic factor that the district court failed to consider is Kathy's network of family support. The district court did not mention the extended family support. Kathy has no family support in ND. App.182,Tr.17,3-4. This Court in *Stout* held that "[T]he benefits a network of close family members would provide" are also considered under the first factor. *Stout*, 1997 ND 61, ¶45, 560 N.W.2d 903. Kathy's mom and sister both live close to NM in Arizona and Texas, respectively, as well as a brother in Virginia. App.493. Kathy's Mom comes to visit often and has been there to assist with the children when Kathy needs help. In fact, Kathy's Mom lived with Kathy and the children while Kathy went to massage therapy school to help run the household so Kathy could concentrate on her studies and go to school. App.190,Tr.49,11-13. Furthermore, Kathy's mom has provided significant financial assistance to Kathy and the children to get her through school and support the family, since Kathy could not work and go to school at the same time. App.191,Tr.54,5-9;55,3-7.

41 Contrary to what the Court found, it was not only Kathy's "subjective opinion" that it was better for her and the children in NM, she also had the testimony and report of

the custody investigator (App.167-177), as well as the children's report cards (App.164-166) to evidence that it was better for the children. In fact, the custody investigator testified that,

“I think that their environment that they are currently in is a stable environment, and I believe that they are being nurtured in all avenues. Their school report cards -- they are doing well in school. All of them indicated that they do have friends down there. They are involved in church activities. They also have recreational activities so I believe that they are well adjusted in the environment that they are in.”

Tr.120,1-9. The custody investigator traveled to NM for three days and during that time visited Kathy and the children's home and met with the children in person. Tr.147,9-14. The custody investigator found the house and the neighborhood that Kathy was living in to be appropriate and also found the children's schools to be appropriate and met with the children's counselor. Tr.148,15-25. The investigator also found that it was Kathy that took care of the children's daily needs as far as cooking, laundry, getting them ready for school, helping with homework, etc. Tr.150,21-25;151-152. The investigator went through each one of the best interest factors and found that the factors weighed more heavily in favor of Kathy, even considering her residing in NM. App.173-175. As was held by this Court in *Oppegard-Gessler v. Gessler*, the primary consideration is the best interest of the children which the district court did not consider in this matter. App.638. *Oppegard-Gessler*, 2004 ND 141@¶6.

42 Additional noneconomic factors that weigh in Kathy's favor, include the fact that the children are all doing excellent in school. Tr.247-248,23-25,1-25. Jason was a C student in ND and at the time of trial had an A/B average, with no grades below a B. Tr.247-248,24-25,1-2. All the children were maintaining an A/B average. Tr.248-249,24-25,1. Furthermore, the children were introduced to cultural activities that are not

available in ND. Tr.260-261,19-25,1-6. The children are also involved in activities such as horse-riding lessons, one-act plays, soccer, racquetball, and CCD (church classes). Tr.246-248. It appears these are some of the things that the district court was referring to when it commented that “Although the children are involved in activities in Albuquerque, they were involved in a substantial number of activities in ND, both off the farm and on the farm.” App.352. There is no doubt that the children are active children, and most likely would be active no matter where they lived, however, there are more important noneconomic factors that the district court did not consider in making its decision, which do demonstrate noneconomic benefits to Kathy and the children related to the move, such as their increased health, Kathy’s family support, Kathy’s increased quality of life and well-being and the continuity and stability that Kathy has provided for the children since December, 2002. These are all factors that the district court did not even address in its findings.

43 In regard to the children’s preference, the district court mistakenly found that “...three of the children wanted to come and live with Mr. Dvorak.” App.352-353. According to the custody investigator, the three younger children wanted to be with “both mom and dad”, not just Bob. Tr.119,5-6. According to the custody investigator, the three younger children’s ideal was to be with Kathy during the week and see Bob on the weekends. Tr.119,6-7. The custody investigator further found that the three younger children’s reasons for wanting to come back to ND were “recreational” in nature; wanting to do things that involved an environment, a farm environment of four wheeling, chasing cats and dogs, and being with cattle, and things of that nature. Tr.119,1-5. The custody investigator further held that the two younger children, Aric (7) and Mickayla

(9), had difficulty staying on track with their reasoning and several times throughout the conversation with Mickayla, she indicated to the investigator that she wanted to be reincarnated as a horse. Tr.150,14-19. Thus, due to their young age, although their preference may be considered, there should not have been much weight given to such preference.

44 Furthermore, the custody investigator also felt that Jason may have had some undue pressure put on him to want to come back to the farm and “help his Dad”. Tr.125,13-21. She also held that “...that was too heavy of a burden to place on an 11-year-old.” *Id.* This Court has held that a child's preference is relevant in assessing the first factor, and a court *may consider* it in determining the best interests of the child in the context of a motion to remove the child from the state. *Tishmack v. Tishmack*, 2000 ND 103, ¶¶ 21- 22, 611 N.W.2d 204. (emphasis added). In the case at hand, it appears that the district court erroneously put too much weight on the three younger children’s preference.

45 Kathy also testified as to the advantages of owning her own massage therapy business and growing her practice. Tr.241-242;11-25;1-16. Although the district court considered the economic advantages of the move at the time of trial and found that it was not economically advantageous, it must be pointed out that Kathy was just in the process of trying to get her business up and running at the time of trial and had little income as a result. App.327,1-19. It has now been over two years since the trial and things have changed, but yet the district court did not request further evidence on the economic advantages of the move on remand. As the district court did not conduct further

proceedings to consider the economic advantages of the move, the district court committed clear error in that regard.

46 In conclusion, the prospective advantages of the move in improving the custodial parent's and the children's quality of life are great, however, the district court failed to consider and analyze the most important factors, such as their health, their quality of life and happiness, their family support system and the continuity and stability of the household that Kathy has provided for the children. Therefore, the district court committed clear error.

**2. The integrity of the custodial parent's motive for relocation, considering whether it is to defeat or deter visitation by the noncustodial parent.**

47 In addressing this issue, the district court held in its Memorandum as follows:

“The Court finds and concludes that Mrs. Dvorak’s motive for the relocation is highly suspect. The Court concludes her motive in deciding to relocate was to frustrate Mr. Dvorak’s visitation. This conclusion is based on the fact that she decided to relocate only after the divorce was filed by Mr. Dvorak. Before he filed, she fully intended to return to North Dakota. Until a custody investigator became involved, she placed impediments in Mr. Dvorak’s way when he tried to exercise visitation, to have contact with the children, and to carry on a meaningful relationship with them.”

App.353.

48 Although Kathy did not intend to stay in NM when she enrolled in massage therapy school there, she was left with no choice when she was served with divorce papers about three months into an eight month stay. Kathy had to reevaluate her life and decide what she was going to do and where she was going to go. She realized that she had no home to go back to in ND, nor any job or financial security in ND. Furthermore, her mom, both her moral support and financial support, lived in Arizona which was close

by. Bob's actions forced her to stay in NM. Kathy's motive for the move was in no way intended to frustrate Bob's visitation.

49 The district court found that Kathy's motives were "suspect" because she only decided to relocate after Bob commenced the divorce. It would make sense that she waited until after the divorce was commenced to make that decision because up to that point she intended on staying married to Bob and moving back to the farm to start her business. Thus, there should not be anything suspect about her timing.

50 As to the district court's findings that Kathy placed "impediments" on Bob's visitation until a custody investigator became involved, although it may have appeared to the court that Kathy tried to deter visitation, that is not the case. In fact, Kathy's affidavit dated 6/24/03 spells out the fear and frustration that she and the children had with regard to Bob's May 2003 visit, which was before the custody investigator was appointed. App.58-62. Bob came to visit the children for the first time and was threatening to call the police to have the children physically removed from Kathy's home and returned to ND. *Id.* The children did not want to return to ND and they were very scared of their father's behavior. *Id.* Bob threatened Kathy in front of the children, by saying "Kathy, you have gone too far this time and you will have to pay for it." App.60. Bob had told the two older girls that he was "desperate and would do anything he had to do to get them (the children) back to ND." *Id.* Kathy was afraid for their lives. *Id.* Kathy also heard Mickayla ask why she needed to be packed and ready when he (Bob) came back. App.61. Thus, Kathy was not interfering with, or putting impediments on Bob's visitation, rather she was protecting herself and the children.

51 The district court, in its additional findings via the testimony of Bob Dvorak, in discussing Bob's first visit to Albuquerque, told the court that the children did not stay at the hotel with him because "Kathleen wouldn't let 'em." (App.282,2-4.) and further testified that Kathleen refused to leave Bob with the kids by himself. *Id.* at 5-25. The thing that Bob forgot to mention in that testimony is the fact that he had threatened Kathy that he was going to take the children back to ND and that he was "desperate" and "would do anything" to get them back. App.68-22. The district court personally questioned Mr. Dvorak on the facts surrounding Bob's first visit and Kathy's actions in what appeared to be Kathy "frustrating" Bob's visitation. What the district court interpreted as "impediments" was simply Kathy protecting the children as a result of Bob's irrational behavior.

52 Further, the district court made findings that Kathy would not let the children stay overnight at the hotel with Bob when he came to visit in November of 2003. It was the custody investigator that placed that restriction on Bob's visits, not Kathy, as held by the court. Tr.134,10-14.

53 As further evidence of Kathy's integrity in requesting the relocation, Kathy has made a concerted effort at keeping Bob informed about the children and promoting their relationship with him. Kathy's affidavit of June 30, 2003 refers to a student information form that indicates Bob's name, address and phone number were provided to the school so that the school could contact him in any situation. App.71-72,75. Kathy also provided Bob with the information pertaining to what schools the children attended and he has had access to all of the children's school records. Bob confirmed this in his testimony wherein he admits that he gets copies of the children's report cards on a regular basis.

Tr.88,7–12. It is apparent from Bob’s testimony and Kathy’s affidavits dated 6/30/03, 10/21/03 and 11/4/03 that she has made every attempt to include Bob in the children’s lives. App.71-72,83-94,99-110.

54 The custody investigator’s testimony also evidences the integrity of Kathy in encouraging Bob’s involvement with the children, rather than deterring it as found by the court. First and foremost the custody investigator specifically denied that there was any parental alienation on Kathy’s part. Tr.128,14-16. When asked specifically if there was any alienation of the children she stated “none whatsoever.” *Id.* However, even though the custody investigator found no alienation, the district court used as its findings Bob’s testimony wherein he felt that Kathy was alienating the children from him. App.269,2-24. It appears that the court gave more credibility to Bob’s testimony, than the custody investigator’s, which was clear error.

55 The custody investigator also found that Kathy gave Bob the children’s school schedule and it was Bob that could not find the time to visit the children because his schedule did not mesh with their school schedule. Tr.134–135. Additionally, the custody investigator testified that the children all verified that Bob was allowed to call on a regular basis and that Kathy did not deter him from contacting the children in person or via phone calls. Tr.156. As further proof of that, Bob himself admitted that he calls the children daily and he gets through “most of the time.” Tr.87,9-16. Kathy is not interfering with visitation if Bob is talking to his children daily.

56 The custody investigator further testified that “they both expressed that they don’t want to exclude the other from their children’s lives”. Tr.120-121,25,1-3. As to the visitation schedule, the investigator found Kathy to be “very agreeable to Bob’s proposed

holiday visits. She indicated she had no problem with his visitation and encouraged his coming so see the children”. App.175-176.

57 As to Bob’s actual visitation, Bob had not even visited the children once during the three months that they had been there prior to the divorce being commenced nor did he visit them for the two months after that. Bob’s actions, speaks for itself. Kathy’s integrity cannot be questioned when it was Bob that forced Kathy to make that difficult choice. Kathy’s request to remain in NM is done in good faith and to enhance her’s and the children’s lives. Kathy’s request has nothing to do with defeating or deterring visitation. The custody investigator asked each of the children how and when they communicate with their father. App.175. Each child said, “they talk to him almost every day and they can call him whenever they want to.” App.175-176. This is not a person that is attempting to defeat or deter visitation. Kathy has never denied visitation and will continue to cooperate with the visitation schedule, as she has in the past, in the best interest of the children.

**3. The integrity of the noncustodial parent's motives for opposing the move.**

58 Bob’s motives for opposing the move appear to be mostly self-serving. The district court held “Mr. Dvorak expressed a genuine interest in being close to the children and having them involved with him on the farm.” App.353. Bob admitted that he was very busy and did not have much time to spend with the children to attend their school functions. Tr.94,2-16. He admitted that family and friends joked that “Kathy has kids, Bob has cows.” App.495. He admitted that he never attended one of the children’s parent teacher conferences (Tr.94,17-22), he only attended one of the children’s piano recitals, (Tr.95,22-25;96,1-10) and he only went on three family vacations. Tr.93,20-

25;94,1. Furthermore, Bob testified that the children should be on the farm to gain "more life experience" such as "good work experience" and they could "...ride 4-wheelers or help with the livestock." Tr.46,4-18. Thus, Bob is looking out for himself and the farm. He wants the children back on the farm to help him with the farm work and caring for the livestock. He is not thinking of the children's best interests, but rather his own.

**4. The potential negative impact on the relationship between the noncustodial parent and the child and the ability to restructure visitation to foster and preserve the relationship.**

59 Under the fourth *Stout* factor, a court must consider the negative impact of the move on the noncustodial parent's relationship with the children and the ability to restructure visitation to foster and preserve the relationship. *Stout*, 1997 ND 61, ¶37, 560 N.W.2d 903. This Court in *Stout* held that a visitation schedule which provided for less frequent visits but extended the time period of each visit preserved the non-custodial parent's right to foster and develop a relationship with his or her child. *Id.* at ¶31.

60 As to the forth factor in this case, the district court held,

"Considering the distance between Albuquerque, New Mexico, and the North Dakota farm, it would have a negative impact on his relationship with his children. His farm and ranch require his almost daily involvement and supervision. Although some of the impact could be eliminated with extended summer visitation, it would be difficult to maintain a close relationship during the other nine months of the year."

App.354.

61 "[A] move sought in good faith and to gain legitimate advantages for the custodial parent and the child must not be denied simply because visitation cannot continue in the existing pattern." *Stout*, 1997 ND 61, ¶ 37, 560 N.W.2d 903. In the case at hand, contrary to the district court's ruling, Bob's right to foster and develop a relationship with his children can be preserved by longer summertime visitation and extended school breaks

for holidays. This Court has held on a number of occasions that although visitation may not be as frequent as under the current circumstances, "[a] visitation schedule which provides less frequent, but extended, visitation periods will preserve a noncustodial parent's ability to foster and develop a relationship with the child." *Olson v. Olson*, 2000 ND 120, ¶ 4, 611 N.W.2d 892 (quoting *Tibor*, 1999 ND 150, ¶ 24, 598 N.W.2d 480). "If this were not recognized, the fourth factor would be an unintentional automatic reason to deny relocation." *Oppegard-Gessler v. Gessler*, 2004 ND 141, ¶16, 681 N.W.2d 762 (N.D.2004) citing *Keller*, 1998 ND 179, ¶ 16, 584 N.W.2d 509. The custody investigator recommended Kathy have the children throughout the school year and Bob "...have the summer visitation time". App.177. She also recommended that holidays be alternated. *Id.* Even though there are significant miles between Bob and the children, a meaningful relationship can still exist.

62 This fourth factor must take into consideration the limited amount of time that Bob spent with the children prior to the divorce. Bob made the choice not to see the children for over five months when they first moved to NM. He did not attend their school events, extra-curricular activities, church functions, family vacations, etc. while they lived in the same house as him. Bob had no intention of raising his children while he was married, but now wants to spend more time with the children. He now realizes that he took the children and Kathy for granted all of those years.

63 The district court failed to consider the limited amount of time that Bob has available for the children today. Although he did inform the custody investigator that he is willing to change his past practices, he did not readily admit that he may have to acquire assistance to help cook, clean, or supervise the children while he is engaged with

farming. App.176. The farm is Bob's life. He can say that he will change his practices, but it is only speculation at this point. It is highly doubtful with his current work load that he could accommodate the current visitation schedule that the Court set, which was "every other weekend" and "six weeks during the summer". App.223-224. One cannot fault a person for his chosen profession, especially farming, which is a noble profession, but in the same sense Kathy should not be penalized for wanting to make a better life for her and the children. Thus, under the circumstances, although the miles are great, there is a visitation schedule that could accommodate Bob and the children to foster their relationship.

64 In conclusion, considering all four factors, it is in the children's best interest to relocate to NM and the district court committed clear error in denying the same.

## **II. The district court committed clear error in the division of the marital property.**

65 Remanding the case for further proceedings, the Supreme Court, in the first appeal in this case, held

"The district court did not articulate its reason for using the net income amounts, and it did not explain why there was a substantial disparity in the property amounts...Bob Dvorak argues that if the district court had awarded any more property to Kathleen Dvorak, it would have put the farm under financial duress...In its findings of fact and conclusions of law, however, the district court does not enunciate the financial hardship to the farm. When we cannot discern from the findings of fact or the record before us whether or not the property distribution is clearly erroneous, we must remand the case for further specific findings on the issue."

R.181, App.255-256, ¶23.

66 Under N.D.C.C. § 14-05-24(1), when a divorce is granted, the district court must make an equitable distribution of the property of the parties. When distributing marital property, all of the assets must be considered to ensure the division is equitable.

*Amsbaugh v. Amsbaugh*, 2004 ND 11, ¶ 21, 673 N.W.2d 601. When all of the assets and debts have been included, the district court can apply the *Ruff-Fischer* guidelines. *Neidviecky v. Neidviecky*, 2003 ND 29, ¶ 10, 657 N.W.2d 255. Under these guidelines, the court considers:

"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. The district court is not required to make specific findings, but it must specify a rationale for its determination."

*Bladow v. Bladow*, 2003 ND 123, ¶ 7, 665 N.W.2d 724 (quoting *Weigel v. Weigel*, 2000 ND 16, ¶ 6, 604 N.W.2d 462).

67 The origin of the property is simply one factor to consider, even if the property was acquired before or inherited during the marriage. *Svetenko v. Svetenko*, 306 N.W.2d 607, 613 (N.D.1981). This Court has repeatedly held, "separate property, whether inherited or otherwise, must initially be included in the marital estate." *Hogan v. Hogan*, 2003 ND 105, ¶21, 665 N.W.2d 672, citing *Young v. Young*, 1998 ND 83, ¶10, 578 N.W.2d 111. This Court has also held that the length of the marriage is relevant in the distribution of gifted property as part of the 'equitable' division of the marital estate and that a lengthy marriage, in general, supports an equal division of *all marital assets*. *Id.* Moreover, when the parties have lived together and then married, it is appropriate for the court to consider all of the parties' time together in making an equitable distribution of the marital estate. *Nelson v. Nelson*, 1998 ND 176, ¶ 7, 584 N.W.2d 527.

68 In the present case, upon remand, the district court did make specific findings as to each *Ruff-Fischer* guideline, however, the findings still do not support the substantial disparity awarded by the court. App.354-359. As in the first case, the district court places much emphasis on when the property was accumulated and in fact erroneously finds that according to Bob's Exhibit 54, "...about 1,280 of the 3,400 acres were acquired during the marriage." App.356,¶9. According to Exhibit No. 54, which is the court's finding on when the land was purchased (App.347), contrary to what the district court held, the parties acquired 2,600 acres during the relationship, not 1,280 acres, which can be determined in review of Exhibit 54. The following is a chart summarizing when the land was acquired:

	<u>Total Acres</u>	<u>Acquired During Relationship</u>
1.	160	No - but owed money at time
2.	320	Yes - 320
3.	320	No
4.	360	Yes - 360
5.	320	Yes - 320
6.	960	No - but owed money at time
7.	960	Yes - 1,600
Total	3400	2,600

App.227-228. In regard to transactions no. 1 and 6, although it was purchased prior to the relationship, Bob was still paying for the property when the relationship began, as evidenced by Bob's Exhibit 53, evidencing long term debt of \$89,630 on 04/07/88, which the court failed to consider. App.134. The district court then takes into consideration the "net value of the property at the time the parties started living together" and "it is from this document the Court found Mr. Dvorak's net worth at \$644,647." App.356,¶9. The district court then compared the net worth on 04/07/88 to the net worth on 03/16/04, the

time of the divorce, arriving at an "Increase in farm net worth" of \$233,757.00. App.357.

The court then goes on to state that,

"A substantial part of the assets and land were acquired prior to the marriage. It would be inequitable to divide the assets equally because it would destroy his ability to earn a living and provide the necessary support to Mrs. Dvorak...it has been difficult for him to earn a living from this farm/ranch operation, and his living expenses have come from the equity in the property."

App.358,¶12. In regard to the above findings, the district court erred in that a substantial part of the land was not acquired prior to the marriage, as shown above. Furthermore, the court attempts to paint a bleak picture for the farm when in fact the farm, in 2003 had more income than it had ever shown in the past, according to Bob's Exhibit 56, which the Court relied on. App.351. In fact, in 2003, Bob had adjusted gross income of \$64,243, which was approximately \$15,000 more than he had ever shown before, dating back to 1985, either single or married. App.138-157. Additionally, Bob deferred an additional \$116,194 of income in 2003, which was actually received in 2003. App.155. Bob even admits that "his debt is a lot less" now (App.301,12-14), which would support an increased ability to pay a larger property settlement to Kathy, without harming the viability of the farm. Thus, the evidence is contrary to the court's findings and is clear error.

69 As to the actual cash settlement, the district court determined that

"According to the Court's findings, the real estate has a current value of \$269.74 per acre. If that were applied to the 1,280 acres acquired during the marriage, that property would have a current value of \$345,267.20...Considering all of these factors, findings, and transfers, the Court awards total cash of \$213,000 to Mrs. Dvorak. Previously, the Court awarded her \$114,190. Thus, this would be an additional \$98,9810(sic) under the same terms and conditions."

App.358-359,¶12. The court again erred in that it used the wrong number of acres acquired during the marriage. Had the court used the 2,600 acres, instead of the 1,280,

the current value would be \$701,324 versus \$345,267.20 the court found. That is an extreme disparity and clear error. If that was the Court's intent to use the value of the land acquired during the marriage, Kathy is entitled to a much larger settlement, than the \$213,000 awarded. Further, it is uncertain how the district court actually arrived at the \$213,000. In any event, it is erroneous and this issue must be reversed accordingly.

70 Furthermore, the Court erred in using the alleged increase in "net worth" as the basis for an equitable distribution, rather than using the actual property in the marital estate at the time of divorce and the net worth of the parties at that same time. The overall net property distribution was \$655,404 to Bob and \$213,000 to Kathy, or less than 25% of the net marital estate to Kathy, which is inequitable and there are no grounds for the same. This was a lengthy marriage; 16 years together and six children. This Court held in *Bladow* that "In general, a lengthy marriage supports an equal division of all marital assets." *Bladow* at ¶8. Furthermore, there is no rule the trial court must equally divide an increase in the net worth of the parties which occurred during the marriage, but rather all property, including separate property, is subject to distribution to either spouse when an equitable distribution requires it. *Spooner v. Spooner*, 471 N.W.2d 487, 491 (N.D.1991).

71 The district court should have used as a starting point the parties' current net worth, which according to the Court's findings was \$868,404, with a 50% split of property to each. App.357. In that case, each party would start out at \$434,202 and if any deviations were warranted, which Kathy does not believe there were, the deviations would be from that amount. In any event, the district court's finding on the division of property was clearly erroneous and must be reversed. An equitable distribution fashioned

after further proceedings on remand should account for disparities in the income-producing capacities of the parties and the property distributed. *Sanford v. Sanford*, 301 N.W.2d 118 (N.D.1980).

**III. Kathy requests and is entitled to an award of attorney fees.**

72 In a divorce action, a court may award attorney fees under N.D.C.C. § 14-05-23, ased upon one spouse's need and the other's ability to pay. *Buchholz v. Buchholz*, 1999 ND 36, ¶18 and ¶19, 590 N.W.2d 215. In light of the financial status of the parties that existed at the time of the March 16, 2003 trial, and the litigious nature of Bob, Kathy requests, under N.D.C.C. §14-05-23 that she be awarded her attorney fees in this appeal. Since this divorce was initiated, Bob has had control over all of the income producing assets of the marriage, the real estate, machinery and equipment, minerals, etc., while Kathy had none. Further, in 2003, according to Bob's 2003 income tax return, he had adjusted gross income of \$64,243 (App.138), plus he also deferred \$116,194 of income that year from the sale of cows. App.155. Whereas, at the time the divorce was initiated, Kathy was unemployed and going to school and had no income. She had custody of the five children and was responsible for feeding, clothing and providing for them medically, while Bob was ordered to pay \$590 per month in support. Kathy has had to rely on the financial assistance of her mother to help provide even the basic necessities for the parties' children. Thus, there is a clear need on Kathy's part and an ability to pay on Bob's part, thus, Kathy should be awarded her attorney fees in this appeal.

73 Furthermore, in regard to Kathy's attorney fees in the first appeal on this matter, she was awarded her "reasonable attorney fees" as per the district court's judgment. App.359. However, this issue is still before the district court, and therefore, Kathy

reserves her right to address this issue during the pendency of this appeal, once the district court has determined the “reasonable” amount of fees.

### CONCLUSION

74 For the reasons stated above, Kathy respectfully requests that this Court 1) reverse the District court’s decision and allow Kathy and the children to continue living in NM; 2) reverse the property distribution, giving Kathy a distribution equal to one-half of the net worth of the parties at the time of the divorce, and 3) award Kathy her attorney fees in this appeal and determine her attorney fees incurred in the previous appeal were reasonable, if necessary.

DATED this 21<sup>st</sup> day of March, 2006.

SMITH BAKKE PORSBORG & SCHWEIGERT

By: /s/ Suzanne M. Schweigert  
Suzanne M. Schweigert (ID #05480)  
116 North Second Street  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630  
*Attorneys for Appellant, Kathleen A. Dvorak*

## CERTIFICATE OF COMPLIANCE

75 The undersigned, as attorneys for the Appellant, Kathleen A. Dvorak, in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 10,480.

DATED this 21<sup>st</sup> day of March, 2006.

SMITH BAKKE PORSBORG & SCHWEIGERT

By: /s/ Suzanne M. Schweigert

Suzanne M. Schweigert (ID #05480)

116 North Second Street

P.O. Box 460

Bismarck, ND 58502-0460

(701) 258-0630

*Attorneys for Appellant, Kathleen A. Dvorak*

## CERTIFICATE OF SERVICE

76 I hereby certify that a true and correct copy of the foregoing **BRIEF FOR APPELLANT, KATHLEEN A. DVORAK**, was on the 21<sup>st</sup> day of March, 2006, emailed to the following:

Dann E. Greenwood  
[grlawdg@ndsupernet.com](mailto:grlawdg@ndsupernet.com)

Ronald A. Reichert  
[reichert@mail.ctctel.com](mailto:reichert@mail.ctctel.com)

/s/ Suzanne M. Schweigert

Suzanne M. Schweigert