

**IN SUPREME COURT  
 STATE OF NORTH DAKOTA**

Bruce Wayne Lee,	)	
	)	
Plaintiff and Appellant,	)	
	)	Supreme Court No. 20180382
vs.	)	District Court No. 18-2017-DM-438
	)	
Kimberly Marie Lee,	)	
	)	
Defendant and Appellee.	)	

**BRIEF OF APPELLANT**

**Appeal from Judgment Entered by the Northeast Central Judicial  
 District Court, County of Grand Forks, the Honorable Lolita G. Hartl Romanick,  
 Judge of the District Court, Presiding, on August 17, 2018**

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**Statement of Issues Presented for Review**

**[¶1] Issue 1: Whether the trial court's Findings of Fact as to valuation of property were clearly erroneous.**

- A. Whether the trial court erred in its valuation of the parties' real estate when it included the value of the life estate in the home and the value of the life estate in the land and the value of Contract for Deed payments.**
- B. Whether the trial court erred when it valued a Bobcat in the sum of \$15,000 when the only credible evidence revealed its value was \$9,500.**
- C. Whether the court erred when it included a receivable from Bruce's children in the sum of \$21,600 in the marital estate.**

**[¶2] Issue 2: Whether the clearly erroneous Findings of Fact as to valuation of property resulted in disposition of property and allocation of debts that were likewise clearly erroneous and the court did not properly consider the source of the property in its determination.**

**[¶3] Issue 3: Whether the trial court's delay in issuing its Findings of Fact, Conclusions of Law, and Order for Judgment for six (6) months from the last day of trial January 31, 2018; until July 31, 2018, resulted in prejudice to Bruce.**

*Statement of the Case*

[¶4] The case at bar is a divorce case. On June 15, 2017, Appellant (“Bruce”) served a Summons and Complaint upon Appellee (“Kimberly”). App. 12. Kimberly served an Answer and Counterclaim on July 12, 2017. App. 13. Bruce served a Reply to Counterclaim on July 18, 2018. App. 33.

[¶5] On July 5, 2017, Bruce served a Motion for Temporary Order and supporting documents. App. 17. Kimberly responded bringing her competing Motion for a Temporary Order. App. 28. In conjunction with the Motions for Temporary Orders, both parties filed Financial Affidavits. App. 24, 34. Prior to hearing, the parties reached an agreement regarding the terms of a Temporary Order. A Notice of Settlement was executed on July 28, 2018. App. 43. A Stipulation for Entry of a Temporary Order followed with the Court approving the same on October 18, 2018, when the Temporary Order was entered. App. 44, 48. Pursuant to the Temporary Order, the trial court awarded possession of the residence to Bruce and acknowledged that the property was being sold to his children on a Contract for Deed with the payments being used to service mortgage debt, awarded the right to manage the real property to Bruce, and awarded the use of all personal property other than one vehicle and a portion of the household goods to Bruce. Bruce was not required to pay temporary spousal support or required to pay temporary attorney’s fees as Kimberly requested in her Motion. However, Bruce did agree to temporarily pay a vehicle payment on the 2014 Subaru awarded to Kimberly. App. 44-48.

[¶6] The trial was held on January 30 and 31, 2018. At trial, the court heard from the parties as well as Kimberly’s daughter and sister.

[¶7] Finally, six (6) full months after trial, on July 31, 2018, the trial court entered an Order that included its Findings of Fact, Conclusions of Law. App. 264. Attached to the Findings of Fact, Conclusions of Law and Order for Judgment was Exhibit “A” which outlined the trial court’s allocation of assets and debts. App. 240. By the trial court’s computations, without a cash property distribution, Bruce was awarded seventy-eight percent (78%) of the total value of assets. App. 240. With the cash property distribution ordered, the trial court’s allocation resulted in a nearly equal allocation with Bruce receiving fifty-one percent (51%). App. 240. A Judgment was entered on August 17, 2018. App. 308. Kimberly served and filed a Notice of Entry of Judgment upon Bruce, through counsel, on August 21, 2018.

[¶8] On October 23, 2018, Bruce served and filed in the Office of the Clerk of the Supreme Court a Notice of Appeal to the North Dakota Supreme Court. App. 7.

### Statement of the Facts

[¶9] Bruce was born in 1957 and was sixty (60) at the time of trial. Tr. 9. Kimberly was born in 1964 and is seven (7) years younger than Bruce. She was fifty-three (53) years old at the time of trial. Tr. 9. The parties were married on September 3, 2005, and had lived together for a time prior to marriage. Tr. 9, 15, 18. This is not a first marriage for either of the parties; Bruce was previously married and divorced in 2001. Tr. 9. Kimberly was previously married and divorced in 2000. Tr. 11. At the time of marriage, Bruce was forty-eight (48) and Kimberly was forty-one (41). Tr. 11.

[¶10] The parties have no children in common but each had children from their prior marriages. Bruce has three (3) sons. Tr. 9. One of Bruce's sons was a minor at the time of marriage. Tr. 9. Kimberly has two (2) children; a daughter and a son. Tr. 11. At the time of trial, the children were all over the age of eighteen (18). Kimberly's sister and daughter did receive support from the parties during the marriage; a payment to her sister of approximately \$10,000 was used for attorney's fees when she divorced and an undefined amount for daughter's graduation expenses. Tr. 11. Further, Kimberly and Bruce cosigned on a note and mortgage to assist Kimberly's sister in purchasing a home. Tr. 91. In addition, funds were loaned to Kimberly's daughter when she fell behind in her rent. Tr. 95.

[¶11] When the parties married, they lived in Hazen, North Dakota. Tr.13. A little over a year after they married, they returned to Walhalla where Bruce was raised and where his family land was situated. Tr. 14. They agreed to the move and the move was accomplished due to Bruce's disability, his inability to work and the financial difficulties that arose from that fact. Tr. 14. Bruce is fully disabled as a result of degenerative disc disease which he



describes as “from his skull to his tailbone”. Tr. 20. However, that is not where his medical issues end. Bruce treated for spinal issues beginning in 1995. Tr. 20. He hoped to avoid spinal surgery as long as possible. Tr. 21. In addition, Bruce needs a total knee replacement on both knees and the surgery was scheduled in early November 2016. Tr. 21. He was unable to complete the surgery as he developed the flu. Tr. 22.

[¶12] He described his level of spinal pain, on a scale of ten (10) as an average of six (6) and a high of eight (8). Tr. 23. The pain was so severe he had a prescription of oxycodone and indomethacin but he limited the amount of medication he used. Tr. 23. He described the pain in his knees at a five (5) out of ten (10) and that the level of pain depends upon activity. Tr. 23. His disabilities not only limited his ability to work but also limited his ability to do daily chores. Tr. 24.

[¶13] In addition to the spinal and knee joint issues, in June 2015, Bruce had a total replacement of his right shoulder. Tr. 25. The left shoulder replacement was scheduled in June 2017 but had not, at the time of trial, been accomplished. Tr. 25. He described his shoulder pain at a seven (7) to eight (8) on a scale of ten (10). Tr. 26. Bruce did not believe he will ever be able to return to work. Tr. 27. Kimberly did not question the fact that Bruce was disabled. Tr. 197. She presented no evidence contradicting Bruce’s description of his condition.

[¶14] Bruce applied for disability in December 2005 and was awarded the same in the summer of 2008. Tr. 19. The award did include a lump sum payment from the date of application. The funds received were used, in part, to fund the building of the home in Walhalla which was partially complete at the time of trial. Tr. 19. Otherwise, the funds compensating Bruce were used to the mutual benefit of Kimberly. Tr. 19.

[¶15] Bruce did have several sources of income. Bruce received \$762 every two (2) weeks from Worker's Compensation. Tr. 29. He received social security disability in the sum of \$2,245 per month. Tr. 30. He also received a pension payment from Otter Tail. Tr. 31. While Bruce had a twenty-six (26) year tenure at Montana Dakota Utilities, the pension accrued only during his last seven (7) years of work due to its acquisition by Otter Tail Power. Tr. 31. That pension payment was \$490 per month. Tr. 32. Bruce was only married to Kimberly for one (1) month of the service that resulted in the accrual of pension benefits. Tr. 89, 90. He did live with Kimberly for about four (4) years of his service when the pension accrued. Tr. 90.

[¶16] Bruce also received a payment for cash rent of his family farmland in the sum of \$5,265 annually. Tr. 32. The land involved was purchased by Bruce from his family and there are only eighty-five (85) tillable acres included in his family's quarter. Tr. 33. The home at issue in this case was built on that family land. The funds from the cash rent were used to pay the payments in the spring and fall due to Choice Financial who held the mortgage. Tr. 162. Bruce's final source of income was from Lee's Gun Sales; a small business he operated. In 2016, the profit from that business was approximately \$100. Tr. 34.

[¶17] At the time of Kimberly and Bruce began cohabitating, Kimberly had no assets other than a Chevrolet S-10 Blazer and she had no significant debt. Tr. 15, 234. At that time, Bruce owned a home in Hazen and had various vehicles. In addition, he had purchased land from his mother on a Contract for Deed. Tr. 15.

[¶18] Upon the move to Walhalla, Kimberly took a job at the Pemblier Nursing Home. Tr. 16. She started in a housekeeping position and was promoted to the supervisor of that

department. Tr. 17, 199. Kimberly is healthy and had no condition that would interfere with her ability to be employed. Tr. 19. She experienced anxiety attacks but did not note the same interfered with her ability to earn income. Tr. 197, 198. In addition to her salary, Kimberly's jobs provided benefits to her. Tr. 87. Those benefits included contribution to retirement accounts. Tr. 87. Kimberly admitted that she left the employment in Walhalla voluntarily when she simply chose not to show up for a shift. Tr. 199, 208.

[¶19] She took a job at the Sheyenne Care Center in Valley City and her employment there provided health insurance with an employer contribution but she did not know the details of that contribution. Tr. 205. She also received sick leave and paid time off and a contribution to a retirement account. Tr. 206.

[¶20] Prior to the move home to Walhalla, Bruce was a mechanic/welder/machinist at Coyote Station which was a generating plant owned by Montana Dakota Utilities near Beulah, North Dakota. Tr. 18. He had worked in that position for twenty-six (26) years prior to his disability. He had not been able to work since October 5, 2005. Tr. 18, 19. Bruce's highest level of education is a high school diploma. Tr. 19.

[¶21] The parties separated on July 2017. Tr. 12. Bruce remained in the home which is located at 11809 106<sup>th</sup> Street Northeast in Walhalla, North Dakota. Tr. 8. Kimberly moved to Valley City, North Dakota, in August 2017. Tr. 8, 196. Her residence in Valley City is a home with five (5) bedrooms and four (4) bathrooms which she shared with her sister. The home was owned by her sister's boyfriend. Tr. 220, 221. She accepted the job at the Sheyenne Care Center for lesser pay than she was earning at her previous job but was given an increase in salary prior to the time of trial. Tr. 17. Bruce believed there were jobs available in Walhalla at the grocery store, gas station and the nursing home which was

always looking for employees. Tr. 167.

[¶22] The home where the parties' lived near Walhalla was on Bruce's family land that he purchased from his mother. The home was in a state of disrepair and was, in fact, not complete. The work necessary to complete the home included insulation of the ceilings and completion of the walls and the exterior was not sided. Tr. 38. The cost of completing the home would be \$40,000. Tr. 28. Bruce had not been able to complete the work on the home due to his physical condition and had not been able to hire the work done for lack of funds. Tr. 39, 106. Kimberly and Bruce had tried to raise funds by the use of other assets as collateral to obtain funds to complete the house but were not successful in doing so completely. Tr. 106. While the parties did hire a contractor in the initial stages, much of the work had been done by Bruce's sons with some help from his brother. One of Bruce's sons also provided materials. Tr. 39. Bruce did not believe that he would have the resources to complete the home and the home was not marketable in its current condition. Tr. 38, 40. There is a mortgage on the home. Tr. 41. Bruce's opinion of value was \$60,000 and Kimberly's \$77,926, but neither obtained an appraisal on the home. Tr. 36. The debt balances were noted on the Rule 8.3 Statement. App. 88. Of the home's three thousand six hundred (3,600) square feet only one thousand forty (1,040) square feet is finished. Tr. 37. Kimberly presented no testimony that contradicted Bruce's description of the home or its condition.

[¶23] Bruce's sons assisted in the construction of the home and they were not paid a wage for their work; rather the work was treated as a barter in exchange for Contract for Deed payments owed to Bruce and Kimberly. Tr. 42.

[¶24] The home is situated on the land Bruce purchased, at a discount, from his mother. Tr. 43. The land was homesteaded by Bruce's great grandfather in the early 1900's. The land has been in Bruce's family for last one hundred (100) years. Tr. 43, 45. The land transferred on Bruce's great grandfather's death to his son, Thomas James Lee. Tr. 43, 44. After Thomas James Lee's death, the land transferred to his sons. Tr. 44. Bruce's father was Oliver Thomas Lee and after some additional transfers, the land was transferred to Bruce's father. Tr. 44. Upon Bruce's father's death, the land passed to Bruce's mother. Tr. 44. At that point Bruce began purchasing the land from his mother on a Contract for Deed. Tr. 44. Bruce's mother passed away in 2010 but he had paid off the Contract for Deed in 2008 prior to her death. Tr. 444. He had started paying her for the land in 1993 and therefore, the majority of the payment for the land occurred prior to marriage. Tr. 44. Bruce purchased the land from his mother at a discounted price. Tr. 189. Kimberly's name was placed on the title to the land in approximately 2008 when the parties began building their home. That was necessary to obtain the loan to accomplish the construction of the home. Tr. 45. Prior to that, Kimberly's name had not been associated with the land. Tr. 45. She never contributed to the farmland and Bruce, other than helping his father as a young boy, never farmed the land. Tr. 47.

[¶25] Just as Bruce had purchased the family land on a Contract for Deed from his mother, Bruce then entered into a Contract for Deed on the land and home with his children in 2010 reserving a life estate. The reservation of the life estate was necessary so that Bruce could receive the rent from the tillable acreage to fund the bank payments. Tr. 47. Bruce entered into that contract to "... carry the Lee name on the land for their lifetime." Tr. 48, lines 6-7. The purchase price paid by the boys was approximately \$100,000. Tr. 152. That priced

was largely established by the boys and like with the purchase from Bruce's mother, was a discounted price. Tr. 189.

[¶26] The land was always intended to be Bruce's children and the Contract for Deed was a way to receive some compensation to fund payment on the bank debt. Tr. 48. Bruce intended that the house be included in the contract as it was on the land being sold. Tr. 48. Bruce's obligations to Choice Financial included a monthly payment of \$1,025 with a balloon payment of \$30,000, and spring and fall payments of \$3,000. Tr. 49. The proceeds of the Contract for Deed from the boys were assigned to Choice Financial so that the loan to build the home could be approved. Tr. 189. Bruce admitted that in part, the reason the life estate was maintained was to assure Kimberly had a home for the remainder of her life. Tr. 150. Divorce was not contemplated at the time that decision was made. The balance of the Choice Financial debt at the time of trial was \$134,602. App. 88. Bruce had been paying the payments to Choice Financial as they become due. Tr. 49.

[¶27] The Contract for Deed requires Bruce's three (3) children to pay \$200 per month per child for a total of \$600 per month. Tr. 50. While the boys had fallen behind with their payments, the payments were current at the time of the trial. Tr. 51. In addition, Bruce explained that some of the payments from his boys were excused for various reasons but largely related to the work and financial contributions made to the construction of the home with the youngest child being the largest contributor of labor. Tr. 52. The allowance Bruce made exchanging labor and materials for cash payments was fair. Tr. 55. The parties prepared their tax returns with the assistance of an accountant. Tr. 190. The accountant never suggested that that Kimberly and Bruce would be required to report the payments not made by the boys as income as would be required if they were considered debt

forgiveness. Tr. 190. Kimberly never objected to the arrangement for barter with the boys and she benefited from their efforts. Tr. 55. Bruce discussed the issue of waiver of payments in exchange for labor with Kimberly. Tr. 157.

[¶28] In addition to providing labor, one of Bruce's children also provided materials. When the construction was started on the home, his oldest son provided two (2) bundles of rebar. Tr. 158. In addition, he paid for the cement poured in the root cellar. Tr. 158. In her submissions on the Rule 8.3 Statement, Kimberly included a receivable from Thomas Lee in the sum of \$7,200; from Taylor Lee in the sum of \$4,800; and from Terrence Lee in the sum of \$9,600 claiming the boys were delinquent in those amounts. App. 88. This was in addition to the claim she made that there remained a payment of \$91,800 on the Contract for Deed. App. 88. The Court included those amounts as assets in its award to Bruce as well as the amount of \$68,902 as the value of the Contract for Deed. App. 253.

[¶29] Bruce did provide a financial statement to the bank which included a value of the real estate but indicated at trial, those figures were inserted by the banker; not by him. Tr. 172. The value placed on the land by the bank was \$236,000 and the home was \$75,000. Tr. 172. Bruce understood those values did not consider the Contract for Deed and that other than the life estate interest, the children owned the property through their remainder interest. The banker typed the financial statement and while Bruce signed it, he was not about to disagree with his banker's statement because he needed to borrow money. Tr. 192, 193.

[¶30] At the time of Bruce's mother's passing, he utilized a portion of the life insurance she had purchased to purchase an IRA through Thrivent for Kimberly. Tr. 82. The value of that account at the time of trial was \$6,004. App 88. Bruce also had a Thrivent account

but to assist the family and pay necessary expenses, he took a loan against his account. Both parties benefited from the funds received from that loan. Tr. 84, 85. In addition to that Thrivent account that Bruce purchased for Kimberly, she had accumulated over \$30,000 in a 401k account which was provided as a benefit from her job while she lived in Walhalla App. 87. Considering the debt on the real estate, that 401k account was the parties' most valuable asset at the time of trial.

[¶31] When he was asked what caused the demise of the marriage, Bruce stated "money". Tr. 11. He had no knowledge of any issues in the marriage other than money and they were living paycheck to paycheck. Tr. 11. That had not changed for Bruce at the time of trial, he was still living paycheck to paycheck. Tr. 11. While there was no physical abuse in the marriage, Bruce described emotional abuse by Kimberly in the summer of 2017 and that she rejected him. Tr. 12. Bruce started seeing a counselor as a result of the marriage failing. Tr. 101. He struggled with the idea of divorce and it was Kimberly's idea to divorce; not his. Tr. 101. The bill to the counselor is one of those expenses that Bruce could not afford to pay and at trial, it remained unpaid. Tr. 101. Likewise, he had fallen behind in his payment to some creditors. Tr. 104.

[¶32] Kimberly provided, during litigation, varying information regarding her monthly living expenses. In her Answers to Interrogatories, she disclosed monthly need of \$1,773. Tr. 212. That budget was provided about a month after Kimberly moved to Valley City. Tr. 212. In December prior to trial, she provided a monthly expense listing stating that her monthly expenses were \$4,434. Tr. 214. At trial, she claimed monthly expenses of \$3,967. Tr. 215. The parties during marriage enjoyed a modest lifestyle. There was no extra money to spend on luxuries. Tr. 88. Bruce's monthly expenses were illustrated through his Exhibit



Tr. 110. They totaled \$4,981 per month but there were questioned upon cross examination.

Tr. 114. He had also continued to pay Kimberly's car payment during separation which was approximately \$500 per month as that was required by the Temporary Order. App. 48.

Due to the six (6) month delay by the trial court in entering its Findings, Conclusions and order, this obligation continued for many more months than contemplated.

### Argument

[¶33] **Issue 1: Whether the trial court's Findings of Fact as to valuation of property were clearly erroneous.**

[¶34] **A. The trial court erred in its valuation of the parties' real estate when it included the value of the life estate in the home and the value of the life estate in the land and the value of Contract for Deed payments.**

[¶35] Bruce recognizes that his is a heavy burden to show this Court that reversal of a District court's property division is warranted. He must demonstrate to this Court that the district court's finding was clearly erroneous. See Corbett v. Corbett, 2001 ND 113, ¶12, 628 N.W. 2d 312; and Schultz v. Schultz, 2018 ND 259, ¶14, 920 N.W.2d 483.

[¶36] "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." Brandner v. Brandner, 2005 ND 111, ¶8, 698 N.W. 2d 259.

[¶37] Bruce's great grandfather in the early 1900's homesteaded property located near Walhalla, North Dakota. Tr. 43, 45. After Bruce's father passed away and the land passed to Bruce's mother, Bruce entered into a Contract for Deed to purchase the land from his mother at a reduced rate. Tr. 44. Later, Bruce entered into a Contract for Deed with his three (3) boys to assure that the land remained in the family. Tr. 44, 47.

[¶38] The land had taken on a new character in that Bruce, being unable to work due to disability left the western part of the state to make his home on the family land. Tr. 18, 19. To fund the construction of that home, he borrowed money from Choice Financial Bank. Tr. 41. Therefore, Bruce retained a life estate in the property as the cash rent from the tillable acreage funded the payment to Choice Financial. Tr. 45.

[¶39] In conjunction with this divorce case, neither party engaged an appraiser to provide valuation information to the trial court. Rather, Bruce provided his opinion that the home had a value of \$60,000 and that the land had a value of \$100,000 considering the life estate interest owned by the parties. App. 88. Taking into account the debts owed to Choice Financial in the sum of \$134,602, the net value of the life estate was minimal.

[¶40] While she recognized the unfinished nature of the home and the existence of a life estate interest only, Kimberly stated a value of \$77,926 for the home, \$190,304 for the land and claimed another component of value was \$91,800 as she claimed that amount was due on the Contract for Deed. Kimberly's opinion as to valuation on the real estate was thus \$360,030. App. 88.

[¶41] The trial court valued the life estate interest in the home in the sum of \$61,521 and the value of the life estate in the land in the sum of \$193,586, for a total value of \$255,107. While Bruce disagrees with that valuation, if the trial court's valuation had stopped with that finding, the error may not have been reversible. However, the trial court did not stop there. In addition to the valuation of the life estate interests, the trial court then included the sum of \$68,902 as addition value for the payment of the Contract for Deed over time. The trial court's total valuation of the real estate was \$324,009. While Bruce disagreed with the valuations noted indicating the Bank had included them on a financial statement; not him, the value assigned to the real estate by the Court exceed the valuation expressed by the Bank in that financial statement. Tr. 172.

[¶42] Therefore, the Court valued an asset in which the parties have only a life estate at a sum greater than the highest value asserted in any evidentiary document provided to it at trial as a fee simple interest. It is not possible for an interest in a life estate to have a value

in excess that it would be as a fee simple.

[¶43] Not only is the record devoid of evidence to support the lower court's finding as to the value of a life estate in real estate, this Court should be left with a firm and definite conviction that a mistake has been made. No other conclusion is possible.

[¶44] **B. The court erred when it valued a Bobcat in the sum of \$15,000 when the only credible evidence revealed its value was \$9,500 and then awarded it to Kimberly.**

[¶45] Although the Bobcat was awarded to Kimberly, the court nonetheless erred when it valued the property at \$9,500. Further, the award of the Bobcat to Kimberly defies logic as she has no need for the property and Bruce does especially when he lacks the ability to replace a necessary piece of property. Bruce provided detailed testimony regarding the Bobcat. It was a 1999 model purchased in 2011 with approximately 2,900 hours. Tr. 62, 63. It was used for snow removal, general cleanup and maintenance around the farm. Tr. 63. It was a necessary asset to maintain the property. Tr. 63. It was purchased for \$15,000. Tr. 63. Kimberly had never used the Bobcat and had no knowledge regarding valuation of used equipment such as the Bobcat. Tr. 63. In addition, Bruce had inquired at the Bobcat dealership as to its fair market value and his valuation on the Rule 8.3 Statement was based upon the information provided. Tr. 64. Contrasting that detailed information from Bruce, the sole statement Kimberly made regarding its valuation was her affirmative response to her counsel's leading question that she had valued the Bobcat at \$15,000. Tr. 172, 183.

[¶46] **C. The trial court erred when it included a receivable from Bruce's children in the sum of \$21,600 in the marital estate.**

[¶47] In addition to assigning a valuation of a stream of income from a Contract for Deed in regard to the real estate, the lower court erred in including a value of receivables from his children when the testimony was clear that those amounts were not due as there had

been a barter exchange of labor and materials for payments. There was no evidence presented by Kimberly that proved such receivables existed. In fact, the testimony was otherwise. Kimberly had no direct knowledge of the payments made to Bruce and further, had no information to refute Bruce's testimony regarding the barter arrangement that was made between he and his sons. Rather the evidence that the lower court had available to it in regard to the issue of sums due from Bruce's sons on the Contract for Deed was that they were current in their payments. Tr. 51. Bruce noted that his son Thomas had fallen behind but that, with a payment of \$7,000 in June 2018, he was only delinquent for two (2) months. Tr. 51. The trial court included a receivable due from Thomas in the sum of \$7,200 when the amount due was no more than \$400. However, Bruce asserted there was no receivable from Thomas as there was still some credit due him for the work on the house. Tr. 51, 52. Bruce noted that Taylor was current and therefore, the \$4,200 receivable included by the district court was in error. Finally, as to Bruce's son Terrence, likewise, there was no amount due. Terrence was, in Bruce's words, the "biggest contributor". Tr. 53. Terrence was there working from the time the footings were prepared. Tr. 54. He was given credit for four years of payments as a result of his supplying materials and labor. Tr. 54. Kimberly complained that Bruce's position was incorrect but presented no evidence to the contrary.

[¶48] **Issue 2: The clearly erroneous Findings of Fact as to valuation of property resulted in disposition of property and allocation of debts that were likewise clearly erroneous and the court did not properly consider the source of the property in its determination.**

[¶49] A trial court is required to consider all of the relevant factors under the Ruff-Fischer guidelines, namely: 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. Lill v. Lill, 520 N.W. 2d, 855, 857 (ND 1994). As stated in the recent case of Schultz v. Schultz, “[a]long with the other factors included within the *Ruff-Fischer* guidelines, the district court is required to consider the duration of the marriage and **source** of the property in determining an equitable allocation of the parties’ marital property. 920 N.W.2d at ¶10. (emphasis added).

[¶50] The trial judge, using its valuations which were in some cases, in error, believed that it awarded Bruce seventy-eight percent (78%) of the value of the assets and Kimberly twenty-two percent (22%). Had the Court not used an erroneous value of the land and not included receivables that did not exist, the actual award did not justify the award of a cash distribution.

[¶51] The Court then required Bruce to pay Kimberly the sum of \$75,000 over a seven (7) year time frame. Considering that cash distribution, the trial court’s award resulted in a nearly equal division with Bruce being awarded fifty-one percent (51%) and Kimberly forty-nine percent (49%) of the value perceived by the lower court.

[¶52] Based upon the court’s determination of a nearly equal award, it stands to reason that the lower court gave no consideration to the fact that the only real estate owned by the parties had its origin with Bruce’s great grandfather in the early 1900’s.

[¶53] While there is no set formula or method for dividing marital property, the division is based upon the particular circumstances of each case. Wagner v. Wagner, 2007 ND 101,

¶11, 733 N.W.2d 593. The circumstances of this case required the lower court to consider the source of the real estate of the parties.

[¶54] In Hoverson v. Hoverson, 2013 ND 48, 828 N.W.2d 510, this Court affirmed a trial court's decision that awarded Ms. Hoverson only twenty percent (20%) of the parties' marital estate. Hoverson, at ¶11. While the facts of the Hoverson case are somewhat different, there are also similar facts. It was not the first marriage for either of the Hoverson's. Likewise, it was not the first marriage for Kimberly or Bruce. The Hoverson's had a marriage of six (6) years at the time of commencement of the case. While the Lee's had been married longer, the real estate involved had been in Bruce's family since homestead in early 1900. Central to the Court's affirmance of an award of twenty percent (20%) of the marital estate to Ms. Hoverson was that property originated with Mr. Hoverson prior to marriage. The facts herein should have led the lower court to consideration of the source of the property and doing so should certainly have resulted in a greater than fifty percent (50%) award to Bruce.

[¶55] The distribution of marital property is treated as a finding of fact which is reviewed under the clearly erroneous standard. Walstad v. Walstad, 2013 ND 176, ¶13, 837 N.W.2d 911. (citations omitted). 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 after reviewing all of the evidence, it is determined a definite and firm conviction a mistake has been made. Id.

[¶56] In a marital dissolution action, the trial court must equitably divide the assets and debts of the marital estate. N.D.C.C. § 14-05-24(1). The court must first establish what is included in the marital estate; everything the parties have earned or received, whether jointly or individually, is a part of the marital estate and subject to division. Lorenz v.

Lorenz, 2007 ND 49, ¶6, 729 N.W.2d 692. The Court must then divide the assets and debts between the parties in a manner that is equitable, but not necessarily equal. Brandner, 2005 ND 111, ¶7, 698 N.W. 2d 259. Nothing in our law requires an equal distribution of assets. In order to make an equitable distribution, the court must apply the Ruff-Fischer factors. Lorenz, at ¶6. The [district] court is not required to make specific findings, but it must specify a rationale for its determination. Id. In an unequal but equitable distribution, the trial court must explain any substantial disparity. Brandner at ¶7.

[¶57] In Horner v. Horner, this Court has found that the parties may be awarded an unequal division of property, considering and setting aside each party's prior acquired assets if it is deemed by the trial court to be a short term marriage. 2004 ND 165, ¶12, 686 N.W.2d 131. See also, Buzick v. Buzick, 542 N.W.2d 756, 759 (N.D.1996); Lill, 520 N.W.2d 855, 857 (N.D.1994). However, this Court further found "[d]espite these generalities, duration of a marriage is only one factor of the *Ruff-Fischer* guidelines and is not controlling in a distribution of marital property." Horner at ¶12. (citing Lill, at 857). This Court further clarified, "[t]here is no set formula for dividing a marital estate, but the trial court must equitably divide the property based upon the circumstances of the particular case." Horner at ¶12. (quoting Nelson v. Nelson, 1998 ND 176, ¶6, 584 N.W.2d 527). Additionally, in Lorenz, this Court found that "[u]nder the *Ruff-Fischer* guidelines, both economic and non-economic fault are factors that may be considered in dividing the marital estate." Lorenz at ¶13. (quoting Heinz v. Heinz, 2001 ND 147, ¶5, 632 N.W.2d 443).



**[¶58] Issue 3: The trial court's delay in issuing its Findings of Fact, Conclusions of Law, and Order for Judgment from the last day of trial January 31, 2018, to July 31, 2018, resulted in prejudice to Bruce.**

[¶59] The last day of trial occurred on January 31, 2018. Bruce submitted his closing summation by way of proposed Findings of Fact, Conclusions of Law, and Order for Judgment on February 14, 2018. App. 221. Kimberly submitted her closing summation by way of Defendant's Post-Trial Brief on the same date. App. 245. The trial court had ordered those submissions be filed simultaneously on that date.

[¶60] However, the trial court did not enter its Findings of Fact, Conclusions of Law, and Order for Judgment until July 31, 2018; six (6) months after the final day of trial. App. 264 The Judgment was entered on August 17, 2018. App. 308.

[¶61] The current version of North Dakota Supreme Court Administrative Rule requires the completion of decisions ninety (90) days from argument, trial or the filing of the last brief. N.D.Sup.Ct.Admin.R. 12(b)(1). The Rule in effect at the time of submission of this case required Judgments to be entered within “ . . . 24 months of the date the complaint was filed or within 90 days of the end of trial, whichever is earlier.” N.D.Sup.Ct.Admin.R. 12(a)(1).

[¶62] This case began with the service of the Summons and Complaint in June 2017. The final day of trial occurred on January 31, 2018. The final briefs and proposals were served on February 14, 2018. Under either Rule, the Court's Findings, Conclusions and Order should have been in the parties' hands on or before May 16, 2018. They were not provided until July 31, 2018. As such, the terms of the Temporary Order remained in place which obligated Bruce to continue to pay a loan payment secured by a vehicle to which he had not access. While the approximate \$1,000 per month that came due during that time may

seem of no consequence to some, it was of great consequence to Bruce and resulted in prejudice.

**Conclusion**

[¶63] For the reasons cited herein and based upon the authority noted, Bruce respectfully asks that this Court reverse the district court's decision and remand the same with instructions.

DATED this 18<sup>th</sup> day of February 2019.

/s/ Patti J. Jensen

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STATE OF MINNESOTA    )  
  ) ss  
COUNTY OF POLK        )

### AFFIDAVIT OF SERVICE

Re: Bruce Wayne Lee v. Kimberly Marie Lee  
Supreme Court No. 20180382

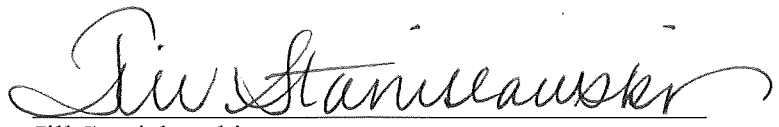
The undersigned, a person not less than eighteen (18) years of age and not a party to this proceeding, being first duly sworn upon oath hereby states copy of the enclosed:

- Brief of Appellant; and
- Appendix of Appellant

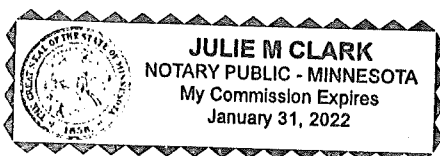
were served upon:

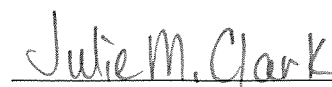
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via electronic mail (e-mail) using the email address published on the North Dakota Supreme Court online directory for Robert Schultz; namely: rschultz@conmylaw.com, the 18<sup>th</sup> day of February 2019.

  
Jill Stanislawski

Subscribed and sworn to before me, a Notary Public, on this 18<sup>th</sup> day of February 2019, by Jill Stanislawski, at East Grand Forks, Minnesota.



  
Notary Public, State of Minnesota  
My Commission Expires: 1-31-2022