
IN THE
SUPREME COURT OF NORTH DAKOTA

SUPREME COURT NUMBER 20170332
DICKEY COUNTY NUMBER 2012-PR-00011

IN THE MATTER OF THE ESTATE OF DELBERT MOORE, DECEASED

**CHARLES MINARD, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF
DELBERT G. MOORE, DECEASED,
PETITIONER AND APPELLANT**

v.

**DONALD B. MOORE, TERRY MINARD, CANDICE EBERHART,
AND SCOTT MOORE,
RESPONDENTS AND APPELLEES**

AND

**GLENN W. MOORE & SONS,
CLAIMANT AND APPELLEE**

ON APPEAL FROM JUDGMENT DATED JULY 5, 2017
ENTERED IN DISTRICT COURT, COUNTY OF DICKEY
SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE JOHN E. GREENWOOD, PRESIDING

BRIEF FOR THE APPELLANT

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QUESTION PRESENTED FOR REVIEW

- [1] The Trial Court Erred In Ordering That The Estate Of Delbert Moore Was Not Entitled To Receive Rental Income From Donald Moore and Scott Moore, Individually And Doing Business As Glenn W. Moore & Sons Partnership, For Use Of The Estate's One-Half Interest In Certain Real Property Located In Dickey County, North Dakota

STATEMENT OF THE CASE

[2] This is an appeal from Judgment entered in the District Court for the County of Dickey, North Dakota, on July 5, 2017. Said Judgment was entered pursuant to the Findings of Fact, Conclusions of Law, and Order for Judgment signed by the Honorable John E. Greenwood on May 30, 2017. *See* Appendix (“App.”) at 46-49.

[3] Delbert Moore died on March 5, 2012. In his will, Moore named his step-son, Charles Minard, as Personal Representative of his Estate. (App. 54-57). On March 20, 2012, Minard was appointed Personal Representative of Moore’s Estate by the trial court. On May 11, 2012, Minard executed a Personal Representative’s Deed granting Moore’s one-half interest in approximately 2500 acres to the named heirs of the Estate so that a partition action could be commenced, and the real property sold as directed by Moore’s will. *See generally* (App. 8-15); (Transcript of Proceedings, June 18, 2014). On May 29, 2012, Donald Moore, the brother of the decedent, Delbert Moore, petitioned the trial court asking that the Personal Representative’s Deed dated May 11, 2012, be set aside (App. 8-11).

[4] Thereafter, the trial court held two hearings in this matter that are relevant to the issues raised on appeal. On June 18, 2014, the trial court held a status hearing to determine the parties’ position on the vacation of the personal representative’s deeds requested by Donald Moore. *See* (Transcript of Proceedings, June 18, 2014, Page 4, lines 16-22). At the hearing, the trial court ordered that the deeds in question be vacated and set aside based on an agreement reached by the parties and asked that an order be prepared accordingly. (Tr., 17, lines 15-19; 22, lines 1-5; 23, lines 9-14). On September

12, 2014, the trial court signed a written order setting aside the personal representative's deeds and declared the same to be void. *See* (App. 12-13). The order specifically stated that "a certified copy of this order...shall serve to nullify the above-referenced transfers as though said transfers never occurred. Title the property shall hereinafter revert back to the Estate of Delbert Moore." *Id.* An Amended Order Setting Aside and Vacating Personal Representative's Deeds and Declaring the Same Void was subsequently entered on December 18, 2014, as it was found that there was an error in part of the legal descriptions contained in the original order. (App. 14-15). However, the context of the order was not changed. *Id.*

[5] On February 9, 2016, the trial court held a hearing on all of the remaining issues raised in the probate matter that had yet to be litigated. *See generally* (Transcript of Proceedings, February 9, 2016). One of the issues raised at the hearing was whether the Estate was entitled to receive rent from the Glenn W. Moore & Sons Partnership. In its Memorandum Opinion dated July 27, 2016, and its Findings of Fact, Conclusions of Law and Order for Judgment dated July 5, 2017, the trial court held that the Estate was not entitled to receive rental income from the partnership. (App. 25-31, 40-45). The trial court reasoned that because an addition to the partnership agreement stated the real property owned between Delbert Moore and Donald Moore shall be contributed to the partnership without charge and that at least six months' notice must be provided in order to dissolve the partnership, that no rentals would be owed during an extended period of time following Delbert Moore's death. *Id.*; *see also* (App. 16). The trial court further held that the Estate did not have standing to bring a claim for rentals for the

time between May 11, 2012, and September 12, 2014, as the real property was then owned by Charles Minard, Terry Minard, Candice Eberhart, and Scott Moore, despite the trial court previously vacating the personal representative's deeds granting the property to said individuals. *Id.* Lastly, the trial court found that the estate was not entitled to receive rentals because it had failed to prove that the doctrine of unjust enrichment was applicable. *Id.*

[6] On July 5, 2017, a Judgment was entered in this matter, adopting the trial court's corresponding Findings of Fact, Conclusions of Law and Order for Judgment. (App. 46-49). On July 24, 2017, Notice of Entry of Judgment was also entered. (App.50). A Notice of Appeal was filed by Charles Minard, Personal Representative of the Estate of Delbert Moore, on August 30, 2017. (App. 51-53).

STATEMENT OF FACTS

[7] Delbert Moore died on March 5, 2012. At the time of this death, Moore was a partner in Glenn W. Moore & Sons, along with his brother, Donald Moore, and his nephew, Scott Moore. *See generally* (Transcript of Proceedings, February 9, 2016). The partnership was primarily involved in the business of ranching, and operated on approximately 2500 acres of real property owned as tenants in common by Delbert Moore and Donald Moore. *Id.* In his will dated January 30, 2012, Delbert Moore directed that his one-half interest in the real property be sold in a commercially reasonable manner within six months from the date of his death and that the net proceeds from said sale be divided equally amongst his three step-children, Charles Minard, Terry Minard and Candice Eberhardt, and his nephew, Scott Moore. Delbert Moore's one-third interest in Glenn W. Moore & Sons was to be divided amongst his step-children. (App. 54-57). The will also named Charles Minard as Personal Representative. *Id.* On March 20, 2012, a probate action was commenced for the Estate of Delbert Moore in Dickey County, North Dakota, and Minard was appointed Personal Representative. *See generally* (Transcript of Proceedings, February 9, 2016).

[8] After conversations with Donald Moore about jointly selling the real property owned in part by Delbert Moore proved unfruitful, Charles Minard, at the direction of legal counsel, transferred the real property to the heirs on May 11, 2012, in order to commence a partition action. On June 18, 2012, Donald Moore petitioned the trial court asking that the Personal Representative's Deed dated May 11, 2012, be set aside (App. 9-11). The petition alleged that the Personal Representative's Deed wrongfully

transferred an interest in real property that Donald Moore was to receive, and claimed that Minard violated his fiduciary duty by transferring the real property to the heirs rather than selling it. *Id.* Thereafter, Minard executed and recorded a corrective Personal Representative's Deed to correct the legal descriptions and ensure that the property Donald Moore was to receive from the estate would be excluded. *See generally* (App. 12-15); (Transcript of Proceedings, June 18, 2014).

[9] As the probate and partition actions languished, the parties attempted to reach an agreement on the petition to vacate the deeds in the hope that it would move the matter along, so the real property could be sold. *Id.* However, Scott Moore refused to sign the agreement and a hearing had to be scheduled. *Id.* On June 18, 2014, the trial court held a status hearing to determine, among other things, the parties' position on the vacation of the personal representative's deeds requested by Donald Moore. *See* (Transcript of Proceedings, June 18, 2014, Page 4, lines 16-22). At the hearing, the trial court ordered that the deeds in question be vacated and set aside based on an agreement reached by a majority of the parties and asked that an order be prepared accordingly. (Tr., 17, lines 15-19; 22, lines 1-5; 23, lines 9-14). On September 12, 2014, the trial court signed a written order setting aside the personal representative's deeds and declared the same to be void. *See* Order Setting Aside and Vacating Personal Representative's Deeds and Declaring the Same Void (App. 12-13). The order specifically stated that "a certified copy of this order...shall serve to nullify the above-referenced transfers as though said transfers never occurred. Title the property shall hereinafter revert back to the Estate of Delbert Moore." *Id.* An Amended Order Setting Aside and

Vacating Personal Representative's Deeds and Declaring the Same Void was subsequently entered on December 18, 2014, as it was found that there was an error in part of the legal descriptions contained in the original order. However, the context of the order was not changed. (App. 14-15).

[10] Thereafter, the real estate was ordered to be sold pursuant to an Order dated November 5, 2013, entered in Case No. 11-2012-CV-00076 (as Doc ID# 50). Over three years had passed between Delbert Moore's death before the real property was finally sold. *See generally* (App. 17-32). During that entire time, the remaining partners of Glenn W. Moore & Sons partnership, Donald Moore and Scott Moore, continued to run their ranching operations on the property. *See* (Transcript of Proceedings, February 9, 2016, Page 106, lines 1-11; Page 107, lines 5-25). According to Minard, he and his siblings were prevented access to the real property shortly after Delbert Moore's death and were not able to participate in the partnership. *Id.*

[11] On February 9, 2016, the trial court held a hearing on all of the remaining issues raised in the probate matter, including the issue of rentals alleged to be owed by the partnership, that had yet to be litigated. *See generally* (Transcript of Proceedings, February 9, 2016). In its Memorandum Opinion dated July 27, 2016, and its Findings of Fact, Conclusions of Law and Order for Judgment dated July 5, 2017, the trial court held that the Estate was not entitled to receive rental income from the partnership. (App. 25-31, 40-45). The trial court gave three different rationales for denying the claim for rentals made by the estate for the period between March 5, 2012, and May 18, 2015, the date of the sale ordered by the partition action. *Id.*

[12] The first rationale dealt with the fact that during the time that Delbert Moore was alive and operating as part of the partnership, that his one-half interest in the real property was to be provided to the Glenn W. Moore & Sons Partnership at no charge. (App. 25-27). The trial court referred to the document entitled Addition and Clarification of Partnership Agreement dated January 1, 1990, that was entered into evidence as Exhibit #10. *Id.*; *see also* (App. 16). The trial court focused on two provisions in the document. The first provision related to the ownership and use of the real property in question. According to the document, "land owned as tenants in common by Delbert and Donald Moore is contributed to the partnership without charge. The partnership is responsible for all costs and management associated with the land and treats the land as if owned by the partnership. This contribution cannot be retracted except on dissolution of the partnership or agreement by both partners." *Id.* The agreement further stated that "this partnership is not automatically dissolved on death of a partner; however, the Estate of a deceased partner cannot make business decisions for the partnership without the approval of the surviving partner." *Id.* The trial court found that based on these provisions and North Dakota law, that the partners intended that there should be an extended period of time after the death of a partner to allow the partnership business to continue while the surviving partner or partners decided how to proceed after the death. (App. 26-27). "Because the partnership agreement is clear that the land is contributed to the partnership 'without charge,' no rental is owed by the partnership to the Estate for that extended period of

time after Delbert's death. Whether the period of time should be three years until May 18, 2015, is a further issue.” (App. 27, ¶ 25).

[13] The trial court went on to deny the claim for rentals made by the Estate stating that the Estate did not hold title to Delbert Moore’s interest in the real estate from May 11, 2012, until September 12, 2014, a period of 28 months. (App. 27-28). The trial court rationalized that the order it entered subsequent to the hearing on June 18, 2014, was in contradiction to the intent of the parties and to its own terms. (App. 28, ¶ 28). The order stated the "personal representative's deeds shall be set aside, vacated, and declared void" and the order "shall serve to nullify the above referenced transfers as though said transfers never occurred. Title to the property shall hereinafter revert back to the Estate of Delbert Moore." *Id.* The trial court surmised that there was a conflict as to “whether the order intended the deeds to be void from the beginning or rather the purpose of the Court's order was to transfer the property back to the Estate effective September 12, 2014.” *Id.* The trial court found that the latter was the intent of the parties as the parties “made it clear to the Court that the intent of the order was to place the real Estate back in the Estate so the real estate could be sold at the partition sale.” *Id.* Because the trial court found that Charles Minard, Terry Minard, Candice Eberhart, and Scott Moore held title to the real property for approximately 28 months and that there was a contradiction between the order and what was alleged during the hearing, that the Estate did not have standing to bring a claim for rentals.

[14] The third basis that the trial court relied on in denying the claim for rentals was that the Estate failed to prove that the doctrine of unjust enrichment was applicable.

(App. 30, ¶ 31). The trial court claimed that “none of the parties presented evidence that the partnership continued its business as usual and to the same extent after Delbert Moore’s death, as it had prior to his death. The evidence presented at trial focused on the time period through 2012, the year Delbert Moore passed away. Had the evidence proven the partnership continued its business as usual making full use of the entire real estate after Delbert Moore’s death perhaps an argument could be made there was enrichment. That evidence was not presented at trial.” (App. 29, ¶ 28-29).

[15] On July 5, 2017, a Judgment was entered in this matter, adopting the trial court’s Findings of Fact, Conclusions of Law and Order for Judgment. (App. 46-49). On July 24, 2017, Notice of Entry of Judgment was also entered. (App. 50). A Notice of Appeal was filed by Charles Minard, Personal Representative of the Estate of Delbert Moore, on August 30, 2017. (App. 51-53). The Notice indicated that this appeal relates to the issue of rentals and whether or not the Estate of Delbert Moore was entitled to receive rental income from the partners of Glenn W. Moore & Sons Partnership for the use by the partnership of the Estate’s one-half interest in certain real property from the date of Delbert Moore’s death to the time said real property was sold. *Id.*

ARGUMENT

Standard of Review

[16] In Border Res., LLC v. Irish Oil & Gas, Inc., 2015 ND 238, ¶ 14, 869 N.W.2d 758 (quoting Brash v. Gulleson, 2013 ND 156, ¶ 7, 887 N.W.2d 538, 835 N.W.2d 798), this Court explained the standard of review for an appeal from a bench trial: “[T]he trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. 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, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. In a bench trial, the trial court is the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations. The district court's determination of whether the facts support a finding of unjust enrichment is fully reviewable on appeal.” Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 53, 855 N.W.2d 614.

[17] The Trial Court Erred In Ordering That The Estate Of Delbert Moore Was Not Entitled To Receive Rental Income From Donald Moore and Scott Moore, Individually And Doing Business As Glenn W. Moore & Sons Partnership, For Use Of The Estate’s One-Half Interest In Certain Real Property Located In Dickey County, North Dakota

[18] The analysis of this issue is three-fold as the trial court gave three different rationales for denying the rental claim made by the Estate. First, this Court must determine ownership of the real property between March 5, 2012, and May 18, 2015. This is the most important inquiry as the remaining issues and outcome ultimately hinge on the determination of ownership. The trial court found that the estate did not own

the real property until September 12, 2014, when the court entered its order vacating the Personal Representative's Deeds. (App. 28, ¶ 27). The trial court held that the intent of the parties was to merely get the real property back in the Estate so that it could be sold and that the order the trial court signed did not purport with the intent of the parties at the hearing. *Id.* The trial court further stated that while the order indicated the deeds were to be set aside, vacated, and declared void and shall serve to nullify the transfers as though they never occurred, the purpose of the Court's order was to transfer the property back to the Estate effective September 12, 2014. *Id.* However, there is nothing in the record to support this.

[19] At the hearing held on June 18, 2014, the Court simply stated that "I think all parties are in agreement that the best course is for the court to vacate the deeds that were issued by the personal representative and that will be the order of the court." *See* (Transcript of Proceedings, June 18, 2014, Page 17, lines 15-19). According to Black's Law Dictionary (7th ed. 1999), vacate means "to annul; to cancel or rescind; to render an act void; as, to vacate an entry of record, or a judgment." Void is defined as "null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." *Id.* Donald Moore had filed a petition to vacate and declare void the deeds in question. (App. 8-11). The parties ultimately reached an agreement based on that petition. *See* (Transcript of Proceedings, June 18, 2014, Page 17, lines 15-19). It is Minard's contention that the parties intended for the personal representative's deeds to be voided, as in having no legal effect, as was requested in the petition. The proposed order, which indicated that the order was to nullify the transfers

as though they never occurred, was drafted by the undersigned, reviewed by the opposing parties and signed by the trial court without modification. *See generally* (App. 12-13). While the trial court claims that its intent was to make the deeds ineffective from September 12, 2014, going forward, that is not supported by the evidence. As such, it is the position of the Personal Representative that Delbert Moore and ultimately his Estate, was the owner of the real property in question until its sale in May, 2015.

[20] If this Court determines that the Estate of Delbert Moore was in fact the owner of the real estate, or at the very least that the Personal Representative of said Estate had the authority and standing to make a claim for rentals, then it must determine for what period of time the Estate would be entitled receive rentals. The trial court determined that there would have been a period of time subsequent to Delbert Moore's death that the partnership would have been able to utilize the real property without charge. (App. 27, ¶ 25). The trial court reasoned that the "phrase of the agreement that the 'partnership is not automatically dissolved on death of a partner' reflects state law as Delbert Moore's death resulted in his dissociation from the partnership. Also, the agreement required six month's written notice to commence the dissolution process. This indicates the partners intended that there be an extended time to deal with a partner leaving or the death of a partner before the necessary wind up of the partnership or its continuation by the remaining partners, by their agreement that the 'partnership is not automatically dissolved on death of a partner.'" *Id.* Minard would argue that the trial court misconstrued the intent of the partnership agreement as to the six-month requirement and death of a partner. The six-month requirement

that the trial court refers to deals with the dissolution process, not death. (App. 16). This is evidenced by the fact that the terms are in separate paragraphs and ultimately separated by language not on point with either process. *Id.* The document reads verbatim “this partnership is not automatically dissolved on death of a partner; however, the estate of a deceased partner cannot make business decisions for the partnership without the approval of the surviving partner. This agreement may be modified at any time by mutual agreement of the partners. Either partner may force dissolution of the partnership, but must provide at least six months’ written notice.” *Id.*

[21] Under N.D.C.C. § 45-18-01(7), a partner who dies is dissociated from a partnership. Under N.D.C.C. § 45-18-03, if a partner's dissociation results in a dissolution and winding up of the partnership business, chapter 45-20 applies, otherwise, chapter 45-19 applies. Upon a partner's dissociation...the partner's right to participate in the management and conduct of the partnership business terminates, except as otherwise provided in section 45-20-03. In this case, Delbert Moore became dissociated from Glenn W. Moore & Sons Partnership by virtue of his death on March 5, 2012. The Addition and Clarification of Partnership Agreement indicated that the partnership would not automatically dissolve on the death of a partner and the facts show that at least up until February 9, 2016, Glenn W. Moore & Sons Partnership still existed and continued to operate as a ranching business. (App.16); *see also* (Transcript of Proceedings, February 9, 2016, Page 168, lines 8-25; Page 169, lines 1-22; Page 170, lines 6-14).

As such, it is clear that Delbert Moore's dissociation by virtue of his death did not cause the partnership to dissolve and/or wind up its affairs. However, it did end the right for him or his estate to participate in the management and conduct of the partnership business. (App. 16); *see also* (Transcript of Proceedings, February 9, 2016, Page 107, lines 21-25). While the partnership agreement indicates that an estate of a deceased partner could make business decisions for the partnership if the partners agreed, the evidence indicates that the Estate of Delbert Moore was never given that authority. (App. 16); *see also* (Transcript of Proceedings, February 9, 2016, Page 48, lines 14-21; Page 49, lines 2-8; Page 100, lines 3-9, 19-25; Page 101, lines 1-4).

[22] Because Delbert Moore's dissociation was not wrongful, Chapter 45-19 would control as to the buyout of Delbert Moore's interest. Under N.D.C.C. § 45-19-01(2), "the buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection 2 of section 45-20-07 if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment." The purpose of pointing out this provision is to show that the date of dissociation is the date used to determine a partner's ownership interest. *Id.* It would only seem logical then, that assets owned by a dissociating partner would no longer be available for use by the partnership as of that date as well absent an agreement to the contrary. There is no provision in the partnership agreement or in law that states or

supports the idea that Glenn W. Moore & Sons was entitled to use, at no cost, real property owned in part by a deceased/dissociated partner of the partnership. *Id.*; see also (App. 16). Therefore, if this Court finds that the Estate has met the burden to establish that there has been an unjust enrichment, it is Minard's contention that rentals would be due commencing as of the date Delbert Moore dissociated from the partnership, which would be the date of his death on March 5, 2012.

[23] Finally, the last inquiry this Court must make is whether the trial court erred in finding that the elements of unjust enrichment had not been established by the Estate entitling it to rentals from the partnership. In McColl Farms, LLC v. Pflaum, 2013 ND 169, ¶ 18, 837 N.W.2d 359, this Court explained the doctrine of unjust enrichment:

Unjust enrichment is a broad, equitable doctrine which rests upon quasi or constructive contracts implied by law to prevent a person from unjustly enriching himself at the expense of another. To recover under a theory of unjust enrichment, the plaintiff must prove: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) the absence of a justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law. The theory may be invoked when a person has and retains money or benefits which in justice and equity belong to another. For a complainant to recover, it is sufficient if another has, without justification, obtained a benefit at the direct expense of the complainant, who then has no legal means of retrieving it. The essential element in recovering under the theory is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value.

“When an impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and there has been no unjust enrichment.

BTA Oil Producers v. MDU Res. Group, Inc., 2002 ND 55, ¶ 23, 642 N.W.2d 873.

Therefore, we have said unjust enrichment generally applies only in the absence of a contract between the parties, and there can be no implied-in-law contract when there

is an express contract between the parties relative to the same subject matter.” *Id.* at ¶ 37.

[24] In this case, because of the dissociation by Delbert Moore from the partnership by virtue of his death, there was no express contract, particularly the partnership agreement, governing the use of Delbert Moore’s one-half interest in the real property subsequent to his death. *See* (Transcript of Proceedings, February 9, 2016, Page 105, lines 24-25; Page 106, lines 1-11). As such, this Court could find unjust enrichment if all of the elements are met. The trial court found that “none of the parties presented evidence that the partnership continued its business as usual and to the same extent after Delbert Moore’s death, as it had prior to his death. The evidence presented at trial focused on the time period through 2012, the year Delbert Moore passed away. Had the evidence proven the partnership continued its business as usual making full use of the entire real estate after Delbert Moore’s death perhaps an argument could be made there was enrichment.” (App. 29, ¶ 29). The trial court held that it could not “find the partnership was enriched and that the Estate suffered an impoverishment. It is the finding of the [c]ourt that the Estate has failed to prove that the doctrine of unjust enrichment is applicable.” (App. 30, ¶ 31). Minard would disagree.

[25] Interestingly, the trial court in its analysis of the dissociation by Delbert Moore, makes a point that then contradicts its conclusion on the issue of unjust enrichment. The trial court specifically stated in its findings that “[t]he real Estate owned as tenants in common by Delbert Moore and Donald Moore was an integral component of the partnership business of farming and ranching. Without the real estate, the partnership

could not conduct its business to the extent it did while Delbert Moore was alive.” (App. 26-27, ¶ 25). This goes to the heart of the Estate’s unjust enrichment claim. The trial court is right – the real estate was an integral part of the partnership and the partnership continued to operate on that real estate until the property was sold. The partnership continued with business as usual regardless of the fact that Delbert Moore, one of its three partners, had died. *See* (Transcript of Proceedings, February 9, 2016, Page 168, lines 8-25; Page 169, lines 1-22; Page 170, lines 6-14). There is absolutely no evidence that showed that the partnership sold out after death and discontinued using the real property. In fact, quite the contrary was shown. Scott Moore testified at the hearing that approximately 50 acres of the real property was rented out to Keith Hauck for \$45 per acre or more for the years 2012 through 2014. *See* (Tr., Page 126, lines 4-14; Page 157, lines 22-25; Page 158, lines 1-7; Page 191, lines 10-22; Page 192, lines 1-18). None of the rentals received for that acreage was ever paid over to the Estate. *Id.* While the partnership determined that someone else should have to pay rent for use of part of that land, they did not, despite the fact that Delbert Moore nor his Estate or any of his other heirs, were able to participate in the partnership.

[26] Scott Moore also testified at length on February 9, 2016, about the partnership’s operation and did not just limit it to the year 2012 as indicated by the trial court.

Q. Tell us about how you call your cows or whatever or sell your cows out of your herd?

A. Well, there are cattle -- where do I start at the beginning of the year if that works. There are cattle that lose their calf, turn up open whatever in the spring. Typically, we will hold these at home and feed them for a time

frame until we greatly increase the value of them through feeding. At the time that they can get sold is anywhere from the beginning of April until some time in June or July depending upon what they are, what the market is. Maybe we need some cash, so we'll sell some cattle. There's not a definite day that we sell them or time frame we are selling it. There's a lot of factors that we look at before we decide that they're going to be sold.

Q. Okay. Now, you also sell heifers and steers, I take it?

A. Yes.

Q. When do you sell them?

A. It depends upon the market. It depends upon the weight of the cattle. It depends upon the condition of the cattle. There is not a definite time frame. We sometimes sell steers or heifers in November, December. Sometimes we wait until January. Sometimes we even wait until June. It depends upon all those factors that you mentioned earlier.

Q. Okay. Now, Mr. Hellwig, Dennis Hellwig testified that and he said that usually ranching will keep the high end cattle. Is that your practice?

A. Not exclusively. What we've been doing the *last several years* because the cattle have been getting too big, frame-wise, et cetera, and they are not as efficient when they're that big in converting feed and meat, we pull off the top end of the cattle, and we keep -- I wouldn't say the middle -- but I would say the lower side of the middle for replacements and then we sell some off the bottom end too that we do not want. And that has been our general practice for, I don't know how many years, a lot of years. (emphasis added)

Q. So how does that jive with what Mr. Hellwig was saying?

A. Mr. Hellwig said that our cattle are at the top of the market. Part of our cattle are at the top of the market. I would agree with that, not all of them. Our calves tend to sell near the top but do not always sell in the top. I'd say that they are in the top fourth. You go into our cow herd and our cow herd is smaller than our normal cattle. They are not fed enough to bring high dollars as bred cattle because the way we handle them.

See (Transcript of Proceedings, February 9, 2016, Page 168, lines 8-25; Page 169, lines 1-22; Page 170, lines 6-14).

[27] It is clear from the record that Scott Moore was referring to the partnership's general business practices up to the day that he testified, which was February 9, 2016. At no time did he limit his testimony to what was done solely in 2012. Furthermore, Minard stated he had driven past the real property over the years, so it would seem logical that he could identify that the partnership ranching operations were carrying on as usual. *See* (Tr., Page 102, lines 6-9). He went on to testify that the partnership still had over 100 cows it had been calving after Delbert Moore's death, which went undisputed by the Moores. *See* (Tr., Page 123, lines 12-25; Page 124, lines 1-7; Page 152, lines 10-21).

[28] It is clear based on these facts that there was an enrichment by Donald Moore and Scott Moore, individually and as partners of the Glenn W. Moore & Sons. Not only did they not pay the Estate for use of its one-half interest in the real property for a period exceeding three years, it also rented out a one-half interest in 50 acres owned by the Estate to Keith Hauck without any compensation being returned to the Estate. Based on Scott Moore's testimony, the Estate should have received in excess of \$1,125.00 annually for Keith Hauck's use of the premises. *See* (Tr., Page 126, lines 4-14; Page 157, lines 22-25; Page 158, lines 1-7; Page 191, lines 10-22; Page 192, lines 1-18). The partnership continued to operate as usual on the land owned by Donald Moore and Delbert Moore up until the real property was sold and had no expense associated with using the real property, except to the extent of Donald Moore's one-half interest. *See* (Tr., Page 125, lines 3-8). Meanwhile, the Estate was having to pay the expenses associated with its one-half interest without the ability to collect any income. *Id.*; *see*

also (Tr., Page 107, lines 5-16, 21-25). This, along with the conversion by the partnership of the rentals received from Keith Hauck, resulted in a clear impoverishment to the Estate.

[29] It is evident that there is a connection between the enrichment by Donald Moore and Scott Moore, individually and doing business as Glenn W. Moore & Partnerships and the impoverishment sustained by the Estate of Delbert Moore. Furthermore, there was no justification for the enrichment and impoverishment. The Moores continued to drag the matter out so that they could continue to operate their ranch on the real property as it was convenient for them and this can be evidenced by the number of requests to postpone the sale in the partition action. There is also no remedy under the law to compensate the Estate for the impoverishment it has suffered. As such, the trial court erred in finding that the Estate had not proven that unjust enrichment was applicable and that the Estate was entitled to rentals under the doctrine.

CONCLUSION

[30] For the foregoing reasons, the trial court's finding in the Judgment that the Estate of Delbert Moore was not entitled to receive rentals from March 5, 2012, to May 18, 2015, should be reversed and this matter remanded back to the trial court to determine a fair amount for rentals.

Respectfully submitted at LaMoure, ND, this 12th day of December, 2017.

A handwritten signature in cursive script, reading "Kim Radermacher", written in dark ink. The signature is positioned above a horizontal line.

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Supreme Court No. 20170332
Probate No. 11-2012-PR-00011
Attorney for the Personal Representative/Appellant

IN THE DISTRICT COURT OF DICKEY COUNTY, STATE OF NORTH DAKOTA

In the Matter of the Estate of **Delbert G. Moore**, Deceased.

CERTIFICATE OF SERVICE (ELECTRONIC AND BY FIRST CLASS MAIL)

STATE OF NORTH DAKOTA)
)ss
COUNTY OF LAMOURE)

[1] I, Kimberly J. Radermacher, do hereby certify that on December 13, 2017, I served the following documents:

- A. BRIEF FOR APPELLANT (IN BOTH WORD AND PDF FORMAT)**
- B. APPENDIX FOR APPELLANT**

[2] by sending a true and correct copy thereof via email at:

North Dakota Supreme Court Clerk at supclerkofcourt@ndcourts.gov
Charles Minard at cminard@nvc.net
Terry Minard at btminard@msn.com
Candice Eberhart at Eberbc@aol.com
Scott Moore at moorbeef@drtel.net

[3] and by sending a hard copy of each via First Class Mail, United States Postal Service to:

Donald Moore
Individually and on behalf of Glenn W. Moore & Sons
7345 Hwy 11
Forbes, ND 58439

[4] To the best of my knowledge, information and belief, such addresses are the actual email/postal addresses of the parties intended to be served. That the above document was duly e-mailed or mailed in accordance with the applicable provisions of North Dakota law.

Dated this 13th day of December, 2017.

A handwritten signature in black ink, appearing to read "Kim Radermacher", written over a horizontal line.

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Supreme Court No. 20170332

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CERTIFICATE OF SERVICE (ELECTRONIC AND BY FIRST CLASS MAIL)

STATE OF NORTH DAKOTA)
)ss
COUNTY OF LAMOURE)

[1] I, Kimberly J. Radermacher, do hereby certify that on December 22, 2017, I served the following documents:

- A. BRIEF FOR APPELLANT (WORD FORMAT)**
- B. TITLE PAGE FOR BRIEF OF APPELLANT**
- C. TITLE PAGE FOR APPENDIX OF APPELLANT**

[2] by sending a true and correct copy thereof via email at:

North Dakota Supreme Court Clerk at supclerkofcourt@ndcourts.gov
Charles Minard at cminard@nvc.net
Terry Minard at btminard@msn.com
Candice Eberhart at Eberbc@aol.com
Scott Moore at moorbeef@drtel.net

[3] and by sending a hard copy of each via First Class Mail, United States Postal Service to:

Donald Moore
Individually and on behalf of Glenn W. Moore & Sons
7345 Hwy 11
Forbes, ND 58439

[4] To the best of my knowledge, information and belief, such addresses are the actual email/postal addresses of the parties intended to be served. That the above document was duly e-mailed or mailed in accordance with the applicable provisions of North Dakota law.

Dated this 22nd day of December, 2017.

A handwritten signature in black ink, appearing to read "Kim Radermacher", written over a horizontal line.

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