20190201
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 9, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

THE STATE OF NORTH DAKOTA

Wendy Michele Willprecht,	)
	)
Plaintiff-Appellant & Cross-Appellee,	)
	)
vs.	)
	)
Kevin John Willprecht,	)
	)
Defendant-Appellee & Cross-Appellant	)

Supreme Court No. 20190201

Cass County File No. 09-2018-DM-00522

APPEAL FROM THE JUDGMENT ISSUED BY THE DISTRICT COURT ON JUNE 11, 2019 STATE OF NORTH DAKOTA, COUNTY OF CASS, THE HONORABLE JOHN C. IRBY PRESIDING

BRIEF OF APPELLANT AND CROSS-APPELLEE, WENDY WILLPRECHT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Table of Contents……2

Table of Authorities……3

Appellant's Request for Oral Argument……¶1

Statement of Issues for Review……¶4

Statement of the Case……¶5

Statement of the Facts……¶9

A. The Farm's Crops……¶18

B. Division of Property……¶28

C. Child Support……¶39

D. Spousal Support……¶47

E. Attorney Fees……¶59

Standard of Review……¶62

Law and Argument……¶66

A. May a trial court assign different valuation dates to different items of the marital estate if there is no agreement as to the valuation date and, if so, what date is to be used?……¶66

B. The District Court erred in not valuing and including the 2018 crop based upon the guaranteed crop insurance values……¶73

C. The District Court's division of the marital estate was inequitable and unsupported by its Findings under the *Ruff-Fisher* guidelines……¶79

D. The District Court erred in its calculation of Kevin's child support and its failure to properly follow the guidelines……¶86

E. The District Court's failure to award spousal support to Wendy, in any form, was in error and unsupported by its Findings under the *Ruff-Fisher* factors……¶95

F. The District Court's failure to award attorney fees to Wendy, or to discuss its reasoning as to why, was an abuse of discretion.....¶109

Conclusion……...……..¶112

Certificate of Compliance…….¶114

TABLE OF AUTHORITIES

Cases ..... **Paragraph**

Berg v. Berg, 490 N.W.2d. 487 74
Brouillet v.Brouillet, 2016, ND 40 67
Ferguson v. Wallace-Ferguson, 2018 ND 122 93
Glander v. Glander, 1997 ND 192 83
Grasser v. Grasser, 2018 ND 85 ..... 67, 82
Hagel v. Hagel, 2006 ND 181 94
Heinle v. Heinle, 2010 ND 5 ..... 110, 111
Heley v. Heley, 506 N.W.2d 715 ..... 85, 100
Hitz v. Hitz, 2008 ND 58 ..... 81, 83
Innis-Smith v. Smith, 2018 ND 34 97
Kautzman v. Kautzman, 1998 ND 192 75
Koble v. Koble, 2008 ND 11 63
Korynta v. Korynta, 2006 ND 17 90
Lee v. Lee, 2019 ND 142 62
Lill v. Lill, 520 N.W.2d 855 80
Lizatowski, v. Lizatowski, 2019 ND 117 ..... 80, 81
Marsden v. Koop, 2010 ND 196 ..... 82, 83
McCarthy v. McCarthy, 2014 ND 234 ..... 83, 84
Ratajczak v. Ratajczak, 1997 ND 122 101
Sateren v. Sateren, 488 N.W.2d 631 98
Savelkoul v. Savelkoul, 119 N.W.2d 110 74
Schmuck v. Schmuck, 2016 ND 87 96
Schultz v. Schultz, 2018 ND 259 ..... 77, 81
Schweitzer v. Mattingley, 2016 ND 231 87
Serr v. Serr, 2008 ND 56 64
State ex rel. K.B. v. Bauer, 2009 ND 45 64
Stephenson v. Stephenson, 2011 ND 57 97
Stock v. Stock, 2016 ND 1 ..... 104, 105, 107
Tuhy v.Tuhy, 2018 ND 53 74
Waldie v. Waldie, 2008 ND 97 65
Werven v. Werven, 2016 ND 60 63
Wilkens v. Westby, 2019 ND 186 ..... 62, 69

Statutes

N.D.C.C. § 14-05-23 110
N.D.C.C. § 14-05-24 ..... 2, 3, 62, 67
N.D.C.C. § 14-05-24.1 96
N.D.C.C. § 14-09-08.2 91
N.D.C.C. § 14-09-08.4 92

Administrative Code

N.D.A.C. § 75-02-04.1-05 ..... 88, 89
N.D.A.C. § 75-02-04.1-09 87

I. Appellant's Request for Oral Argument

[¶1] The undersigned requests oral argument on this appeal. In this appeal, Appellant, Wendy Willprecht (Wendy), challenges the District Court's disparate division of property, the determination of child support, and the lack of an award of spousal support or attorney fees to Wendy.

[¶2] N.D.C.C. § 14-05-24 (1) established a new system for setting a valuation date that remains central to the equitable division of assets. This change created uncertainties and confusion in setting valuation timeframes in divorces. In particular, does the Court have discretion to choose a date it deems proper, or does the statute only allow for such discretion in limited circumstances? Further, does the statute allow a district court to use one valuation date for one category of property and a separate, different, date for another category when there is a dispute as to the date of valuation?

[¶3] Wendy requests oral argument as these questions under N.D.C.C. § 14-05-24 (1) appear to be questions of first impression before the Court.

II. Statement of Issues for Review

[¶4] This appeal raises the following issues for review:

a. Whether the District Court erred in its valuation and distribution of the marital estate, as particularly stated in Appellant's Notice of Appeal and Preliminary Statement of Issues, found at Paragraphs 1 (a) through 1 (e), incorporated by reference herein. (Index # 239, App. at Pp. 270-71).

b. Whether the District Court erred in setting its child support obligation for Kevin, as particularly stated in Appellant's Notice of Appeal and Preliminary Statement of Issues, found at Paragraphs 2 (a) through 2 (c), incorporated by reference. (Index # 239, App. at Pp. 271).

c. Whether the District Court erred in failing to award spousal support to Wendy, as particularly stated in Appellant's Notice of Appeal and Preliminary Statement of Issues, found at Paragraphs 3 (a) through 3 (d), incorporated by reference herein. (Index # 239, App. at Pp. 271).

d. Whether the District Court erred in failing to award Wendy any of the tax credits and/or exemptions for the children moving forward.

e. Whether the District Court erred in failing to award attorney fees to Wendy.

III. Statement of the Case

[¶5] The parties in this matter are Plaintiff/Appellant, Wendy Willprecht, and Defendant/Appellee, Kevin Willprecht. Service of the Complaint (Index #1) was accomplished by the Sargent County Sheriff on May 17, 2018. (Index #7). Kevin served and filed his Answer and Counterclaim on May 24, 2018. (Index #11). The parties agreed to an Interim Order, entered on September 11, 2018. Wendy received interim primary residential responsibility of the children, subject to Kevin's parenting time, a child support obligation of $3,000 per month, a spousal support award of $2,000 per month, and an award of $7,500 in attorney fees. (Index # 53). The issue of retroactive child support was reserved by the District Court. (Index #53 at Paragraph 8). The same residential responsibility and parenting time provisions were later incorporated into the final Judgment (Index # 236).

[¶6] The remaining disputed issues came before the District Court for trial on two days, March 4 and 5, 2019. Prior to this time, Wendy provided the District Court with a Pretrial Brief outlining the disputed issues. (Index #86, App at Pp. 27-38). The District Court received testimony and evidence that addressed, among other things, the valuation and division of property, including the nature and origin of the marital property, child support, and Wendy's need for spousal support and attorney fees. The parties served and

filed letter briefs with the Court simultaneously on March 21, 2019. (Index # 225, 227; App at Pp. 204-25). The District Court did not request proposed Findings. (Tr. Vol. II, Pg. 345, Ln. 11-15).

[¶7] On April 29, 2019, the District Court issued a Memorandum Opinion and Order. (Index # 229, App at Pp. 226-35). The District Court made the following statements and findings:

a. The crop insurance estimates provided by Wendy were speculative in nature. (Index # 229, ¶6; App. at Pg. 227).

b. The valuation of crops as of December 2017 was the most-well supported valuation of harvested crop assets. (Index # 229, ¶7; App. at Pg. 228)

c. That two tracts of land, valued at $864,273, were outright gifts to Kevin. (Index # 229, ¶11; App. at Pg. 232).

d. The property distribution, resulting in a 63-37% percent division in Kevin's favor, was accounted for because Kevin purchased property at a discounted price. (Index # 229, ¶11, 14; App. at Pp. 232-33).

e. Kevin's three-year average was appropriate under the child support guidelines. (Index # 229, ¶15; App. at Pp. 233-34). The average was then further reduced by the District Court after it performed a math computation in that same paragraph.

f. Kevin was awarded tax exemptions for all four children, without explanation. (Index # 229, ¶16; App. at Pg. 234).

g. Kevin was not entitled to a "step down" in child support when each child graduated. (Index # 229, ¶16; App. at Pg. 234). The District Court explicitly tied this to its decision to not award spousal support to Wendy. Id.

h. No spousal support obligation was required. The District Court stated that the failure to include "step down" provisions was done deliberately by the court "in light of the income disparities of the parties." (Index # 229, ¶18; App. at Pg. 235).

i. Each party was found to be responsible for his or her own attorney fees, without discussion or explanation. (Index # 229, ¶19; App. at Pg. 235).

[¶8] The District Court directed Kevin's counsel to prepare the appropriate Findings of Fact, Conclusions of Law, Order for Entry of Judgment, and Judgment. The Findings of Fact, Conclusions of Law, and Order for Entry of Judgment were entered on June 11, 2019. (Index # 235). The Judgment was entered by the Court on that same day. (Index # 236). This appeal followed on July 2, 2019. (Index # 241).

IV. Statement of the Facts

[¶9] Wendy and Kevin Willprecht were married on December 18, 1999. (Tr. Vol. I, Pg. 12, Ln. 16-18). They did not have a prenuptial agreement or any other contract that was entered into at the time of the marriage. Kevin was a farmer at the time and remains so to this day. Wendy was primarily a homemaker during the marriage. The parties have four children together, namely AJW, age 16 (DOB 2002), FMW, age 14 (DOB 2004), CAW, age 10 (DOB 2008), and KJEW, age 8 (DOB 2010). There was no dispute that Wendy was the primary parent for the children during the marriage.

[¶10] In the early years of the marriage, Wendy worked for State Farm Insurance. (Tr. Vol. I, Pg. 64 Ln. 15-18). She has a business administration degree. (Tr. Vol. I, Pg. 66, Ln. 21-22). While working for State Farm, Wendy traveled from the family farm near Forman, North Dakota, to Fargo for work. She continued to do so until she left her job with State Farm in 2003. She also continued to do so after Kevin was severely injured in an accident in 2002. (Tr. Vol. I, Pg. 65, Ln. 3-13). Wendy described her contribution to the farm, and the parties' livelihood at that time, as not only contributing through her own work, but by driving Kevin to appointments, visiting him while he recovered in the

hospital, and making sure the farm continued to function in his absence. (Tr. Vol. I, Pg. 65, Ln. 14-23).

[¶11] When Wendy became pregnant with the parties' first child, AJW, she and Kevin discussed her continued employment and how they wished to have their division of labor and family lives moving forward. They decided that Wendy would leave her job with State Farm and become a stay-at-home parent. (Tr. Vol, I, Pg. 66, Ln. 2-9). Kevin continued to work on the farm, and the family's expenses and needs were paid for by that enterprise. Kevin would regularly transfer $6,000 to $8,000 into an account for Wendy to use for the children and household during the marriage. (Tr. Vol. I, Pg. 21, Ln. 16-23).

[¶12] During this same time, Kevin and Wendy became owners of various property. They purchased the land where the marital home sits in Forman. (Tr. Vol. I, Pg. 24, Ln. 8-10.) They purchased land during the marriage that was included in the real estate appraisal. (Index #143-159). These purchases included the alleged gifts of property to Kevin by his parents, referred to as Tract #7 and Tract #9.

[¶13] Over the course of the marriage, Kevin displayed behavior that was concerning to Wendy. He drank too much and had a temper. This behavior came to a head in September 2017 when Wendy came home from a football game to find that Kevin had been drinking and hiding vodka in their bedroom. (Tr. Vol. I, Pg. 76, Ln. 2-9). When she confronted Kevin, and attempted to take the water bottle of vodka from him, Kevin pushed Wendy to the ground and dragged her by her foot out of the closet. (Tr. Vol. I, Pg. 77, Ln. 1-6). When she was able to get away from Kevin, Wendy contacted his family. (Tr. Vol. I, Pg. 77, Ln. 19-23).

[¶14] Kevin took a personal breathalyzer that evening and was twice the legal limit for blood alcohol content. (Tr. Vol. I, Pg. 79, Ln. 3-6). Kevin left the home that evening. Sherriff Travis Paeper provided an Affidavit to the Court as part of the interim proceedings, confirming this information. (Index #48-49; App. at Pp. 18-22) The day after the assault, Kevin contacted Wendy and asked if she would help him with his drinking. Wendy agreed and tried to arrange for treatment. (Tr. Vol. I Pg. 79, Ln. 12-16). However, Kevin refused to be admitted to Sanford Hospital, and treatment was abandoned. (Tr. Vol. I. Pg. 80, Ln. 3-11). Kevin later denied that he was seeking treatment, a claim which was refuted by an email to him regarding the subject. (App. at Pg. 127).

[¶15] In December of 2017, Wendy and the children returned home from her family's home to find Kevin passed out on the floor. (Tr. Vol. I, Pg. 83, Ln. 1-5). Wendy could smell the alcohol on Kevin. (Tr. Vol. I, Pg. 83, Ln. 8-11). Kevin left the home to live at the farmhouse after this event. (Tr. Vol. I, Pg. 83, Ln. 16-18). He did not return to the home as a residence. However, he and Wendy remained in contact and the separation was for the purpose of Kevin getting help for his actions and to try and save the marriage. (Tr. Vol. I, Pg. 40, Ln. 16-21.) They agreed that a six-month period of time would be used to try to reconcile. (Tr. Vol. I, Pg. 83, Ln. 18-24). No papers were served or filed during this time. Additionally, Kevin did not provide monetary support during these months. (Tr. Vol I, Pg. 84 Ln. 16-18).

[¶16] In March 2018, Wendy traveled to the farmhouse to check for her mail. She did not expect to see Kevin when she arrived, but he was in the home. (Tr. Vol. I, Pg. 27, Ln. 24-25). When Wendy approached the hearth in the living room, she noticed an

envelope with cash and a solo cup with liquid in it. (Tr. Vol. I, Pg. 29, Ln. 17-20). Wendy attempted to retrieve the envelope from its hiding place, only to have Kevin pinch her hand behind the hearth, scraping it as she pulled the envelope out. (Tr. Vol. I, Pp. 29-30 Ln. 23-2; App at Pg. 126). After six months passed, Wendy started this action.

[¶17] Three appraisals were conducted by agreement of the parties. The personal property appraisal was conducted by Steffes Auctioneers with an effective date of July 17, 2018. (Index #127-142; App at Pg. 75). The farmland appraisal was conducted by Kyle Nelson of Farmers National Company, with an effective date of September 24, 2018. (Index #143-159; App at Pg. 87). The appraisal of the marital home was conducted by Michel Richard of Red River Valuations with an effective date of October 24, 2018. (Index #199-202; App. at Pg. 145). Each of these appraisals provided post-separation valuations that were adopted by the parties and agreed to on the Joint Rule 8.3 Asset and Debt Listing. (Index #120, App at Pp. 39-46). The parties did not agree on the value, or valuation date, of the farm's 2018 crops.

[¶18] ***A. The Farm's Crops***

[¶19] On her direct examination, Wendy testified that the nature of farming is that of a "rotating circle", where once the harvest ends, the pre-planning and purchases for the next year begins. (Tr. Vol. 1, Pg. 39, Ln. 6-16). As part of this yearly planning, Wendy testified that the farm's pre-purchase represents a promise of what it will purchase and plant in the spring. (Tr. Vol. I, Pg. 47, Ln. 6-9).

[¶20] Wendy testified that Kevin regularly farms three crops: soybeans, wheat, and corn. (Tr. Vol. I, Pg. 48, Ln. 1-5). She was asked to review the crop insurance estimates

provided by Kevin in discovery and entered into evidence as Exhibit 26. Index #175; App at Pp. 114-119). Despite Kevin's objections as to the valuation date, which were overruled by the District Court (Tr. Vol. I, Pp. 48-51), Wendy was allowed to provide the following values for the crops based upon Kevin's insurance statement:

a. Corn: $579,375.72 (Tr. Vol. I, Pg. 55, Ln. 14)
b. Soybeans : $881,954.48 (Tr. Vol. I, Pg. 55, Ln. 17)
c. Spring Wheat: $296,185.09 (Tr. Vol. I, Pg. 55, Ln. 20)

[¶21] Wendy testified that these were the values, based upon Kevin's crop insurance statement, that she wished for the Court to use as its values for the farm's 2018 crop. (Tr. Vol I, Pg. 55, Ln. 23-25). Kevin objected to such values, based upon the valuation date, and on the claims that the insurance values were not the values of the crops in the end. (Tr. Vol. I, Pg. 53, Ln. 10-18). However, this was incorrect, as confirmed by Kevin himself on cross-examination.

[¶22] During his cross-examination, Kevin testified that he was knowledgeable about crop insurance, as he had taken it out since 1993. (Tr. Vol II, Pg. 281, Ln. 6-22). Kevin was asked to review Exhibit 26, specifically what the term "RP" on the form referred to. (App. at Pg. 114). Kevin confirmed that it referred to revenue protection insurance. (Tr. Vol. II, Pg. 282, Ln. 5-8). Kevin then testified and explained that his crop is protected up to 75% of the predetermined value and that he was guaranteed to make 75% of the total crop in the ground. (Tr. Vol. II, Pg. 282, Ln. 14-18; Pg. 287, Ln. 19-22).

[¶23] Kevin was asked to look at Exhibit 26 and determine the amount of guaranteed crop income he would receive for a given area based upon his crop insurance statement, in particular line 54 on Exhibit 26. (Tr. Vol. II, Pg. 285, Ln. 3-13; App at Pg.

115). Kevin confirmed the amount that he was guaranteed corresponded to the amount on his crop insurance statement found at Exhibit 26. (Tr. Vol. II, Pg. 285, Ln. 14-21). When asked to confirm the amount of guaranteed revenue under his crop insurance, Kevin testified that he would be guaranteed $1,366,000. (Tr. Vol. II, Pg. 287, Ln. 1-22). Exhibit 26 also specifically listed the date that each of the crops was planted in each of the insured tracts and fields. (App. at Pp. 115-16). These planting dates occurred from April 27, 2018 through May 23, 2018, with the majority of the dates falling prior to the commencement of this action. (App. at Pp. 115-16).

[¶24] When Kevin was asked by his attorney on direct examination about his crop insurance, he first attempted to claim that the insurance amounts were inaccurate due to a "basis." (Tr. Vol. I, Pg. 207, Ln. 9-19). However, he contradicted himself not only on cross-examination, but only a few questions later when he acknowledged he covers 75% of the value of the crop. (Tr. Vol. I, Pg. 208, Ln. 22-23). When asked about his crop values, Kevin referred only to crops grown in 2017 and sold in 2018. (Tr. Vol. II, Pg. 254, Ln. 3-7; Index # 112-113). This was the resulting number that Kevin listed on the 8.3 Asset and Debt Listing. (Tr. Vol. II, Pg. 255, Ln. 12-20). He did not include any of the crops that were covered by insurance or in the ground in his calculation.

[¶25] At the close of Kevin's examination, the District Court asked Kevin if he or the corporation have any unsold crops. The District Court's inquiry led to the following exchange:

> THE WITNESS: From 2018, yes.
> THE COURT: Okay. And is there a document in here that would say when those are?
> THE WITNESS: I don't believe so.

> MR. SCHULTZ: No. We don't have that, Your Honor.
> MR. MCLEAN: I think, Your Honor, the only thing that would be there, the document—excuse me. Exhibit 26 that was provided as the crop insurance document, shows how much would have been expected to be planted and covered in 2018. That would explain that...
> If we're looking for document, I would say probably Exhibit 26 is the one that shows what Kevin was, the total acres planted, and pricing from there for '18.
> THE COURT: Okay. **That's the best we can do.** All right anything else.

(Tr. Vol. II, Pg. 327, Ln 2-23 (emphasis added)).

[¶26] The District Court addressed three separate dates that it could use for the crop valuation: 1) the date of separation, December 2017, 2) the date of commencement, May 2018, or 3) the date of the trial, March 3, 2019. (App .at Pg. 228, ¶7). Erroneously, the Court stated that none of these dates involved crops in the ground. Furthermore, in dismissing the evidence presented regarding the crop insurance, the Court erroneously stated that only "speculative evidence" was presented by Wendy. (App. at Pg. 228, ¶7). Compounding this error was the District Court's statement in Paragraph 7 that, "Again, there was no evidence as to the actual value of the growing crop in the ground in May 2018." (App. at Pg. 228, ¶7). This statement ignores the testimony of both parties as well as the plain language found on of Exhibit 26, which provided guaranteed protections.

[¶27] In its property distribution, the District Court valued the crops at an amount of $789,478, representing the 2017 crops sold in 2018. (App. at Pg. 230). It did not include any of the crops that were growing or covered by Kevin's insurance in its division of property. Rather, the District Court claimed that the crops were "double counted" and included in the child support calculation. (App. at Pg. 232, ¶11). However, as will be discussed in this Brief, the crops were not counted by the Court in its child support determination. Instead, the District Court did not "double count" the crops. It failed to

account for them at all. By failing to do so, the Court committed an error in the minimum amount of $1,366,000.

[¶28] ***B. Division of Property***

[¶29] Kevin raised the claim that he was gifted portions of the parties' marital estate by his parents, in particular the parcels of land referred to as Tract #7 and Tract #9 (listed at lines 4 and 7 on the 8.3 Asset and Debt Listing). Based upon the farmland appraisal and the agreed upon values on the 8.3 Asset and Debt Listing, these two parcels were valued at a total amount of $864,273. (Index #120).

[¶30] To establish that the land was gifted, Kevin and his family testified. His mother, Janet Willprecht, testified that she and her husband began gifting money to their three children in 2006 or 2007. (Tr. Vol. I, Pg. 144, Ln. 9-10). Kevin produced a document, Exhibit 116, that showed transfers of money to each of the Willprecht children. (App at Pp. 169-75). The amount of the gifts varied for Kevin, due to a grain bin, but were a minimum of $8,000 and as high as $20,000. (Tr. Vol. I, Pg. 146, Ln. 1-14). These alleged gifts all occurred during the marriage, ending in 2013. (Tr. Vol. I, Pg. 147, Ln. 22-23). When asked if Kevin kept the money gifted to him separate, Janet could not answer, as it was up to him. (Tr. Vol. I, Pg. 154, Ln. 22-25).

[¶31] Janet then was asked to testify about land that was transferred to the children. Janet testified that each of her children was gifted a quarter section of land occurring in 2012, during the marriage. (Tr. Vol. I, Pg. 148, Ln. 16-18). However, at some point in 2012, Kevin and his family entered in to a "like-kind" exchange. (App. at Pp. 156-159). Janet described the transfer as follows:

> "That's when we bought that one quarter of land, or Kevin bought it. And he traded that quarter for, like, two, quarters of where he was living. That's how we ended up with the Williams."

(Tr. Vol. I, Pg. 149, Ln. 7-10).

[¶32] When asked to identify deeds and explain which property was transferred and which was not, Janet could not differentiate which land was part of the like-kind transfer and which was the alleged gift. (Tr. Vol. I, Pp. 149-50, Ln 24-1). When Kevin's father, Arlen Willprecht, was asked about the land transfers, he was less clear and failed to remember what was gifted, when, and how much. (Tr. Vol. I, Pg. 168, Ln. 15-17; Tr. Vol. I, Pg. 170, Ln. 5-9). Kevin confirmed that the like-kind transfer occurred during the marriage when questioned by the Court. (Tr. Vol. II, Pg. 324-5, Ln 25-12). The only undisputed fact that was established through the testimony was that any transfers occurred during the marriage.

[¶33] Further, when asked about the uses for the land, both Kevin and Wendy testified that land was used for the family farm. (Tr. Vol. I, Pp. 43-44 Ln. 24-2; Vol II, Pg. 265, Ln. 9-14). The funds from the land were not segregated by the parties. (Tr. Vol. II, Pg. 266, Ln. 24-25; Vol. II, Pg. 267, Ln. 1-4). Rather, the proceeds from the land went to either the family farm account, prior to the formation of Cayuga Coyotes, or into the farming corporation, which the parties then used to live on. (Tr. Vol. II, Pg. 267, Ln. 10-13).

[¶34] Four tracts of land from the farm were the subject of a Contract for Deed in the amount of $410,000 that was paid from 2006 through 2012. (Tr. Vol. II, Pg. 267, Ln 15-19). (Index #192; App. at Pp. 137-44). Kevin conceded that these parcels had increased

in value of approximately $1,600,000 since the date of purchase. (Tr. Vol. II, Pg. 268, Ln. 2-3). He also conceded that the purchases were made with marital funds. (Tr. Vol. II, Pg. 268, Ln. 9-10).

[¶35] Of the various legal transfer documents that were entered into evidence, only one predated the date of Kevin and Wendy's marriage. (Tr. Vol. II, Pg. 261, Ln. 20-22). The Warranty Deed, entered as Exhibit 47, was from 1994 and concerned the alleged gifted properties. (Index # 191) The evidence showed that it had only been in the Willprecht family for approximately five years prior to Wendy and Kevin's wedding. (Tr. Vol. II, Pp. 262-63, Ln. 23-3; App. at Pp. 132-36). Kevin did not produce deeds or documents to show that the land at issue in this matter was long held by him or his family.

[¶36] In addressing the division of the marital estate, the District Court first stated that the parties' farmland came to Kevin in the form of discounted pricing or as an outright gift. (App at Pg. 229, ¶ 8). The District Court then set forth its award of property, giving Kevin 63% of the estate and Wendy 37%. (App at Pp. 231-32, ¶ 11). To explain the disparity the District Court stated:

> "When considering the outright gifts of tracts 7 and 9 from Kevin's parents to Kevin for land value in the divorce of $864,273, Kevin's testimony that other gifts were given by his parents to him, and that other land was purchased from his parents was purchased at a discounted price, and disparity has been accounted for....
>
> Taking into the account the outright gift of property from Kevin's family to him valued now at $864,273, discounted land purchases, other gifts, and the "double counting of crop assets, there is no real substantial disparity in the assets awarded to each party."

(App. at Pg. 232-33, ¶11, 14).

[¶37] As part of its 63-37% division of the marital estate, the District Court included a $750,000 equalization payment to Wendy. (App. at Pg. 231). It dictated that the payment would be spanned over a period of 15 years with a three percent interest component, resulting in annual payments of $62,825. However, the District Court, without explanation, did not commence the payments in 2019, postponing the first payment until April 1, 2020. (App. at Pg. 232, ¶11).

[¶38] The District Court did not discuss the co-mingling of assets, the contributions of each of the parties, the reasons for the divorce, or the nature of how the parties conducted their finances during the marriage. Its division also awards all of the increased value of the property to Kevin, without discussion of contributions by Wendy, based solely on the origin of the property. It delays her final settlement payment without explanation. This is not consistent with North Dakota law and constitutes a reversible error.

[¶39] ***C. Child Support***

[¶40] Kevin is a self-employed farmer. (App. at Pg. 233, ¶15). During the course of the marriage, the parties files their taxes jointly as a married couple, with the farm income making up the majority of the income for the parties. Wendy testified that the parties' taxes show the following for income from 2013 through 2017:

a. 2013: $461,175. (Tr. Vol. I, Pg. 16, Ln. 8; App. at Pg. 47; Index # 121).
b. 2014: $380,435. (Tr. Vol. I, Pg. 17, Ln. 21; App. at Pg. 53; Index # 122).
c. 2015: $184,100. (Tr. Vol. I, Pg. 18, Ln. 2; App at Pg. 60; Index # 123).
d. 2016: $152,033. (Tr. Vol. I, Pg. 18, Ln. 12; App. at Pg. 65; Index # 124).
e. 2017: $178,666. (Tr. Vol. I, Pg. 18, Ln. 17; App at Pg. 69; Index # 125).

[¶41] With the exception of 2017, where she earned approximately $1,320 from substitute teaching (Tr. Vol. I, Pg. 19, Ln. 4-8), Wendy did not work. Wendy provided the

Court with a five-year average based upon the 2013 through 2017 tax returns as Exhibit 7. (App. at Pg. 74). Based upon this average yearly income of $275,008, Kevin's support was calculated at $4,447 for four children. Id. Kevin's health insurance contribution was not included in this initial calculation, but she conceded that she wished for Kevin to provide insurance. (Tr. Vol. I, Pg. 16, Ln. 18-21). The 2018 income was not used as it was not available when the calculation was provided as a witness disclosure prior. (Tr. Vol. I, Pg. 128, Ln. 13-16).

[¶42] Wendy testified that she was not regularly paid support from December 28, 2017, through the date of the Interim Order. (Tr. Vol. I, Pg. 20, Ln-21-25). The issue was specifically reserved in Paragraph 8 of the stipulated Interim Order. (Index #53; App. at Pg. 26). In total from January 2018 to August 2018, Wendy received $11,500 from Kevin. (Tr. Vol. I, Pg. 33, Ln. 3-8; App. at Pp. 128-30). Wendy expressly asked the District Court to award her retroactive child support to the date of separation. (Tr. Vol. I, Pg. 33, Ln. 14-21).

[¶43] Kevin provided his personal 2018 income taxes as Exhibit 124. (Index # 218 App. at Pg. 176-82). Kevin had filed as head of household, not jointly with Wendy, and claimed two of the children on his taxes. Id. His total income was listed on line 6 on the return as $166,368. His adjusted gross income was $160,855, to account for the amount of spousal support paid in 2018. (App. at Pg. 176) Kevin provided his own calculations for the Court as Exhibit 125. (Index #125; App. at Pp. 183-203). In making his average, Kevin used only three years of income, and averaged his Schedule E income from the land rent and his salary from the Cayuga Coyotes corporation to come up with an average

income of $172,098 per year. Kevin testified under cross-examination that he controls his income based upon what is best for tax purposes. (Tr. Vol. II, Pg. 277, Ln. 5-11).

[¶44] In addressing the child support issue, the District Court did not use either party's income information or calculation. Rather, it relied on what it called "current agricultural conditions" in determining that a three-year average was proper. (App. at Pg. 233, ¶15). From there, the District Court proceeded to further reduce Kevin's income, citing lost rent from the property it awarded to Wendy. Id. However, in doing so, the District Court, in its own words, had to guess at the amount, based upon the appraisal and its own math. Id. This set, unaveraged number, was then deducted from the averaged income, artificially reducing Kevin's support even further. Id. Nowhere in the District Court's calculation were the crops in the ground that it claimed were "double counted" in Paragraphs 11 and 14 of its Order. (App. at Pp. 233-34, ¶ 15).

[¶45] The District Court then, without explanation, awarded all four of the child-related tax exemptions to Kevin. (App. at Pg. 234, ¶16). This was done despite the fact that 1) the parties had agreed that Wendy would have primary residential responsibility of the children, 2) no evidence was presented by either party that would show how, equitably, Kevin would receive a benefit reserved for primary parents under federal law, and 3) the parties had previously equally divided the exemptions in 2018. It made no reference to the request for retroactive child support or the amounts owed from the date of separation.

[¶46] Lastly, the District Court stated that Kevin would be unable to exercise the step-down provisions of the child support guidelines when each of the children graduated or were otherwise emancipated, stating, "[The] Court makes this determination in

conjunction with the decision to not award spousal support as set forth below." (App. at Pg. 234, ¶16). In doing so, the District Court added to its reversible errors in making its child support determination...and these errors are intertwined with the District Court's decision on spousal support.

[¶47] ***D. Spousal Support***

[¶48] Wendy testified that prior to the end of 2016, it was common for Kevin to transfer her anywhere from $6,000 to $8,000 into the joint checking account for her use. (Tr. Vol. I, Pg. 21, Ln 16-23; Tr. Vol. I, Pg. 45, Ln 11-24). The joint account then had $8,000 to $10,000 in it on a regular basis during the marriage. (Tr. Vol. I, Pp. 21-22, Ln 25-1). This was the sole account Wendy was able to use to pay household and personal bills. (Tr. Vol. I, Pg. 21, Ln. 9-10). In late 2016 or early 2017, Kevin began to restrict Wendy's access to the marital funds. (Tr. Vol. I, Pg. 21, Ln. 5-13). Wendy was required to ask Kevin for money, and he then dictated how much she would get. (Tr. Vol. I, Pg. 21, Ln. 13-15). Kevin confirmed that money was transferred to Wendy for bills. (Tr. Vol. II, Pg. 300, Ln 2-5).

[¶49] Wendy testified that she worked as a claims representative for State Farm Insurance in Fargo from August of 2000 through July 2003. (Tr. Vol. I, Pg. 64, Ln. 15-20). She left that position when their oldest son was born because Kevin was unable to be a full-time parent with the farm. (Tr. Vol. I, Pg. 66, Ln. 2-7). Her decision to leave State Farm was a mutual decision after in-depth discussions. (Tr. Vol. I, Pg. 66, Ln. 8-9). Other than some substitute teaching in 2017, Wendy was a stay-at-home parent during the majority of the marriage. (Tr. Vol. I, Pg. 66, Ln. 10-18).

[¶50] After the parties' separation, in July 2018, Wendy took a position with Sargent County that consisted of an emergency management position and the 911 Coordinator. (Tr. Vol. I, Pg. 67, Ln 4-14). Her benefits and salary were entered into evidence as Exhibit 27. (Index #176, App. at Pp. 120-23). She earned $1,781.70 per month in gross income from the two positions. (Tr. Vol. I, Pg. 67, Ln 15-23; App. at Pg. 120). Wendy testified that she occasionally subbed three to four days a month, although it was sporadic in nature, and earned $85 in net income for each day. (Tr. Vol. I, Pg. 69, Ln 14-20).

[¶51] Wendy testified that she looked for work in other areas, but that her opportunities were limited. In particular, the hardware and grocery stores were on the verge of closing or had closed. (Tr. Vol. I, Pg. 70, Ln. 7-14). Her employment opportunities were limited to Sargent County or Bobcat—which was not a viable option—if she were to remain in the area. (Tr. Vol. I, Pg. 70, Ln. 15-23). On cross-examination, Wendy was asked if she had applied at Bobcat, which she had done in in the summer of 2018. (Tr. Vol. I, Pg. 100, Ln. 19-23). Wendy did not get that job.

[¶52] Wendy provided the Court with a budget of her expenses as Exhibit 34. (Index # 183; App. at Pp. 124-25). On cross-examination, Wendy confirmed that some of the expenses were paid in lump sums and others were monthly reoccurring expenses. Throughout her examination, there were questions regarding the monthly or yearly costs of auto repairs (Tr. Vol. I, Pg. 109, Ln. 18-20), licenses (Tr. Vol. I, Pg. 111, Ln. 4-9), and activity passes (Tr. Vol. I, Pg. 116-17, Ln 25-11). In addition to these changes, Wendy testified that Kevin covered the children's orthodontic expenses, reducing her expenses by

$400. (Tr. Vol. I, Pg. 113, Ln. 7-22). However, Wendy also testified that she had expenses that were unknown to her when she completed her budget at Exhibit 34, in particular the $4,800 annual house taxes, amounting to $400 per month (Tr. Vol. I, Pp. 87-88, Ln. 23-6; App at Pg. 113; Index #160) and propane bills in the winter that were approximately $970 per fill. (Tr. Vol. I, Pg. 89, Ln. 6-21). All told, Wendy believed her monthly budget to be close to $7,000 per month at the time of trial. (Tr. Vol. I, Pg. 88, Ln. 13-15).

[¶53] Wendy testified that she struggled in the interim to make ends meet even with a $2,000 monthly spousal support award from Kevin. (Tr. Vol. I, Pg. 90, Ln. 16-21). When she did not have the funds, she relied on her credit cards to bridge the gap. (Tr. Vol. I, Pg. 90, Ln. 21-24). In contrast, Kevin testified that he had been able to travel to Frisco, Texas, for the North Dakota State Championship football game in 2019. (Tr. Vol. II, Pg. 306, Ln. 4-16). He stated that he flew to the game and bought a ticket for it all while paying the $2,000 a month in spousal support to Wendy. (Tr. Vol. II, Pp. 306-07, Ln. 21-1). Kevin did not show debts or other information that would indicate he had an inability to pay support.

[¶54] Kevin testified that he would receive income-producing assets, the farmland. (Tr. Vol II, Pg. 308, Ln. 7-13). He admitted that his risk was mitigated by his crop insurance. (Tr. Vol. II, Pg. 308, Ln. 16-18). Kevin admitted that his gross earnings, per his own calculations, are approximately ten times the gross earnings of Wendy. (Tr. Vol. II. Pg. 310, Ln. 16-20). Despite this difference in income, Kevin testified that it was fair and equitable that he not pay any form of spousal support to Wendy. (Tr. Vol. II, Pg. 310, Ln. 21-25).

[¶55] In addressing the *Ruff- Fischer* factors, Wendy testified that the parties took various trips, (Tr. Vol. I, Pg. 71, Ln. 15-22) and that they did not have to save every penny or have concerns for paying the bills. (Tr. Vol. I, Pg. 72, 2-6). Wendy testified that when she did spend money, it was normally for the family and on her own credit cards. (Tr. Vol. I, Pg. 72, Ln. 9-25).

[¶56] For his part, Kevin claimed that Wendy did not contribute to the farm. (Tr. Vol. II, Pg. 301, Ln. 4-6; Tr. Vol. II, Pg. 302, Ln 2-4). In response to this allegation, Wendy testified:

a. She gave up her career so that Kevin could live his dream to farm. (Tr. Vol. I, Pg. 95, Ln. 7-13). Kevin confirmed that this occurred on cross-examination. (Tr. Vol. II, Pg. 302, Ln. 18-20).

b. She took care of the home and the children as the anchor of the family farm. (Tr. Vol. I, Pg. 95, Ln. 14-22). On cross, Kevin acknowledged that Wendy's raising of the children did free him to farm. (Tr. Vol. II, Pg. 304, Ln. 21-23).

c. The parties were partners with a distinct division of labor between them, in part that she wouldn't ask him to potty train the children and he wouldn't ask her to combine the corn. (Tr. Vol. I, Pg. 96, Ln. 1-5; Tr. Vol. II, Pg. 337, Ln. 24-25). Kevin agreed that Wendy was responsible for keeping the household. (Tr. Vol. II, Pg. 302, Ln. 22-24).

d. In her efforts to support Kevin's dream of the family farm, she gave up all of her opportunities to collect retirement and put away money for herself. (Tr. Vol. II, Pg. 334, Ln. 15-24).

[¶57] The District Court found that no spousal support award was required. (App. at Pg. 235, ¶18). In doing so, the Court paid lip service to the behavior that caused the divorce—Kevin's drinking and violence—stating only that Kevin's drinking "appears to be the root cause of the demise of this near 20 year marriage." (App at Pg. 234, ¶17). It made no reference to Wendy's contributions to the marriage.

[¶58] Rather, the District Court focused on the parties' respective incomes, including the speculative rent and child support amounts to be added to Wendy's income, and the payment of the property settlement over time. (App. at Pp. 234-235, ¶18. It also specifically referred to its deliberate decision to include the unenforceable child support step-down removal as a rationale—because of the "income disparity"—for failing to award any form of spousal support to Wendy. Id. Each of these instances are errors requiring reversal and remand.

[¶59] ***E. Attorney Fees***

[¶60] At trial, Wendy provided the District Court with a summary of her attorney fees, Exhibit 45, showing that she owed approximately $27,115.81 in fees. (Index #189; App. at Pg. 131). Wendy paid her initial retainer from the loan she took out for her living expenses. (Tr. Vol. I, Pg. 93, Ln. 18-20). She testified that she did not have the ability to pay the balance of her fees and requested that Kevin do so. (Tr. Vol. I, Pg. 94, Ln. 4-16). Kevin claimed he could not pay the fees and that he had taken out loans for his fees. (Tr. Vol. I, Pg. 225, Ln. 1-5). However, Kevin did not provide evidence to corroborate his testimony.

[¶61] The District Court did not provide any guidance on this matter other than one declaratory statement: "Each party will be responsible for their own attorney fees." (App. at. Pg. 235, ¶ 19). While the District Court did apportion Wendy's Bell Bank loan to Kevin, it did so in terms of the property distribution, not as a fee award. It failed to address Wendy's need for fees, instead relying on a blanket declaration. The District Court erred in doing so.

V. Standard of Review

[¶62] Questions as to the valuation of property are findings of fact and subject to a clearly erroneous standard of review. Lee v. Lee, 2019 ND 142, ¶6, 927 N.W.2d 104. However, the issues regarding the interpretation and application of a statute, in this case N.D.C.C. § 14-05-24 (1), are questions of law and fully reviewable on appeal. Wilkens. Westby, 2019 ND 186, ¶6, 931 N.W.2d 229.

[¶63] A district court's decision regarding property distributions and spousal support are findings of fact subject to the clearly erroneous standard of review. Werven v. Werven, 2016 ND 60, ¶¶ 11,18, 877 N.W.2d. 9. Such a decision will not be reversed on appeal unless it is induced by an erroneous view of the law, if no evidence exists to support it, or if on the entire record the Supreme Court is left with a definite and firm conviction a mistake has been made. Koble v. Koble, 2008 ND 11,¶6, 743 N.W.2d 797.

[¶64] Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review." State ex rel. K.B. v. Bauer, 2009 ND 45, ¶ 8, 763 N.W.2d 462. If the district court fails to comply with the child support guidelines in determining an obligor's child support obligation, the court errs as a matter of law. Serr v. Serr, 2008 ND 56, ¶ 18, 746 N.W.2d 416

[¶65] An award of attorney's fees is within the sound discretion of the district court and will not be reversed on appeal absent an abuse of discretion. Waldie v. Waldie, 2008 ND 97, ¶ 16, 748 N.W.2d 683.

VI. Law and Argument

[¶66] **A. May a trial court assign different valuation dates to different items of the marital estate if there is no agreement as to the valuation date and, if so, what date is to be used?**

[¶67] In making an equitable division of marital property, the district court must first assign a value to that property. Brouillet v. Brouillet, 2016, ND 40, ¶ 25, 875 N.W.2d 484. Prior to August 1, 2017, the valuation date for marital property in a divorce was the date of trial. Grasser v. Grasser, 2018 ND 85, ¶ 22, 909 N.W.2d 99. However, this timeframe changed with the amending of N.D.C.C. § 14-05-24 in the 2017 legislative session. Rather than placing the valuation date at the end of the proceedings, as had been done in the past, N.D.C.C. § 14-05-24 placed it at the beginning and, in some cases, prior to the divorce action. The amended statute reads as follows:

> 1. When a divorce is granted, the court shall make an equitable distribution of the property and debts of the parties. Except as may be required by federal law for specific property, and subject to the power of the court to determine a date that is just and equitable, the valuation date for marital property is the date mutually agreed upon between the parties. If the parties do not mutually agree upon a valuation date, the valuation date for marital property is the date of service of a summons in an action for divorce or separation or the date on which the parties last separated, whichever occurs first.

N.D.C.C. § 14-05-24 (1) (2019).

[¶68] This new amended statute refers to two different events, or clauses, when determining the date of valuation for the trial courts. First, in the second sentence, it carves out exceptions for the valuation date based upon federal law and the equitable power of the court. However, this clause is then linked to the provision that defines the proper date as the one agreed upon by the parties. Id. Adding to the already jumbled question of when the valuation of the estate should occur, the amended statute then states in its final clause

that if there is no agreement, the proper date is the date of commencement or when the parties separated, whichever occurred first. Id. However, it is unclear what happens when some valuation dates are agreed to and others are not.

[¶69] The plain language of the statute refers to a singular valuation date for the marital property. N.D.C.C. § 14-05-24 (1). It does not appear to account for situations where the parties may agree on values from one date and then attempt to apply different valuation dates to other properties that will benefit his or her claim. In interpreting a statute, this Court's primary goal is to ascertain the intent of the legislature by first looking to the plain language of the statute and giving each word of the statute its ordinary meaning. Wilkens v. Westby, 2019 ND 186, ¶6, 931 N.W.2d 229. A statute is ambiguous if it is susceptible to meanings that are different, but rational. Id. Lastly, this Court presumes the legislature did not intend an absurd or ludicrous result or unjust consequences, and it construes statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted. Id.

[¶70] Moreover, the District Court also expressed a level of uncertainty with regard to this statute. At one point the District Court stated that it was afforded some level of flexibility and that it is not bound by the initiation of the action. (Tr. Vol. I, Pg. 36, Ln. 15-25). Later, when discussing the admissibility of crop insurance information found in Exhibit 26, Kevin argued that the legislature provided a set timeframe for valuation. (Tr. Vol. I, Pg. 49 Ln. 10-17). Wendy provided a counter-argument that in a situation where a party could manipulate values—such as the nature of farming—relying solely on the date of separation without discretion would produce a result that was not intended by the

legislature. (Tr. Vol. I, Pg. 50, Ln. 13-23). The District Court overruled Kevin's objection as to the line of questioning. (Tr. Vol. I, Pg. 51, Ln. 14). However, both Kevin and Wendy made claims that were rational within the meaning of the statute[1]. There is ambiguity in N.D.C.C. § 14-05-24 (1).

[¶71] Further, as noted by the Court and in testimony, farming is a never-ending and circular endeavor. (Tr. Vol. I, Pg. 36, Ln. 36; Pg. 39, Ln. 6-11). Harvest ends and the next year begins, be it through prepayments, planning, loans, or the like. (Tr. Vol. I, Pg. 39, Ln. 10-16). To allow for the use of one date, agreed upon after the date of commencement of the action for some property, while allowing for a party to withhold agreement on the valuation of other property on that same date because it may not benefit him or her, would lead to a ludicrous and unjust result.

[¶72] In cases where there are issues as to valuation dates ***and*** agreed upon valuations, the reasonable application of the statue is not to apply separate dates for each piece of property. Rather, the logical approach would be to use the date that was agreed to or the valuation closest to that date. In applying different valuation dates to different properties, when the majority of the property was valued post-commencement, the District Court committed an error as a matter of law. It committed that error because the statute itself is flawed and ambiguous. A reversal and remand with instruction as to the valuation date is proper.

1. Perhaps the only thing that the parties, their counsel, and the District Court agreed upon was that the changes made to N.D.C.C. § 14-05-24 (1) were not helpful on the issue of valuation.

[¶73] **B. The District Court erred in not valuing and including the 2018 crop based upon the guaranteed crop insurance values.**

[¶74] All property held by either party, whether held jointly or individually, is considered marital property, and the court must determine the total value of the marital property before making an equitable distribution. Tuhy v. Tuhy, 2018 ND 53, ¶10, 907 N.W.2d 351. Crops, like other items of marital property, are subject to valuation and distribution by the district court in a divorce. See Savelkoul v. Savelkoul, 119 N.W.2d 110, 113 (ND 1962), (awarding each party one-half of the profits from the 1962 crops). In Berg v. Berg, 490 N.W.2d. 487 (ND. 1992), the district court awarded one-half of the crops for one year (1989-90) to each spouse. In dividing the grain crop in Berg, this Court stated:

> The court then divided the grain equally between them. Although Rhonda may not have directly contributed toward the production of the 1990 crop, she was trying at that time to maintain full-time employment and, in that way, to assist in providing for herself and the children. Under the circumstances, we are not convinced that the trial court's equal division of the 1990 grain was a mistake or that it resulted in a clearly erroneous division of the marital property.

Berg, 490 N.W.2d at 492.

[¶75] Much like Rhonda Berg, Wendy established that she contributed to the farm and the crops by virtue of her role in the household. Where a homemaker's contributions to the family enable the other spouse to devote full time and attention to a business, contributing to the accumulation, appreciation, and preservation of assets, the homemaker's contributions deserve equivalent recognition in a property distribution upon dissolution of the marriage. Kautzman v. Kautzman, 1998 ND 192, ¶ 13, 585 N.W.2d 561.

[¶76] During testimony regarding his crop insurance—found at Exhibit 26—Kevin stated that his crops were insured under revenue protection crop insurance, to ensure that he received at least 75% of the value, regardless of the markets. As the testimony detailed, Kevin's crop coverage was based upon past performance and an agreed upon crop price. The minimum total value of the insured coverage for the 2018 Willprecht crop, as established by testimony and Exhibit 26, was $1,366,780. Because Kevin is guaranteed this amount, even if the crop is sold for less, $1,366,780 was the lowest number the District Court should have used for the valuation of the crops. Exhibit 26 also established when the crops were to be planted by in 2018. (App. at Pp. 115-16).

[¶77] For his part, Kevin did not provide evidence as to the value of the crops in the ground. He relied on the crops that were in storage from 2017 for his valuations on the parties' Rule 8.3 Asset and Debt List. Generally, a valuation within the range of evidence presented is not erroneous in nature. Schultz v. Schultz, 2018 ND 259, ¶17, 920 N.W.2d. 483. However, that was not the case here. Rather, the District Court assigned no value to the growing crop, calling the values "speculative" in nature. App. at Pg. 228, ¶7. A cursory review of Exhibit 26 shows: 1) the amount of guaranteed income from each crop, 2) when it was planted, and 3) where it was planted. (App. at Pg. 114-19).

[¶78] By failing to value and include the 2018 crop into the marital estate for distribution, the Court committed a reversible error requiring a reversal and remand with instructions to include the qualified 2018 crop insurance values into the marital estate for distribution.

[¶79] **C. The District Court's division of the marital estate was inequitable and unsupported by its Findings under the *Ruff-Fisher* guidelines.**

[¶80] In determining an equitable division of a marital estate, a district court is required to consider the *Ruff-Fischer* guidelines. Lill v. Lill, 520 N.W.2d 855, 857 (N.D. 1994). A distribution of marital property need not be equal to be equitable, but a substantial disparity must be explained. Lizatowski v. Lizatowski, 2019 ND 117, ¶7, 930 N.W.2d 609.

[¶81] Along 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. Schultz v. Schultz, 2018 ND 259, ¶10, 920 N.W.2d. 483. There is no bright-line rule to distinguish between short and long-term marriages. Hitz v. Hitz, 2008 ND 58, ¶16, 746 N.W.2d 732. Wendy acknowledges that length of marriage is only one factor for the Court to use in determining a division of property and is not a controlling factor. Schultz v. Schultz, 2018 ND 259, ¶10. However, the logical starting point for our courts is an equal distribution in long-term marriages. Lizatowski, v. Lizatowski, 2019 ND 117, ¶10, 930 N.W.2d 609.

[¶82] Likewise, the origin and nature of property is only one factor to be considered by the district courts. Marsden v. Koop, 2010 ND 196, ¶44, 789 N.W.2d 531. In such cases, the length of the marriage remains relevant to the distribution of gifts and inherited property as part of the equitable division of the marital estate. Grasser v. Grasser, 2018 ND 85, ¶22, 909 N.W.2d 99. Even in cases with inherited or gifted property, a lengthy marriage supports an equal division of property. Id.

[¶83] Our courts have never held that property that was owned prior to marriage, inherited, or received as a gift by one spouse needs to be irretrievably set aside. Hitz v. Hitz, 2008 ND 58, ¶14, 746 N.W.2d 732. This Court has also found that such property is subject to distribution. Glander v. Glander, 1997 ND 192, ¶11, 569 N.W.2d 262. Further, premarital ownership, standing alone, will not justify a wide disparity in a property distribution. McCarthy v. McCarthy, 2014 ND 234, ¶12, 856 N.W.2d 762. In McCarthy and Glander, the property in question was inherited. In Marsden the question was whether the included property was a gift or a loan. Marsden v. Koop, 2010 ND 196, ¶44 (stating that a gift is a transfer of personal property without consideration). Neither of these circumstances existed in the Willprecht divorce.

[¶84] Despite the facts laid out in the record and in the Statement of Facts, the District Court made an initial award of the martial estate to Kevin of $4,312,998 (76.49%) and $1,326,308 (23.51%) to Wendy, a difference of $2,986,690. It then awarded what was termed an "equalization payment" of $750,000, making the final distribution of $3,562,998 (63%) to Kevin and $2,076,302 (37%) to Wendy, a difference of $1,486,696. The justification for this disparate and inequitable award did not address Wendy's contribution to the marriage, Kevin's behavior and noneconomic fault, or the 400% gains that had been made in the farmlands. While a district court is not required to address all of the *Ruff Fischer* guidelines, a substantial disparity must be explained so as to provide some indication of the rationale of the trial court in distributing the property. McCarthy v. McCarthy, 2014 ND 234, ¶13. The District Court failed to do so here.

[¶85] The District Court erred in making the equalization award over time and delaying the property payment for a year without explanation. It is commonplace for the courts to award an offsetting monetary award for the value of a business or farm. Heley v. Heley, 506 N.W.2d 715, 719 (N.D. 1993). What is not common is to delay the payment and not account for some form of support for the spouse. This curious and unexplained move compounds the errors committed by the District Court in its property division. A reversal and remand with instructions to provide for an equitable distribution of all property in the marital estate is proper.

[¶86] **D. The District Court erred in its calculation of Kevin's child support and its failure to properly follow the guidelines.**

[¶87] It is well-known that the child support guidelines are presumptively correct. N.D.A.C. § 75-02-04.1-09 (2019). The first step in determining the proper support obligation is to determine the obligor's income. Schweitzer v. Mattingley, 2016 ND 231, ¶17, 887 N.W.2d 541. In cases where the obligor is self-employed or has wide fluctuations in income, an average gross income is used to establish the guideline amount. N.D.A.C. § 75-02-04.1-05 (2019).

[¶88] N.D.A.C. § 75-02-04.1-05 (4) states as follows with regard to the calculation of income from self-employment:

> 4. Self-employment activities may experience significant changes in production and income over time. To the extent that information is reasonably available, the average of the most recent five years of each self-employment activity, if undertaken on a substantially similar scale, ***must be used*** to determine self-employment income. When self-employment activity has not been operated on a substantially similar scale for five years, a shorter period may be used.

N.D.A.C. § 75-02-04.1-05 (4) (2019) (emphasis added).

[¶89] Other than discussions of commodity prices, there was no evidence presented that the farm had changed in the past five years. Instead, his business fits within the reasons for a five-year average set forth in N.D.A.C. § 75-02-04.1-05 (4). In using a decrease in commodity prices as a reason to use only the past three years of Kevin's income, the District Court erred in failing to establish Kevin's true income for guideline purposes. A five-year average is ***required*** under the guidelines.

[¶90] Similarly, unless the trial court makes a determination that evidence of an obligor's recent past circumstances is not a reliable indicator of his future circumstances, the trial court must not extrapolate an obligor's income under N.D.A.C. § 75–02–04.1–02(8). Korynta v. Korynta, 2006 ND 17, ¶17, 708 N.W.2d. 895. In this matter the District Court had six years of tax returns from which to calculate Kevin's child support. It did not need to reach into the appraisal to attempt to determine unknown rental income, that was then subtracted from the already incorrect average. As the District Court failed to properly follow the guidelines for determining Kevin's income, it erred as a matter of law in setting his support amount. Id. at ¶18

[¶91] Next, the District Court erred when it failed to allow for Kevin's child support to be modified in accordance with the guidelines. This decision failed on two fronts. First, N.D.C.C. § 14-09-08.2 states the limitations of child support after majority:

> A judgment or order requiring the payment of child support until the child attains majority continues as to the child until the end of the month during which the child is graduated from high school or attains the age of nineteen years, whichever occurs first, if:
>
> a. The child is enrolled and attending high school and is eighteen years of age prior to the date the child is expected to be graduated; and

b. The child resides with the person to whom the duty of support is owed.

N.D.C.C. § 14-09-08.2 (1) (2019).

[¶92] Next, N.D.C.C.§ 14-09-08.4 states, in part:

> If a child support obligation sought to be amended was entered at least one year before the filing of a motion or petition for amendment, the court ***shall order*** the amendment of the child support obligation ***to conform the amount of child support payment to that required under the child support guidelines***...

N.D.C.C. § 14-09-08.4 (4) (2019) (emphasis added).

[¶93] The District Court's reasoning for this limitation on modification was to essentially freeze the child support amount and alleviate the need for spousal support. In doing so, it included a provision that is not in accordance with the Century Code or the child support guidelines. As it failed to comply with the guidelines, the District Court committed an error as a matter of law. Ferguson v. Wallace-Ferguson, 2018 ND 122, ¶ 21, 911 N.W.2d 324.

[¶94] Lastly, the District Court failed to address the request for retroactive child support from the date of the parties' separation. A district court has the power to award guideline child support retroactively back to the date of separation, even if divorce proceedings are not initiated, under N.D.C.C § 14-08.1-01. Hagel v. Hagel, 2006 ND 181, ¶7, 721 N.W.2d 1. Like the situation in Hagel, there is no discussion or reasoning stated by the District Court as to why Wendy's retroactive child support request was denied. As a result, this Court is "left to speculate whether factors were properly considered and the law was properly applied, leaving us unable to perform our appellate function." Hagel at

¶9. On remand it is appropriate to direct the District Court to address the issue of past child support using the child support guidelines as a consideration.

[¶95] **E. The District Court's failure to award spousal support to Wendy, in any form, was in error and unsupported by its Findings under the *Ruff-Fisher* factors.**

[¶96] N.D.C.C. § 14-05-24.1 allows a district court to award spousal support for a limited period of time based upon the circumstances of the parties. N.D.C.C. § 14-05-24.1 (1) (2019). The circumstances of the parties are viewed through the *Ruff-Fisher* factors. Schmuck v. Schmuck, 2016 ND 87, ¶6, 882 N.W.2d 918. These factors include both economic and non-economic factors. Id. A district court must consider the property distribution and spousal support award together. Id. Further, while the Court need not discuss each factor individually, it must provide enough information to allow this Court to determine the reason for its decision. Id.

[¶97] Traditionally, the district courts award either temporary (rehabilitative) support or permanent support. Permanent spousal support may be appropriate when there is a substantial disparity in earning capacity and a substantial income disparity that cannot be adjusted by property division or rehabilitative support. Stephenson v. Stephenson, 2011 ND 57, ¶ 27, 795 N.W.2d 357. Further, permanent spousal support is an appropriate remedy to ensure parties equitably share the reduction in their standards of living. Id. While rehabilitative spousal support is preferred, permanent spousal support may be necessary to maintain a spouse who cannot be adequately retrained to independent economic status. Innis-Smith v. Smith, 2018 ND 34, ¶22, 905 N.W.2d. 914.

[¶98] Awards of spousal support are an integral consideration when a property award is delayed or paid over time. For example, in Sateren v. Sateren, 488 N.W.2d 631 (N.D. 1992), when a district court ordered payments over time, but found the farming spouse could not make spousal maintenance payments, this Court said the following:

> Because it is to the advantage of both parties that Erika obtain a college degree in order that she have the opportunity to become self-supporting, the trial court should consider the payment of spousal support if the periodic payments of property division can be structured or delayed so that Erika's needs as well as Elmer's needs and ability to pay can be accommodated.

Sateren v. Sateren, 488 N.W.2d 631, 635 (N.D. 1992).

[¶99] The district court in Heley faced similar circumstances and facts to those presented in this matter:

a. Vikki Heley was 40 years old at the time of the divorce. Wendy was 41.
b. The Heleys were married for 17 years. The Willprechts were married for 19 years.
c. Both the Heleys and Willprechts operated family farms where the wife was not expected to work outside of the home.
d. Both families had four children, which were cared for by the wife.
e. Vicki lived in an area with a difficult job market in Richland County. Wendy lives in an area with a difficult job market in Sargent County.
f. Vikki was awarded residential responsibility (custody) of the parties' four children and needed to tailor her work around their care. Wendy was awarded the residential responsibility of the four Willprecht children and will need to tailor her work availability around their care.
g. Vikki had not been employed outside of the home since 1975, a total of 17 years. Wendy, until the separation in 2018, had not regularly worked outside of the home since 2003, approximately 15 years.
h. Larry Heley was awarded the income-producing property –the farm—and contended that support would drive him out of business. Kevin was awarded the income producing farm, with the exception of land he rented in Cass County, and contended he could not pay spousal support.

[¶100] In addressing these facts in Heley, this Court first found, based upon the forgoing, that the failure to award any type of spousal support was ***clearly erroneous***.

Heley v. Heley, 506 N.W.2d 715, 720 (N.D. 1993). It also addressed the options for the district court on remand if there is an inability to pay:

> If the reason for denying spousal support was Larry's inability to pay, various alternatives are available. Rather than the minimal $315 in liquid assets Vikki received immediately pursuant to the divorce decree, the court could award a substantial percentage of her property distribution in other available liquid assets, *i.e.,* cash accounts, crops and livestock....Spousal support payments could be ordered for a period of time and the property distribution payments delayed so ***Vikki need not dissipate her property award in order to survive***. *(citation omitted).*

Heley, 506 N.W.2d at 720 (emphasis added).

[¶101] Similarly, in Ratajczak v. Ratajczak, 1997 ND 122, 565 N.W.2d 491, the obligor husband claimed that his ex-wife could use her property settlement to cover her living expenses. Ratajczak, 1997 ND 122, ¶30. This Court disagreed, stating that an ex-spouse should not have to dissipate a property to survive. Id. Further, given the conduct during the marriage, Ervin Rtajczak's abusive behavior, it was proper to award support, even if there was a claim on inability to pay. Id.

[¶102] Wendy testified about Kevin's alcohol issues. She provided testimony and exhibits to show that Kevin had physically abused her on more than one occasion. She stated that he hid cash during the marriage and separation, claims that were not refuted by Kevin. The District Court made a passing reference to Kevin's drinking, but did refer to it as the "root cause of the demise of this near 20-year marriage." (App at Pg. 234, ¶17). Despite this acknowledgement, the District Court did not provide any further discussion as to why it did not place any consideration on this fault in its spousal support decision.

[¶103] Instead, the District Court focused on the incomes of each party. In doing so, it extrapolated—guessed—at a number for land rent that Wendy would receive from

the Cass County land, and used the extrapolated—unproven—income number that it found in setting a child support calculation. Neither of these numbers were supported by the evidence provided. Neither of them shows that Wendy would not be required to dissipate her marital property award to live. If anything, the District Court's Findings *embrace* that premise as it refers to the delayed, periodic property settlement payment as a reason for its failure to award any form of spousal support to Wendy. (App at Pg. 235, ¶18). In doing so, it is breaking with long-established North Dakota law.

[¶104] Because of the District Court's focus on Kevin's inability to pay and his child support obligation, it is necessary for the Court to reference a similar argument made in Stock v. Stock, 2016 ND 1, 873 N.W.2d 38. In Stock, Robert Stock argued that he could not afford to pay spousal support because his base income, based upon a rolling average, was exceeded by his child support and spousal support obligations. He claimed that he needed to rely on a year-end bonus to make ends meet. Stock v. Stock, 2016 ND 1, ¶19. In addressing these concerns, the majority of this Court stated:

> While we appreciate law firm bonuses are subject to change based upon the vicissitudes of legal practice, nothing in the record demonstrates Robert Stock is incapable or unlikely to earn a bonus sufficing to cover the difference between his expenses and his base pay. His past bonuses, along with being in the early stages of his legal career, indicate Robert Stock has a reasonable chance of earning similar or larger bonuses as his career matures...While paying the support may require disciplined budgeting, we are not persuaded Robert Stock has shown he is unable to pay the support so as to render the support amount clearly erroneous.

Stock v. Stock, 2016 ND 1, ¶19.

[¶105] Additionally, Tiffany Stock was expected to see a modest increase in her income and had shown a relatively low income from her part-time work. Stock v. Stock,

2016 ND 1, ¶20. Even with the support payments she received, Ms. Stock would experience a shortfall. Id. Her situation, like those mentioned previously, is analogous to Wendy. In each case, those spouses were awarded some form of spousal support. Wendy was not. Based upon the circumstances, the District Court committed an error that requires a reversal and remand.

[¶106] Of greater concern and consequence was the District Court's decision to tie the decision on spousal support to the unenforceable child support provisions discussed previously at Paragraphs 91-93 of this Brief. This was done, according to the District Court, "deliberately in light of the income disparity of the parties." If there are income disparities that are concerning enough to continue increased ***child support***, that would seem to indicate that ***spousal support*** is necessary.

[¶107] This Court has also warned against the tying together of child and spousal support awards:

> In affirming the amount awarded, including the escalation of support upon the termination of Robert Stock's child support obligation, we caution the district court in elevating the support amount without proper explanation... This implies the child support amount was to equitably balance the divorce's burden when, in fact, the child support was for the care and maintenance of the minor child. If the court found Tiffany Stock should have received $5,500 per month in support to equitably balance the divorce's burden, but Robert Stock's financial situation prevented the imposition of this full amount at the present time, the district court should have explicitly stated as much in its decision so we can readily discern the court appreciated the different ends served by child and spousal support...Although the court's failure to explicitly state its rationale is not a reversible error, we do not foreclose the possibility that failing to set forth the rationale for escalating a support award might warrant reversal under different circumstances.

Stock v. Stock, 2016 ND 1, ¶ 23.

[¶108] Here, the District Court explained its rationale in terms of the unenforceable child support award and did not differentiate between the need of the children and Wendy's needs. These are the circumstances that would warrant a reversal and remand to the District Court. Wendy asks for the same.

[¶109] **F. The District Court's failure to award attorney fees to Wendy, or to discuss its reasoning as to why, was an abuse of discretion.**

[¶110] District courts are authorized to award attorney fees under N.D.C.C. § 14-05-23. A court is required to balance one party's needs against the other party's ability to pay. In doing so a court should consider the property owned by each party, their relative incomes, whether property is liquid or fixed assets, and whether the action of either party unreasonably increased the time spent on the case. Heinle v. Heinle, 2010 ND 5, ¶32, 777 N.W.2d 590.

[¶111] The District Court did not discuss these areas in light of the attorney fees request. Instead, a one sentence Finding is all that the District Court provided to address Wendy's request. (App at Pg. 235, ¶19). In doing so the District Court abused its discretion by misapplying the law regarding such request. Heinle v. Heinle, 2010 ND 5, ¶32 (stating that a court abuses its discretion when it misapplies or misinterprets the law). A reversal and remand are necessary to address the attorney fees question beyond a one-sentence finding.

IV. Conclusion

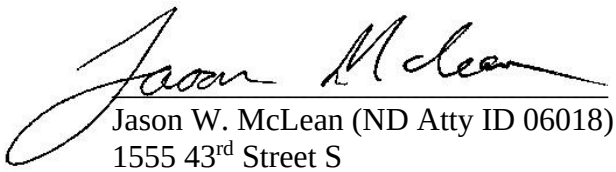
[¶112] Despite this long-term marriage and shared enterprise, the District Court awarded nearly 2/3 of the marital estate to Kevin. The Court applied different valuation dates to different property, and then failed to include the disputed property throughout its

analysis and decision. It delayed payments to Wendy. The District Court made concessions for Kevin's child support not allowed under our law. It left Wendy without the means of support even though she had contributed to the farm and marital estate of the past 20 years. It failed to address her claims for attorney fees in a way that allows this Court to determine if a mistake was made or if the required areas were even addressed.

[¶113] Each of these failures results in an error that requires a reversal and remand by the Court with instructions. Wendy Willprecht respectfully requests that this Court find in her favor and require the same.

Dated this the 9th day of October 2019.

Parvey, Larson, and McLean, PLLC



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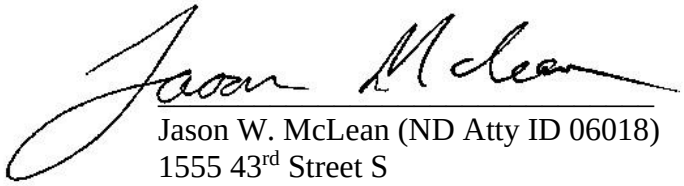
CERTIFICATE OF COMPLIANCE

[¶114] The undersigned, as the attorney representing Appellant, Wendy Willprecht, and the author of the Brief of Appellant, Wendy Willprecht, hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and the Court's Order of October 4, 2019, granting an extension of the page limitation, as to not exceed 45 pages and is 43 pages.

[¶115] Dated this the 9th day of October 2018.

Parvey, Larson, and McLean, PLLC



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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Wendy Michele Willprecht, Plaintiff-Appellant & Cross-Appellee, vs. Kevin John Willprecht, Defendant- Appellee & Cross-Appellant	)	Supreme Court No. 20190201 File No. 09-2018-DM-00522 ***Affidavit of Service***

1. I, Christine Goodall, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the 9th day of October 2019, I electronically served a copy of the following document(s) upon the below-listed individual(s), by electronic service the North Dakota Supreme Court E-Filing Portal:

   1. Brief of the Appellant, Wendy Willprecht
   2. Appendix of the Appellant, Wendy Willprecht

2. A copy of the foregoing was emailed upon the following individual(s):

   Mr. Robert Schultz
   Attorney for Appellee, Kevin John Willprecht
   Email: rschultz@conmylaw.com

3. To the best of my knowledge, the email address given is the actual email address of the party intended to be so served.

4. I certify under penalty of perjury that the foregoing is true and correct.

   Dated this 9th day of October 2019 in Cass County, State of North Dakota.

Christine Goodall

20190201
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 14, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Wendy Michele Willprecht, Plaintiff-Appellant & Cross-Appellee, vs. Kevin John Willprecht, Defendant- Appellee & Cross-Appellant	)	Supreme Court No. 20190201 File No. 09-2018-DM-00522 ***Affidavit of Service***

1. I, Christine Goodall, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the 14th day of October 2019, I electronically served a copy of the following document(s) upon the below-listed individual(s), by electronic service the North Dakota Supreme Court E-Filing Portal:

   1. Brief of the Appellant, Wendy Willprecht (revised)

2. A copy of the foregoing was emailed upon the following individual(s):

   Mr. Robert Schultz
   Attorney for Appellee, Kevin John Willprecht
   Email: rschultz@conmylaw.com

3. To the best of my knowledge, the email address given is the actual email address of the party intended to be so served.

4. I certify under penalty of perjury that the foregoing is true and correct.

   Dated this 14th day of October 2019 in Cass County, State of North Dakota.

Christine Goodall