

IN THE SUPREME COURT  
THE STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
NOVEMBER 21, 2019  
STATE OF NORTH DAKOTA

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

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Supreme Court No. 20190201

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

APPELLANT’S BRIEF IN RESPONSE TO APPELLEE’S MOTION TO DISMISS  
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

Respectfully Submitted By:

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## I. Statement of Issues

[¶1] The Appellee's Motion to Dismiss raises the following issue for review:

- a. Whether the Court Should Grant Kevin Willprecht's Motion to Dismiss

*No. Appellant, Wendy Willprecht did not waive her right to appeal by accepting benefits or items awarded to her in the divorce decree.*

## II. Statement of the Case and Facts

[¶2] Appellant, Wendy Willprecht, reasserts the Statement of the Case and Statement of Facts in her principal brief and will address, as succinctly as possible, the allegations and discrepancies in Appellee's Statement of the Facts in this Motion with which she disagrees.

[¶3] The District Court, the Honorable John C. Irby presiding, entered its Judgment in this matter on June 11, 2019. (District Court Doc ID # 235-236). As part of that Order for Entry of Judgment and Judgment, various items of marital, jointly owned, property were distributed to the parties. Additionally, the District Court apportioned the marital debts to Appellee, Kevin Willprecht.

[¶4] On July 2, 2019, less than 30 days after the entry of the Judgment, Wendy served and filed her Notice of Appeal. (District Court Doc ID# 239). Neither party sought to stay the execution of the judgment during the time for appeal. On August 5, 2019, Kevin served and filed his Notice of Cross-Appeal, seeking to set aside the child support findings in the Judgment as they related to the step-down provisions. (District Court Doc ID# 244). Kevin did not challenge the distribution of the marital estate in his cross-appeal.

¶5] As is stated in her principal Brief, and as it relates to Kevin’s motion, Wendy challenges: 1) the District Court’s valuation of property, 2) the subsequent property distribution, 3) the delay in payment of the equalization payment, and 4) the decision to not award spousal support, either rehabilitative or permanent, to her. Of the property that was transferred to her, the majority was by agreement or without objection by either party. For example, the marital home was awarded to Wendy after the District Court received proposed distributions from both parties that awarded the same to her. (District Court Doc ID# 179, 181, 211).

¶6] The only disputed parcel of land that was transferred to Wendy is known as Tract 1, or the Cass County land. (District Court Doc ID# 120, Appellant’s App. at Pg. 39) As part of its division of property, the District Court awarded this land to Wendy. (District Court Doc ID# 236, Appellant’s App at Pg. 262). Kevin does not challenge the District Court’s decisions on any of these issues—including the transfer of the Cass County land—and has asked that the District Court’s decision be affirmed as to each. (Appellee’s Brief, at ¶71).

### **III. Law and Argument**

#### **¶7] A. Wendy did not waive her right to Appeal**

¶8] As a general rule, the party moving to dismiss an appeal bears the burden of establishing the waiver of appeal. Spooner v. Spooner, 471 N.W.2d 487, 489 (N.D. 1991). The general rule is that a party who accepts substantial benefit of a divorce judgment waives the right to appeal from that judgment. Wetzel v. Wetzel, 1999 ND 29, ¶5, 589

N.W.2d 889. However, this Court has sharply limited the general rule in domestic relations cases in order to promote a strong policy in favor of reaching the merits of an appeal. Id.

[¶9] As this Court stated in Wetzel, when looking at the acceptance of the substantial benefit from a judgment, the moving party must show that the benefit accepted by the appealing party is one that he or she would not be entitled to without the decree. Id. (citing to Hoge v. Hoge, 281 N.W.2d 557, 563 (N.D. 1979)). Likewise, there must be unusual circumstances demonstrating a prejudice to the movant, or a very clear intent of the party accepting the benefit to waive the right, for the court to avoid the merits of the appeal. Id. (citing to Spooner, 471 N.W.2d at 490). Generally, the acceptance of a property award in a divorce does not waive the right to the appeal from the divorce judgment when the accepting party is claiming a right to a larger share of the marital estate. Id. at ¶6 (citing to Sanford v. Sanford, 295 N.W.2d 139, 142 (N.D. 1980)).

[¶10] The joint ownership of marital property in divorce also lends itself to a denial of Kevin’s motion. As this Court noted in Spooner, the unique nature of a divorce judgment, which divides property that is often jointly owned and enjoyed, means that the award of this previously owned property does not constitute “acceptance.” Spooner 471 N.W.2d at 489. Most of the property that is distributed in divorces—as was distributed in this matter—are items that are part of the parties’ daily lives, such as houses and vehicles. It would be unreasonable for an appellant in a divorce case to have to choose between economic adversity and the right to an appeal. Spooner, 471 N.W.2d at 490; *see also* Lyon v. Ford Motor Company, 2000 ND 12, ¶7 fn.1, 604 N.W.2d 453.

[¶11] Two of the cases that Kevin cites as a premise for his Motion, White v. White 434 N.W.2d 361 (N.D. 1989) and Geier v. Geier, 332 N.W.2d 261 (N.D. 1983), were discussed and distinguished by the Court in Spooner. In White, the appellant implemented the terms of the judgment, including the portions that she was challenging. White 434 N.W.2d at 636-64. In Geier, the only item of joint property held by the parties was awarded to the appellant and its transfer constituted a transfer of all of the benefits of the judgment. Geier 332 N.W.2d at 264. Neither of these circumstances are present in this action.

[¶12] What is also missing from this action is a cross-appeal by Kevin concerning the property distribution. Where the appellant's right to benefit was not disputed by the movant, the Court has declined to dismiss the appeal. Sanford, 295 N.W.2d at 142-43; Spooner, 471 N.W.2d at 489. Kevin is not prejudiced, nor is he challenging the District Court's decision as it relates to the property distribution. Rather, it is Wendy who challenges the valuation and the less-than-equitable share of the estate. As far back as 1894, this Court stated:

Where the reversal of the judgment cannot possibly affect the appellant's right to the benefit he has secured under the judgment, then an appeal may be taken, and will be sustained, despite the fact that the appellant has sought and secured such benefit.

Tyler v. Shea, 4 N.D. 377, 61 N.W. 468, 469 (N.D. 1894).

[¶13] Lastly, the nature of spousal support also precludes the dismissal of Wendy's appeal. Spousal support and property divisions are interrelated and intertwined in North Dakota. Tuhy v. Tuhy, 2018 ND 53, ¶6, 907 N.W.2d 351. They must be considered by the Court together. Id. In Tuhy, the movant argued that she was not seeking a full dismissal

of the appeal, but rather the issues related to the property distribution only. The Court denied her motion. Id. at ¶8.

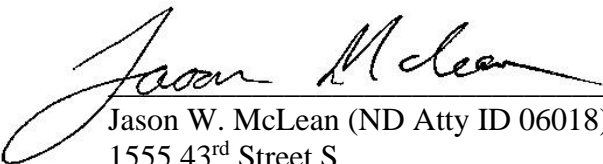
[¶14] In this matter, Wendy took possession of items that were jointly owned and enjoyed during the marriage. Some of these items, such as the marital home, her vehicle, and furnishings, were not in dispute. She has disputed the District Court's valuation of the marital estate and its disparate distribution. She has disputed the District Court's failure to award spousal support. Both parties dispute the child support award. Wendy has not accepted the judgment of the District Court, nor has she waived her right under our law.

#### IV. Conclusion

[¶15] Based upon the laws of our State and the facts in this matter, Wendy did not waive her right to appeal. She respectfully requests that Kevin's Motion to Dismiss be denied in its entirety.

Dated this the 21st day of November 2019.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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

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 21st day of November 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. Appellant's Brief in Response to Appellee's Motion to Dismiss Appeal***

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 21<sup>st</sup> day of November 2019 in Cass County, State of North Dakota.

  
\_\_\_\_\_  
Christine Goodall