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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

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE, WENDY WILLPRECHT

ORAL ARGUMENT REQUESTED

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I. Statement of Issues on Cross Appeal

[¶1] The Appellee's cross-appeal raises the following issue for review:

a. Whether the District Court erred in refusing to include a child support step-down provision in its child support award.

The Appellant, Wendy Willprecht, does not dispute that the Court erred in failing to include such a provision, as required under the guidelines. Where Wendy differentiates her position from Kevin's is that by failing to include the provision, the District Court tied this reversible error to its decision to not award spousal support. If the child support was in error, then the reasoning for failing to award spousal support is also in error.

II. Statement of the Case and Facts

[¶2] Wendy 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 with which she disagrees.

[¶3] In his Brief, Kevin paints his life as one of a longtime family farmer in North Dakota that was the result of his family, and not Wendy. This is, simply put, inaccurate. While Kevin testified to what he thought he brought into the marriage—referenced at Paragraph 5 of his Brief—the documents provided in his Appendix do not corroborate his claims. Rather, they show that the farmland came into the Willprechts' possession after the marriage.

[¶4] Similarly, Kevin claims that he received several gifts from his parents, including cash, loan forgiveness, and parcels of property. Appellee's Brief at ¶6. However, as was noted in Wendy's Brief at Paragraphs 30 and 33 through 35, there was no evidence, via documents or testimony, that the alleged gifts were segregated or that they were to be used by Kevin alone and not the family. The reality is that the alleged gifts were for the family and use by the family as a whole. What Kevin's recitation of the facts appears to

do is to invite the Court to use a "Minnesota-style" approach to property, where non-marital property is cleaved from the estate. North Dakota does not follow this style of division, and it should not start now.

[¶5] In discussing his payments during the separation, Kevin addresses all of the extras he allegedly paid, such as utilities, internet, and insurance. Setting aside Wendy's disputes as to Kevin's regular payment of these expenses, Kevin fails to show how these payments, in addition to the $5,000 per month he paid in combined support, made it impossible for him to continue to pay spousal support for Wendy. In contrast, it helps to establish a flourishing farmer with the ability to support his wife and children after the divorce concluded.

[¶6] Kevin also erroneously defines the crop insurance as "multi-peril" as opposed to revenue protective insurance on his crops. As was discussed at length in Wendy's principal Brief, the crop insurance that Kevin took—as he testified to—***guaranteed*** a 75% payment based upon the coverage he used. Appellant's Brief at ¶¶ 22-24, Appellant's App. at Pp. 114-16. It did not, and does not, matter what effect the weather or market forces had on the crop. Kevin was to be paid his share based upon his wise decision to use revenue protective insurance in addition to other options.

[¶7] The characterization of Kevin's income in his Brief also seems to indicate that the Court erred in using a three-year average. As Kevin states, it was his "opinion" that three years of income should be used. Appellee's Brief at ¶14. He then seeks to use this three-year average, as opposed to a less favorable five-year average, to justify the District Court's decision to not award spousal support in this matter. However, had the District

Court correctly followed the Child Support Guidelines, as set forth in Wendy's principal Brief, Kevin's income is more than adequate for payment of support to Wendy moving forward, even with the questionable accounting that he provided.

III. Law and Argument

[¶8] A. N.D.C.C. § 14--05-24 does not provide for multiple valuation dates...or does it? That is the question.

[¶9] In his Brief, Kevin takes great pains to claim that the multiple valuation dates used by the District Court are part of a normal process, going as far as saying that it is "quite common" for parties to use multiple valuation dates in divorce cases. Appellee's Brief at ¶26. However, Kevin cites no case law that would indicate that is the case. The reason for that is simple: it is not a common occurrence, nor should it be.

[¶10] Rather, as was noted in Wendy's principal Brief, prior to 2017, valuation dates were set as of the date of trial, if there was no agreement by the parties. With the amending and enactment of N.D.C.C. § 14-05-24 (1), the valuation date is to be the earliest of the date of final separation or the commencement of the action, barring an agreement to the contrary. This arguably "simple" change has opened the proverbial Pandora's Box with regard to valuation. Where there was once a singular date for valuation, the trial, there are now instances like those in this matter where different, individual pieces of property are valued at different time and dates.

[¶11] This problem would seem to undercut the legislative intent behind the law. Setting aside that a legal separation is not the same as divorce, the legislative intent that Kevin provides is instructive and supportive of ***Wendy's*** position. If the intention of the bill's sponsor, Ms. Connie Triplett, was to create an appropriate default date for valuation,

logic would dictate that one date would need to be used for all of the property, not bits and pieces.

[¶12] As noted in Wendy's principal Brief, and conceded by Kevin in his, the vast majority of the property in the marital estate was valued well after the date of separation by the appraisers that were hired by Kevin. It was only the disputed issue of the crop values that were ultimately re-set back to December 2017 by the District Court. Such picking and choosing is not in keeping with the legislative intent of N.D.C.C. § 14-05-24 or equity under the law.

[¶13] Lastly, Kevin claims that there is a significant cost associated with putting the crop in the ground. Appellee's Brief at ¶ 30. However, it is not Wendy's duty to put on Kevin's case or prove Kevin's stance. Both Wendy and Kevin knew that the valuation question was unresolved at trial. Kevin failed to introduce any evidence of the cost of putting the crop in the ground for 2018. He also confirmed the insurance values that his coverage provided for. While Kevin's counsel made sure that he could provide the corresponding liability to the District Court—at Tr. Vol. I, Pg. 49, Ln. 18-25—Kevin failed to provide such evidence. It would be and is speculative to include such information in the division of assets. This Court should also not lose sight of the fact that Kevin would be able to present such evidence on remand and is not prejudiced if such was ordered. Given the inequities and irregularities of the valuation, a reversal and remand are necessary.

[¶14] **B. Family farms cannot be preserved to the detriment of others**

[¶15] At Paragraph 36 of his Brief, Kevin cities to Schiff. v. Schiff, 2013 ND 142, 835 N.W.2d 810, and opines that preserving the family farm is a laudable purpose if it is

possible to do so without detriment to the other party. Schiff, 2013 ND 142**Error! Bookmark not defined.** at ¶ 26. It is this last portion of the purpose that the District Court failed to account for in this matter.

[¶16] It is curious that Kevin chose to cite Schiff for this premise, in that his citation comes from the Dissent provided by Justice Mary Maring. In that Dissent, Justice Marring included and emphasized an important word that was absent from Kevin's paraphrasing of the statement. The full quote from Justice Maring's Dissent reads as follows:

> While preserving a family farm is a "laudable purpose," it "is to be achieved *only if* it is possible to do so without detriment to the other party." (citation omitted). "Preserving the family farm is not to be done at all costs nor should it engulf all other factors. Rather, we have said its purpose is to avoid the potential for economic hardship if the farm is divided or sold."

Schiff, 2013 ND 142 at ¶ 26 (emphasis in original).

[¶17] The case that Justice Maring cites in her Dissent, Marschner. v. Marschner, 2001 ND 4, 621 N.W.2d 339, is a closer corollary to this matter than Schiff. As in this matter, the farmer in Marschner, Richard, claimed that he was receiving less income from the farm due to forces out of his control. Marschner, 2001 ND 4, ¶15. The district court awarded a cash settlement to the wife, Carol, of $50,000, for the purpose of preserving the family farm, and failed to award spousal support. Marschner, 2001 ND 4, ¶8. It justified this non-award by stating that the liquid nature of the award would burden Richard and decrease any income advantage he may have. Marschner, 2001 ND 4, ¶15. This Court reversed and remanded the matter.

[¶18] In doing so, this Court addressed the steps the district court took to preserve the family farm and found them wanting:

> Here, the preservation of the farm appears to increase rather than decrease the potential for economic harm. Not only is Carol Marschner denied spousal support, her share of the marital estate, payable in cash, is, at Richard's option, payable over a period of ten years...
>
> Although this distribution may not be characterized as a "windfall" to Richard Marschner, the effect of the property distribution is to require Carol Marschner to forego spousal support because she is to receive her property distribution in a cash payment. As a result, she will be required to deplete her property distribution for living expenses. Richard Marschner will retain the farm. The farm may be encumbered after the payments are made to Carol Marschner but Richard Marschner will retain an income-producing asset while Carol Marschner will have depleted her share of the property distribution to find a residence and otherwise subsist. Property distribution and spousal support are overlapping issues and are to be considered together. *(citation omitted).* The property division, viewed in a vacuum, may appear equitable, but when the denial of spousal support is included in the analysis, it is not equitable.

Marschner, 2001 ND 4, ¶¶18-19

[¶19] Like Carol Marschner before her, Wendy is required to deplete her property award and wait for her cash payment over years. Kevin, like Richard Marschner, maintains the income-producing asset and will continue to have subsistence. Like the award in Marschner, the District Court's award in this matter is inequitable. A reversal and remand for further determination is appropriate.

[¶20] **C. The District erred in its determination of Kevin's child support, and thus erred in denying Wendy's spousal support claim.**

[¶21] In his Cross-Appeal, Kevin alleges that the District Court erred when it failed to include a step-down provision. Wendy does not disagree with this position. Rather, she reasserts her position, as stated in Paragraphs 91 through 93 and 106 through 108 of her principal Brief, that the District Court's tethering of the spousal support decision to an unenforceable child support provision constitutes reversible error on both issues.

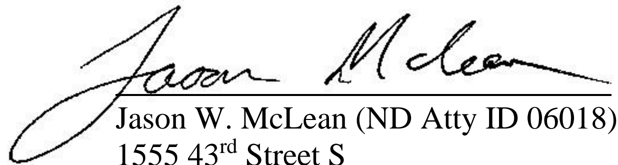
IV. Conclusion

[¶22] The "family farm" is something that is more complex than the idyllic picture of someone toiling in the fields. A family farm is more than the land itself. It is more than the implements and bins. It is more than the crops in the ground. It is even more than that classic idea of a man in a cap surveying the fields. While that is part of the picture, it is not the whole picture. Because, to borrow a phrase, behind every successful farmer on the family farm is the spouse that is there supporting his or her work.

[¶23] If it is a "laudable purpose" to preserve the family farm, it should be equally laudable to ensure that the family members who helped the farm thrive over the years are also treated fairly in a divorce. The District Court failed to do that in this matter. As a result, it is proper for this Court to reverse the findings of the District Court and remand this matter back for further determination of the valuation of the crops, distribution of the marital estate, and an award of spousal support to Wendy.

Dated this the 21st day of November 2019.

Parvey, Larson, and McLean, PLLC



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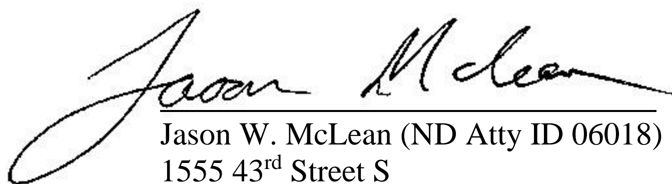
CERTIFICATE OF COMPLIANCE

[¶24] 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, as to not exceed 12 pages and is 10 pages.

[¶25] Dated this the 21st day of November 2019.

Parvey, Larson, and McLean, PLLC



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	)	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. Reply Brief 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 21st day of November 2019 in Cass County, State of North Dakota.

Christine Goodall