

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

CLARE MESSMER,)	
)	
Plaintiff/Appellee,)	Supreme Ct. Case No. 20190243
)	
vs.)	
)	Stark County District Court
ROBERT RALPH MESSMER,)	Case No. 45-2016-DM-00124
)	
Defendant/Appellant.)	

APPELLANT’S BRIEF

APPEAL FROM JUDGMENT DATED AUGUST 22, 2018; ORDER GRANTING MOTION FOR NEW TRIAL DATED NOVEMBER 7, 2018; AND AMENDED JUDGMENT DATED JUNE 12, 2019; OF THE STARK COUNTY DISTRICT COURT, THE HONORABLE RHONDA R. EHLIS

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

STATEMENT OF ISSUES.....¶ 1

STATEMENT OF THE CASE.....¶ 6

STATEMENT OF FACTS.....¶ 15

ARGUMENT.....¶ 32

 A. Standard of Review.....¶ 32

 B. The District Court Erred in the Distribution of Marital Property.....¶ 36

 i. The district court’s findings regarding the conduct of the parties during the marriage are clearly erroneous.....¶ 37

 ii. The court erred in ordering Robert to make equalization payments to Clare¶ 45

 iii. The court erred in not awarding certain real property to Robert.....¶ 49

 iv. The court erred in refusing to allocate mineral interests on an equal percentage in awarding mineral interests to the respective parties, when there was insufficient evidence to value the minerals to assure the total value and income producing ability of the marital property is accounted for and equitably distributed.....¶ 54

 C. The court erred in determining the two land parcels from Robert’s mother were a completed gift as of 2012.....¶ 58

 D. In the alternative, the court erred in determining the two land parcels from Robert’s mother are to be valued as fee simple interests, rather than as remainder interests¶ 63

 E. The Court Erred in Denying an Award of Spousal Support to Robert.....¶ 65

 F. The Court Erred in Denying an Award of Attorney’s Fees to Robert.....¶ 72

CONCLUSION.....¶ 75

ORAL ARGUMENT REQUESTED.....¶ 76

CERTIFICATE OF COMPLIANCE.....¶ 77

TABLE OF AUTHORITIES

CASES

Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 34, 673 N.W.2d 601.....¶ 38

Bakes v. Bakes, 532 N.W.2d 666, 669 (N.D. 1995).....¶ 68

Barth v. Barth, 1999 ND 91, ¶ 8, 583 N.W.2d 359.....¶ 59

Doeden v. Stubstad, 2008 ND 165, ¶ 12, 755 N.W.2d 859.....¶ 59

Dronen v. Dronen, 2009 ND 70, ¶ 41, 764 N.W.2d 675.....¶ 67

Erickson v. Erickson, 384 N.W.2d 659, 661 (N.D. 1986).....¶ 39

Fox v. Fox, 1999 ND 68, ¶ 14, 592 N.W.2d 541.....¶ 55, 68

Gierke v. Gierke, 1998 ND 100, ¶ 15, 578 N.W.2d 522, 526-27.....¶ 32

Grinaker v. Grinaker, 553 N.W.2d 204, 209.....¶ 64

Hoverson v. Hoverson, 2013 ND 48, ¶ 9, 828 N.W.2d 510.....¶ 33

In re Kaspari’s Estate, 71 N.W.2d 558, 567 (N.D. 1955).....¶ 59

Keita v. Keita, 2012 ND 234, ¶ 25, 823 N.W.2d 726.....¶ 35, 73

Kosobud v. Kosobud, 2012 ND 122, ¶ 6, 817 N.W.2d 384.....¶ 32

Kostelecky v. Kostelecky, 537 N.W.2d 551, 554 (N.D. 1995).....¶ 69

Kovarik v. Kovarik, 2009 ND 82, ¶ 13, 765 N.W.2d 511.....¶ 59, 62

Makedonsky v. North Dakota Dep’t of Human Servs., 2008 ND 49, ¶ 11,
746 N.W.2d 185.....¶ 59

Martire v. Martire, 2012 ND 197, ¶ 20, 822 N.W.2d 450.....¶ 34

<u>McKechnie v. Berg</u> , 2003 ND 136, ¶ 6, 667 N.W.2d 628.....	¶ 38
<u>Mellum v. Mellum</u> , 2000 ND 47, ¶ 19, 607 N.W.2d 580.....	¶ 67
<u>Neubauer v. Neubauer</u> , 524 N.W.2d 593, 595 (N.D. 1994).....	¶ 69
<u>Overland v. Overland</u> , 2008 ND 6, ¶ 16, 744 N.W.2d 67.....	¶ 34, 65
<u>Parisien v. Parisien</u> , 2010 ND 35, ¶ 15, 779 N.W.2d 130.....	¶ 66
<u>Paulson v. Paulson</u> , 2010 ND 100, ¶ 19, 783 N.W.2d 262.....	¶ 55, 59
<u>Pearson v. Pearson</u> , 2009 ND 154, ¶ 6, 771 N.W.2d 288.....	¶ 34, 65
<u>Ratajczak v. Ratajczak</u> , 1997 ND 122, ¶ 30, 565 N.W.2d 491.....	¶ 68
<u>Rebel v. Rebel</u> , 2016 ND 144, ¶ 7, 882 N.W.2d 256.....	¶ 33
<u>Rice v. Neether</u> , 2006 ND 247, ¶ 11, 888 N.W.2d 749.....	¶ 60
<u>Solem v. Solem</u> , 2008 ND 211, ¶ 5, 757 N.W.2d.....	¶ 34
<u>Ulsaker v. White</u> , 2006 ND ¶ 12-13, 717 N.W.2d 567).....	¶ 33
<u>Van Oosting v. Van Oosting</u> , 521 N.W.2d 93, 98 (N.D. 1994).....	¶ 55
<u>Walstad v. Walstad</u> , 2013 ND 176, ¶ 29, 837 N.W.2d 911.....	¶ 35
<u>Wanttaja v. Wanttaha</u> , 2016 ND 14, ¶ 31, 873.....	¶ 35, 73
<u>STATUTES</u>	
N.D.C.C. § 14-05-23.....	¶ 35, 73
N.D.C.C. § 14-05-24(1).....	¶ 33, 64
N.D.C.C. § 14-05-24.1.....	¶ 34, 65
N.D.C.C. § 47-09-06.....	¶ 60
<u>OTHER AUTHORITIES</u>	
27B C.J.S. <u>Divorce</u> § 852 (2009).....	¶ 59
38 Am.Jur.2d <u>Gifts</u> § 67 (1999).....	¶ 59

STATEMENT OF ISSUES

¶ 1. Whether the Court erred in its distribution of the marital property, including the equalization payments ordered.

¶ 2. Whether the Court erred in refusing to allocate mineral interests on an equal percentage in awarding mineral interests to the respective parties, when there was insufficient evidence to value the minerals to assure the total value and income producing ability of the marital property is accounted for and equitably distributed.

¶ 3. Whether the Court erred in determining the two land parcels from Robert's mother were a completed gift as of 2012 or in the alternative whether the Court erred in determining the two land parcels from Robert's mother are to be valued as fee simple interests, rather than as remainder interests.

¶ 4. Whether the Court erred in denying an award of spousal support to Robert.

¶ 5. Whether the Court erred in denying an award of attorney's fees to Robert.

STATEMENT OF THE CASE

¶ 6. This case was initiated by a Complaint filed by Clare Messmer (hereinafter Clare) on June 13, 2016. App. 14. Robert Messmer (hereinafter "Robert") filed his Answer and Counterclaim on July 1, 2016. App. 16. Clare filed Plaintiff's Answer to Defendant's Counterclaim on July 8, 2016. App. 18.

¶ 7. Trial was held on May 7, 2018. The court heard testimony from the parties, as well as Vincent Bitz, and received Plaintiff's exhibits 1-9 and 12-19 and Defendant's exhibits A-H, J-U, W, Y, Z, BB, and EE. The court entered its Memorandum Opinion and Order on July 25, 2018 with Attachment #1 Valuation and Division of Assets and Debts. App. 72.

¶ 8. The Findings of Fact, Conclusions of Law, and Order for Judgment were entered on August 22, 2018. App. 97. The Judgment was entered that same day. App. 117.

¶ 9. On September 10, 2018, Robert filed his Motion for New Trial and Alternative Motion for Rule 60B Relief. A hearing was held on October 16, 2018 on this motion.

¶ 10. On October 5, 2018, Clare filed her Motion to Amend Judgment. A hearing was held on November 5, 2019 on this motion.

¶ 11. On November 7, 2019, the court issued its Order Granting Motion for New Trial setting a new trial on the issues of the valuation of the Brady Wind turbine lease and valuation of the 320 acres that were newly discovered. App. 122.

¶ 12. On January 10, 2019, Robert filed a Notice of Appeal. App. 129. The appeal was dismissed on March 6, 2019 by the Supreme Court, however. App. 132.

¶ 13. The second trial was held on April 12, 2019. The court heard testimony from the parties, as well as Matt McPherson and James Messmer, and received Plaintiff's exhibits 1 and 2, and Defendant's exhibit II. On June 12, 2019, the court issued its Memorandum Opinion Amended Findings of Fact Conclusions of Law and Order for Amended Judgment with Attachment #1 Valuation and Division of Assets and Debts (App. 161) and Amended Judgment (App. 182).

¶ 14. Robert filed his Notice of Appeal on August 11, 2019. App. 192.

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STATEMENT OF FACTS

¶ 15. The parties were married on June 29, 1984 in Stark County, North Dakota, resulting in a 34 year marriage. 5/7/18 Transcript 63:16-19 and 4/12/19 Transcript 217:24-25. Three children were born of this marriage, all of whom are adults. Id. at 64:23-65:2.

¶ 16. Clare is currently 56 years of age (5/7/18 Transcript 60:13) and Robert is 62 years of age (5/7/18 Transcript 215:9).

¶ 17. Clare has been employed with Nodak Mutual Insurance Company/Farm Bureau since 2013, as a licensed insurance producer and owns her own corporation, when the parties invested in and set up the insurance corporation, Clare Messmer Corporation. 5/7/18 Transcript 85:23-87:8. She attended Dickinson State University, receiving a bachelor degree in business administration and accounting. 5/7/18 Transcript 63:4-9. She also has training as an E.M.T. Clare has had employment off the farm/ranch for the majority of the marriage, previously working at FSA for 25 years before retiring as the County Executive Director. 5/7/18 Transcript 74:12-75:8. Clare is healthy with a significant earning ability and adequate cash flow. 4/12/19 Transcript 35:6-7. The tax returns documents that she had an income of \$204,865 in 2015 (5/7/18 Transcript 152: 21-24), \$243,231 in 2016 (5/7/18 Transcript 159:19-23), and \$148,075 in 2017 (5/7/18 Transcript 164:3-5). However, once Clare's draws from the corporation are added in, her total income for 2017 is \$232,270. Additionally, Clare recently purchased additional interests in Valley Insurance Agency, Inc. for \$75,000, which gives her a 10% interest in the company. 5/7/18 Transcript 139:18-140:22. This asset was never disclosed by Clare until it was found through discovery demands. 5/7/18 Transcript 169:3-170:24.

¶ 18. Robert has been self-employed as a farmer/rancher since prior to the marriage. 5/7/18 Transcript 215:17-22. He has an associate degree in Agriculture from Bismarck State College. 5/7/18 Transcript 215:11-14. His earning capacity has significantly diminished following his deteriorating health. Robert's total income showed a loss in 2015, was \$78,743 in 2016, and \$94,843 in 2017, of which \$54,753 were capital gains from the sale of breeding livestock and equipment in downsizing. Not only is this income sporadic, being realized at limited windows such as fall harvest or in annual cattle sales, but it is seasonally vulnerable and subject to operating loans and similar priority obligations to be paid before his utilization of those funds is available. Robert testified that he expects his income to decrease significantly due to his health, forced retirement, and consistent with the parties' long-term plan of their children taking over the farm/ranch. 4/12/19 Transcript 69:21-71:4 and 72:24-73:6.

¶ 19. Clare has engaged in extra-marital affairs, resulting in significant expenditures of marital funds, destruction of the marriage, and this divorce. Clare admitted to one extra-marital affair with Don Foster (5/7/18 Transcript 176:7-9), but it is Robert's belief that Clare had additional affairs throughout the marriage based upon the circumstances and Clare's statements to him (4/12/19 Transcript 219:21-220:8). Robert introduced a credit card summary of Clare's spending from the time her affair began with Dan Foster to December 2016. App. 51. Clare admitted to four trips taken to Las Vegas to spend with her extra-marital affair. Together with additional personal trips, Clare spent \$8,472 on trips from February through December 2016; \$44,029.49 was spent on miscellaneous furniture, household and other purchases primarily from Amazon, QVC, HSN, Overstock, and numerous weight loss and beauty fads, such as Dietitian Cassie,

Garcinia Crown, Total Cleanse, RF Vitamins, Beachbody Fitness, and Bodylift Fitness; and \$17,362.90 was spent exclusively on clothing. *Id.* Robert testified that when she left the marital home Clare left clothes and shoes in the closet, dresser, and in boxes that were never worn, never taken out of the package, and still had tags on them. 5/7/18 Transcript 227:1-20. Rather than spending time with Robert, their children, and the family agricultural operation, she spent extraordinary marital funds and time increasing her personal standard of living and lifestyle, time away from employment, and spending additional marital funds devoted to her extra-marital relationship.

¶ 20. Clare testified that she had some ongoing health issues, but that she is still able to work. 5/7/18 Transcript 60:21-61:5.

¶ 21. Robert has diabetes, high blood pressure, and heart disease. He has had open heart surgery, a splenectomy, appendectomy, and prior heart attack between 1999 and 2001. 5/7/18 Transcript 83:1-84:2. He also suffered a stroke and heart attack on February 12, 2017, requiring a double bi-pass surgery, 12 stints, and ongoing medical care, therapy, and counseling. 5/7/18 Transcript 215:24-10. Only 40% of his heart remains functioning. *Id.* While he was recovering from this major event, he had further been trying to follow the orders of his doctors to manage the physical, emotional, and mental stress of this divorce and infidelity by Clare, as not to risk another attack or complications. Robert continues to have impaired function on the left side of his body, remains at high risk for additional heart and stroke complications, requires physical, emotional, and mental health therapy, and suffers ongoing sleeplessness, restlessness, and anxiety. Many of the daily medications that Robert takes further impair his memory and ability to concentrate. For example, Robert takes Digoxin for heart failure, which side effects include confusion,

hallucinations, and unusual thoughts or behavior. Robert also takes a statin drug, Rosuvastatin to lower cholesterol and triglycerides, which side effects include confusion, memory problems, headaches, and unusual weakness or tired feeling.

¶ 22. The evidence showed that these health conditions have caused permanent damage that will require Robert to change his career and negate his ability to meet the basic functions of his current employment and lifestyle. The district court found that “his medical issues are serious and may impact his further ability to farm and ranch without the assistance of others” (App. 81 at ¶ 34) and that “Robert will not be able to continue to actively farm/ranch for much longer” (App. 84 at ¶ 46).

¶ 23. The parties have substantial real property and income-producing property interests. App. 21. The parties own a home in Richardton that is paid in full. 5/7/18 Transcript 100:4-5.

¶ 24. Prior to the marriage, Robert owned 137-95 Section 1, 137-94 Section 14, 137-94 Section 34 and 36. App. 20; 5/7/18 Transcript 97:12-19, 98:7, 13-15. Section 21 of 137-92 was purchased from Clare’s mother in 2014. 5/7/18 Transcript 99:7-11. This piece of land has the Quonset, barn for livestock, corrals, garage, electricity, and water for the farm operation. Robert inherited the farmland located in 141-94 Section 30 and 140-95 Section 12 from Anna Rebel. App. 21. The pasture land located in 137-92 Section 4 and 9 were purchased from Clare’s father’s estate. Id. Clare used \$68,000 from her inheritance to put towards the purchase of the land, with the remaining coming from the farming income. 5/7/18 Transcript 198:3-199:6. The other land that was purchased was purchased using money that Robert inherited, including the 2014 purchase of land from Clare’s mother in 2014. Id. at 199:10-18 and 211:15-25.

¶ 25. Robert testified that if the farmland gets split up he will not be able to continue farming and ranching. 4/12/19 Transcript 216:20-217:23.

¶ 26. Clare and her family have oil and mineral income coming in on a regular basis (4/12/19 Transcript 32:10-12), whereas Robert's mineral interests are not producing (5/7/18 Transcript 224:15-17). Exhibit C documents that Clare was deeded a 1/42nd interest in all oil, gas, coal, gravel, scoria, and all other minerals in and under four separate Sections of land in Stark, Dunn, and Golden Valley Counties. App. 22. Exhibit E is a Mineral Deed transferring a 1/6th vested interest to Clare, with a life estate reserved to Eva Kilzer to the use, possession, and income from parcels within three Sections in Dunn County, and parcels within 9 Sections in Stark County, many with producing wells, as well as gravel, sand, scoria, and other minerals thereon. App. 31. Clare also holds mineral interests in the Benard Kilzer Irrevocable Mineral Trust, Exhibit F. App. 33. Neither party presented a value for the minerals. 5/7/18 Transcript 224:24-25.

¶ 27. On February 13, 2012 Robert's mother, Kathryn Messmer, executed a Quit Claim Deed transferring 137-95 SE1/4 of Section 12 and 138-94 E½E½ of Section 34 to Robert, reserving a life estate. App. 160. No evidence exists that the Quit Claim Deed was ever delivered to Robert. Clare and Robert both testified that until Kathryn passed away in July, 2018, after the first trial, she wasn't aware the deed existed. 4/12/19 Transcript 30:25-31:8 and 63:5-14. James Messmer has consistently operated on the property (4/12/19 Transcript 31:3-4, 64:22-25, 82:15-24, and 85:7-10), and he himself testified that he was not aware that his mother had deeded it to Robert (4/12/19 Transcript 82:6-12). The deeds and all correspondence were retained by Kathryn and her legal

counsel, and all financial matters related to the property, including payment of the real estate taxes, remained under Kathryn's control.

¶ 28. The parties have a lease with Brady Wind which the parties valued at \$1,307,934. 4/12/19 Transcript 19:15-19 and 67:6-8.

¶ 29. Clare has retained exclusive use of the income generated from the Messmer insurance business for 2016 and 2017.

¶ 30. Only Clare has and continues to accumulate monies into her retirement accounts through the duration of these proceedings, with significant value.

¶ 31. Clare introduced her monthly living expenses totaling \$5,252. App. 20. Robert introduced his monthly estimated living expenses totaling \$5,777. 5/7/18 Transcript 202:2-4.

ARGUMENT

A. Standard of Review

¶ 32. A district court's decision regarding division of property is a finding of fact reversible on appeal only if clearly erroneous. Kosobud v. Kosobud, 2012 ND 122, ¶ 6, 817 N.W.2d 384.

A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence the reviewing court is left with a definite and firm conviction a mistake has been made.

Gierke v. Gierke, 1998 ND 100, ¶ 15, 578 N.W.2d 522, 526-27.

¶ 33. Pursuant to N.D.C.C. § 14-05-24(1), a district court is required to make an equitable distribution of all marital property and debts. "A 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."

Hoverson v. Hoverson, 2013 ND 48, ¶ 9, 828 N.W.2d 510 (citing Ulsaker v. White, 2006 ND ¶ 12-13, 717 N.W.2d 567). To equitably distribute the marital estate, the court must consider the Ruff-Fischer factors, which include:

The respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Rebel v. Rebel, 2016 ND 144, ¶ 7, 882 N.W.2d 256. Although the court is not required to make specific findings on each factor, it must explain the rationale for its decision. Id.

¶ 34. Pursuant to N.D.C.C. § 14-05-24.1, a district court may require one party to pay spousal support to the other party. An award of spousal support is a “finding of fact which will not be set aside on appeal unless clearly erroneous.” Solem v. Solem, 2008 ND 211, ¶ 5, 757 N.W.2d. The district court must consider the Ruff-Fischer factors in determining an award of spousal support. Pearson v. Pearson, 2009 ND 154, ¶ 6, 771 N.W.2d 288. “Spousal support awards must also be made in consideration of the needs of the spouse seeking support and of the supporting spouse’s needs and ability to pay.” Overland v. Overland, 2008 ND 6, ¶ 16, 744 N.W.2d 67. The Court has further held that “property distribution and spousal support are interrelated and must be considered together.” Martire v. Martire, 2012 ND 197, ¶ 20, 822 N.W.2d 450.

¶ 35. N.D.C.C. § 14-05-23 gives the district court discretion to award attorney’s fees in divorce proceedings. The primary standard is “consideration of one spouse’s needs and the other spouse’s ability to pay.” Keita v. Keita, 2012 ND 234, ¶ 25, 823 N.W.2d 726. The district court should also consider “the property owned by each party, their relative incomes, and whether property is liquid or fixed assets.” Wanttaja v. Wanttaha,

2016 ND 14, ¶ 31, 873. “A district court’s award of attorney fees will not be disturbed on appeal unless the appealing party establishes the court abused its discretion.” Walstad v. Walstad, 2013 ND 176, ¶ 29, 837 N.W.2d 911. “A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law.” Id.

B. The Court Erred in its Distribution of the Marital Property

¶ 36. The district court distribution of marital property was clearly erroneous. First, the court’s findings regarding the conduct of the parties during the marriage were not supported by the evidence. Second, the district court erred in ordering Robert to make equalization payments to Clare. Additionally, the district court erred in its distribution of the land. Finally, the district court’s allocation of the mineral interests was clearly erroneous as in awarding mineral interests to the respective parties, when there was insufficient evidence to value the minerals to assure the total value and income producing ability of the marital property is accounted for and equitably distributed.

i. The district court’s findings regarding the conduct of the parties during the marriage are clearly erroneous.

¶ 37. The district court’s findings regarding the conduct of the parties during the marriage are clearly erroneous as they are not supported by the evidence. While the district court considered the non-economic fault of Clare in having an extra-marital affair in the last year of the parties’ marriage (App. 78 at ¶ 25 and 27), it failed to consider the economic fault that accompanied it. Further, the court found that Robert had non-economic fault with no evidence to support its conclusion. This is clearly erroneous.

¶ 38. “Both ‘economic and non-economic fault are proper factors for the trial court to consider in dividing the marital property.’” Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 34, 673 N.W.2d 601 (quoting McKechnie v. Berg, 2003 ND 136, ¶ 6, 667 N.W.2d 628. In this case, Clare committed both economic and non-economic fault. Evidence was presented that Clare engaged in extra-marital affairs, resulting in significant expenditures of marital funds, destruction of the marriage, and this divorce.

¶ 39. As the district court acknowledged, Clare committed non-economic fault in having extra-marital affairs. Clare admitted to one extra-marital affair with Don Foster (5/7/18 Transcript 176:7-9), but it is Robert’s belief that Clare has additional affairs throughout the marriage based upon the circumstances and Clare’s statements to him. Evidence of adultery can be fault and may be considered in the distribution of the marital estate. Erickson v. Erickson, 384 N.W.2d 659, 661 (N.D. 1986). Robert sought to question Clare via discovery questions and deposition to inquire into Clare’s extra-marital affairs, the amount and sources of marital funds spent on these activities, the times and locations of these activities, and the identity of the additional persons involved or whom have knowledge of these activities. Clare has not been forthcoming in her responses.

¶ 40. Clare also committed economic fault; however, the district court erroneously found that “[n]either party’s behavior dissipated marital assets in an amount that would affect this estate.” App. 82 at ¶ 42. Robert introduced a credit card summary of Clare’s spending from the time her affair began with Dan Foster to December 2016. App. 51. Clare admitted to four trips taken to Las Vegas to spend with her extra-marital affair. Together with additional personal trips, Clare spent \$8,472 on trips from February through December 2016; \$44,029.49 was spent on miscellaneous furniture, household and

other purchases primarily from Amazon, QVC, HSN, Overstock, and numerous weight loss and beauty fads, such as Dietitian Cassie, Garcinia Crown, Total Cleanse, RF Vitamins, Beachbody Fitness, and Bodylift Fitness; and \$17,362.90 was spent exclusively on clothing. *Id.* Rather than spending time with Robert, their children, and the family agricultural operation, she spent extraordinary marital funds and time increasing her personal standard of living and lifestyle, time away from employment, and spending additional marital funds devoted to her extra-marital relationship.

¶ 41. Clare’s conduct has had a direct impact in the loss of the marriage, an even more pronounced impact on Robert’s health and stress levels, and his now life-long limitations imposed with respect to his health, ability to work, and earning ability. Robert’s most recent heart attack and stroke followed Clare’s publication of her own sexually explicit pictures and videos, which were sent to the parties’ children. 5/7/8 Transcript 221:14-222:15.

¶ 42. Further the district court found that “Robert testified at trial, stating that Clare did not contribute to the family, and basically dismissed her efforts, both as a homemaker and a wage earner, to support her family and contribute to the success of the farming operation.” App. 79 at ¶ 26. That is not an accurate recitation of Robert’s testimony. Robert actually testified that Clare helped on the farm until their son got older, and then she became preoccupied with other things. 5/7/1818 Transcript 234:13-17. He further testified that that they both contributed financially for food and other household items. *Id.* at 235:5-17. He never stated that she did not contribute to the family.

¶ 43. The district court further found, “[i]t is clear to the Court that Robert has minimized and belittled Clare’s hard work to help support their family over the years, and

that behavior has not only contributed to the demise of the marriage, but was probably a factor in Clare's reasons for looking outside of her marriage." App. 79 at ¶ 28. However, there was no evidence to support such a finding. As explained above, the district court mischaracterized Robert's testimony. Additionally, there was no evidence presented that Robert minimized or belittled Clare's hard work to help support the family or that it contributed to the demise of the marriage or Clare's affairs. Even Clare herself did not make any such accusations when she testified regarding Robert's alleged conduct during the marriage. See 5/7/18 Transcript 113:13-118:22.

¶ 44. Based on the above, the district court's findings regarding the conduct of the parties during the marriage were clearly erroneous. They were not supported by the evidence. Further, even if there was some evidence to support it, a review of the entire evidence makes it clear a mistake has been made. As such, Robert respectfully requests that the Court reverse the district court's findings and judgment.

ii. The court erred in ordering Robert to make equalization payments to Clare

¶ 45. The district court erred in requiring Robert to make an equalization payment to Clare in the amount of \$200,000 in yearly installments of \$21,134.19, which includes interest at a rate of 8.5% per annum commencing June 11, 2020. App. 174-175 at ¶ 67. In order to avoid the interest, he would have to pay it in a lump sum; however, Robert does not have the cash flow to make an equalization payment without the necessity of liquidating assets and incurring significant tax consequences. The Court's valuation of the cattle operation already includes a value of the calf crop of 2018, which would otherwise be income to Robert, but does not offset any of the expenses that he has had to incur in terms of feed, labor, vet and other costs. Further, the amount of the annual equalization payments

are approximately the same amount as the income Robert will receive from the Brady Wind Farm lease, thus depriving him of that income for the next twenty years. App. 159 and App. 174-175 at ¶ 67. The district court specifically relied on Robert receiving this payment in finding that he does not need spousal support because he has this income to rely on. App. 170 at ¶ 46.

¶ 46. As explained in detail above, Robert's earning abilities have become increasingly limited. Robert's total income showed a loss in 2015, was \$78,743 in 2016, and \$94,843 in 2017, of which \$54,753 were capital gains from the sale of breeding livestock and equipment in downsizing. Not only is this income sporadic, being realized at limited windows such as fall harvest or in annual cattle sales, but it is seasonally vulnerable and subject to operating loans and similar priority obligations to be paid before his utilization of those funds is available. Robert testified that he expects his income to decrease significantly due to his health, forced retirement, and consistent with the parties' long-term plan of their children taking over the farm/ranch. 4/12/19 Transcript 69:21-71:4 and 72:24-73:6.

¶ 47. Clare has retained exclusive use of the income generated from the Messmer insurance business for 2016, 2017, 2018, and 2019. Three and one quarter years at average gross profit from the insurance business of \$237,750 annually had provided Clare exclusively cash of \$772,688 during the pendency of this action. That alone should serve as an equalization payment in the distribution of the marital estate.

¶ 48. Based on the above and the entire evidence presented in the case, it is clear that a mistake has been made in the equalization payment that Robert was ordered to pay

to Clare. As such, Robert respectfully requests that this Court reverse the district court's findings and judgment

iii. The court erred in not awarding certain real property to Robert

¶ 49. The district court's findings and judgment were clearly erroneous regarding its distribution of the real property. The court's distribution greatly limits or completely prohibits Robert's ability to continue farming in any capacity or leasing out the land as planned. Further, it fails to appropriately account for the fact that a majority of the land was acquired by Robert prior to the marriage, inherited by Robert, or paid for with money inherited by Robert.

¶ 50. Prior to the marriage, Robert owned 137-95 Section 1, 137-94 Section 14, 137-94 Section 34 and 36. App. 20; 5/7/18 Transcript 97:12-19, 98:7, 13-15. Section 21 of 137-92 was purchased from Clare's mother in 2014. 5/7/18 Transcript 99:7-11. This piece of land has the Quonset, barn for livestock, corrals, garage, electricity, and water for the farm operation. Robert inherited the farmland located in 141-94 Section 30 and 140-95 Section 12 from Anna Rebel. App. 21. The pasture land located in 137-92 Sections 4 and 9 were purchased from Clare's father's estate. Id. Clare used \$68,000 from her inheritance to put towards the purchase of the land, with the remaining coming from the farming income. 5/7/18 Transcript 198:3-199:6. The other land that was purchased was purchased using money that Robert inherited, including the 2014 purchase of land from Clare's mother in 2014. Id. at 199:10-18 and 211:15-25. Further, Robert testified that if the farmland gets split up he will not be able to continue farming and ranching. 4/12/19 Transcript 216:20-217:23.

¶ 51. In its original distribution, the court awarded Robert the pasture land 137-92-Sec.21, which includes the farmstead with buildings. App. 91. However, in the Amended Judgment, Clare was awarded this land. App. 186. In doing so, the court took away the Quonset, barn for livestock, corrals, garage, electricity, and water for the farm operation. Robert has no ability to store any of the equipment he was awarded. He has nowhere for the cattle to be held. Further he has no access to electricity or water to run the operation. This will make it impossible for Robert to continue with the current operation. Further, Robert does not have the funds to replace these items or put them into the property he was awarded.

¶ 52. The district court found that “Robert still farms and will need the land in order to make a living, either from farming the land himself, or by renting it out and living off the rental income from the leases. The cattle are also another source of income for Robert.” App. 80 at ¶ 32. The court further found that without the land, “he may need the assistance of spousal support from Clare if his health deteriorates.” App. 83-84 at ¶ 45. However, it then took away the most important piece of land to the farming operation.

¶ 53. Robert respectfully requests, based on the above, that the Court reverse the district court’s findings and judgment. The distribution of the land is clearly erroneous given the evidence presented and the district court’s own findings.

iv. The court erred in refusing to allocate mineral interests on an equal percentage in awarding mineral interests to the respective parties, when there was insufficient evidence to value the minerals to assure the total value and income producing ability of the marital property is accounted for and equitably distributed

¶ 54. The district court’s award of mineral interests to the parties without values as to these assets or their income producing ability is clearly erroneous. The court found,

The parties also have mineral interests to divide. Unfortunately, neither party had these minerals appraised or even valued, and therefore the Court has no value to place upon them. It is clear from the evidence presented at Court that they have some value, but the Court was not given a clear picture as to the realistic value of the minerals. Therefore, the Court will award to Clare her family minerals in the Eva Kilzer Mineral Trust and the minerals in the Bernard A. Kilzer Irrevocable Family Mineral Trust, and Robert shall be awarded the minerals granted to Robert from the estate of Anna Rebel.

App. 85-86 at ¶ 52.

¶ 55. “Trusts are generally included as marital property subject to equitable distribution by the trial court.” Paulson v. Paulson, 2010 ND 100, ¶ 19, 783 N.W.2d 262 (citing Fox v. Fox, 1999 ND 68, ¶ 14, 592 N.W.2d 541). “Like pensions or retirement plans, a trial court may divide a trust by awarding the present value of the benefits.” Paulson at ¶ 19 (citing Van Oosting v. Van Oosting, 521 N.W.2d 93, 98 (N.D. 1994)). However, “the trial court may also award a percentage of future payments when present valuation is too speculative or there are insufficient assets for a present division.” Paulson at ¶ 19.

¶ 56. In this case, there is no question that the parties have a present and vested interest in the minerals and related interests, the minerals are marital assets, and the parties will continue to receive benefits from the mineral interests; however, no evidence of the value of any of the mineral interests was presented at trial. Therefore, the mineral interests are too speculative in value, thus requiring and justifying an equal division of all mineral interests held and an equal percentage of future royalty and other payments from the mineral interests. Further evidence was presented that the mineral interests from the Kilzer Mineral Trusts had producing wells, while the mineral interests from Anna Rebel had no wells or leases. Thus, the district court’s distribution of the minerals is inequitable.

¶ 57. Robert respectfully requests this Court reverse the district court's distribution of the mineral assets. Such distribution was clearly erroneous and an abuse of discretion in that it was a misapplication of the law. Further, the distribution is inequitable.

C. The court erred in determining the two land parcels from Robert's mother were a completed gift as of 2012

¶ 58. The district court's findings and judgment were clearly erroneous in determining that the two land parcels from Robert's mother were a completed gift in 2012. Such a finding is not supported by the law or the facts and evidence presented in this case. As such, Robert respectfully requests that this Court reverse such finding.

¶ 59. "In order to be considered a property asset in the marital estate, the property must be a present property interest, rather than a mere expectancy." Paulson v. Paulson, 2010 ND 100, ¶ 19, 783 N.W.2d 262 (citing 27B C.J.S. Divorce § 852 (2009)). As set forth by this Court in Kovarik v. Kovarik, 2009 ND 82, ¶ 13, 765 N.W.2d 511, a valid gift must satisfy certain prerequisites, which are absent in this case:

A district court may consider property to be part of the marital estate, if supported by evidence, even if a party claims it is owned by a nonparty. Barth v. Barth, 1999 ND 91, ¶ 8, 583 N.W.2d 359. "The principles applicable to inter-vivos gifts in general apply as well to purported gifts of certificates of deposit." 38 Am.Jur.2d Gifts § 67 (1999). A valid gift made during the donor's lifetime must satisfy certain requirements—donative intent, delivery, actual or constructive, and acceptance by donee. Makedonsky v. North Dakota Dep't of Human Servs., 2008 ND 49, ¶ 11, 746 N.W.2d 185. ("A valid gift requires an intention by the donor to then and there give the property to the donee, coupled with an actual or constructive delivery of the property to the donee and acceptance of the property by the donee.") A donor's intent is a question of fact. Doeden v. Stubstad, 2008 ND 165, ¶ 12, 755 N.W.2d 859. The actual or constructive delivery must be "of a nature sufficient to divest the owner of all dominion over the property and to invest the donee therewith." In re Kaspari's Estate, 71 N.W.2d 558, 567 (N.D. 1955).

¶ 60. Here, the Quit Claim Deed was never delivered to Robert. Rather, it was retained by Kathryn's estate planning attorney with copies provided only to her. Pursuant

to N.D.C.C. § 47-09-06, “a grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor and is presumed to have been delivered at its date.” Emphasis added. This Court has clarified that delivery must be proven, based on the circumstances presented. Rice v. Neether, 2016 ND 247, ¶ 11, 888 N.W.2d 749. No evidence exists that the Quit Claim Deed was ever delivered to Robert. Clare and Robert both testified that until Kathryn passed away in July, 2018, after the first trial, they were not aware the deed existed. 4/12/19 Transcript 30:25-31:8 and 63:5-14.

¶ 61. Additionally, there can be no gift, as there is no evidence of notice to Robert or that Kathryn intended to divest herself of the use or absolute control of the property. The district court’s own findings provide, “[n]either Clare nor Robert knew that they owned a remainder interest in this three hundred twenty acres as of the date of the first trial in May, 2018.” App. 163 at ¶ 13. James Messmer has consistently operated on the property (4/12/19 Transcript 31:3-4, 64:22-25, 82:15-24, and 85:7-10), and he himself testified that he was not aware that his mother had deeded it to Robert (4/12/19 Transcript 82:6-12). The deeds and all correspondence were retained by Kathryn and her legal counsel, and all financial matters related to the property, including payment of the real estate taxes, remained under Kathryn’s control.

¶ 62. Based on the above, no valid gift existed at the time of trial in this case. Kovarik, supra. As such, the district court finding was clearly erroneous. Therefore, such finding should be reversed by this Court.

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D. In the alternative, the court erred in determining the two land parcels from Robert's mother are to be valued as fee simple interests, rather than as remainder interests

¶ 63. If the Court affirms that the two land parcels from Robert's mother were completed as a gift prior to the date of separation, the district court's valuation of the parcels was an abuse of discretion, based on a misapplication of the law.

¶ 64. Pursuant to N.D.C.C. § 14-05-24(1), the valuation date for marital property is the date of service of the summons or the date of separation, whichever occurs first, when the parties cannot agree on a date. As of the date of service of the summons, and even the date of the trial in this case, the only vested interest that can be argued as held by Robert was that of a remainder interest in the two land parcels, and subject to the life estate of his mother, Kathryn Messmer. To set a date of valuation as of the Order Granting Motion for New Trial creates a precedent that valuation of a marital estate will be an endless moving target and open the door for ongoing motions for new trial on the basis that other assets, which were valued at different timelines are then constantly "outdated," or as in this case, previous interests that were not 100% vested have now become vested. The Court declined this moving target approach to valuation in Grinaker v. Grinaker, 553 N.W.2d 204, 209, specifically discussing that only in "extraordinary cases when a substantial, unanticipated change in valuation of an asset occurs after trial but before distribution" can the valuation be changed.

E. The Court Erred in Denying an Award of Spousal Support to Robert

¶ 65. Pursuant to N.D.C.C. § 14-05-24.1, "taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for any period of time." The district court must consider the Ruff-Fischer

factors in determining an award of spousal support. Pearson v. Pearson, 2009 ND 154, ¶ 6, 771 N.W.2d 288. “Spousal support awards must also be made in consideration of the needs of the spouse seeking support and of the supporting spouse’s needs and ability to pay.” Overland v. Overland, 2008 ND 6, ¶ 16, 744 N.W.2d 67.

¶ 66. Robert’s necessitated change in employment to attend to and accommodate his health factors justifies an award of permanent spousal support. This Court has held an award of permanent spousal support was more appropriate than a temporary rehabilitative spousal support award because of Jill Parisien’s age, health difficulties, and earning capacity. Parisien v. Parisien, 2010 ND 35, ¶ 15, 779 N.W.2d 130. The Court found that Jill Parisien, who was 50 years old at the time of the divorce, had reached her maximum earning capacity at \$24,000 a year, and to exceed that level of earnings, she would need to further her education, which at that stage of her life would not necessarily be awarded. Id. The Court further held that a greater property distribution does not necessarily eliminate the need for spousal support. Id.

¶ 67. Further, “a difference in earning power is an important factor in both spousal support and property division determinations.” Dronen v. Dronen, 2009 ND 70, ¶ 41, 764 N.W.2d 675 (quoting Mellum v. Mellum, 2000 ND 47, ¶ 19, 607 N.W.2d 580). Robert’s 2016 and 2017 average income earning ability, utilizing all the ag real estate, cattle, and equipment, generated total income of \$173,586, of which \$54,753 were capital gains from the sale of downsizing breeding livestock and equipment. In contrast, Clare’s income for those two years was \$475,501. However, the district court fails to address the disparity in the parties’ respective earning abilities.

¶ 68. A party need not dissipate his property award for living expenses. Ratajczak v. Ratajczak, 1997 ND 122, ¶ 30, 565 N.W.2d 491. Further, a disadvantaged spouse is not required to deplete his property distribution in order to live. See, e.g. Bakes v. Bakes, 532 N.W.2d 666, 669 (N.D. 1995) and Fox v. Fox, 1999 ND 68, 592 N.W.2d 541. In this case, Robert’s inability to physically manage a cattle operation will result in sale of those assets, taxes, and loss of that income source. Robert testified that his expected total monthly living expenses post-divorce would be \$5,777. Transcript 202:2-4.

¶ 69. Moreover, any sale required of the land in order for Robert to make monthly living expenses and routine cash flow needs, will bring significant capital gains tax debt (4/12/19 Transcript 74:1-6), which the court has not considered in its determination. This Court has recognized matters of taxation are part of the pragmatic effects of property division and spousal support and should be considered by the trial court in making those findings. See e.g. Kostelecky v. Kostelecky, 537 N.W.2d 551, 554 (N.D. 1995) and Neubauer v. Neubauer, 524 N.W.2d 593, 595 (N.D. 1994).

¶ 70. Further, the district court specifically relied on Robert receiving the payment from the Brady Wind Farm lease in finding that he does not need spousal support because he has this income to rely on. App. 170 at ¶ 46. However, it then ordered Robert to make annual equalization payments to Clare which are approximately the same amount as the income Robert will receive from the Brady Wind Farm lease, thus depriving him of that income for the next twenty years. App. 159 and App. 174-175 at ¶ 67. Moreover, the court found that without the land, “he may need the assistance of spousal support from Clare if his health deteriorates.” App. 83-84 at ¶ 45. However, it then awarded the most important piece of land for the farming operation to Clare, as explained above.

¶ 71. Based on the above, the court's denial of spousal support was clearly erroneous. When considering the facts and evidence presented, the court's own findings related to spousal support, and the interrelatedness to the distribution of the property. Robert is in need of spousal support. Therefore, Robert respectfully requests that the decision be reversed.

F. The Court Erred in Denying an Award of Attorney's Fees to Robert

¶ 72. The district court erred in denying an award of attorney's fees to Robert based on his needs, Clare's ability to pay, and Clare's frustration of discovery of evidence relevant to her misconduct and related dissipation of marital funds.

¶ 73. N.D.C.C. § 14-05-23 authorizes an award of attorney's fees in a divorce case. The primary standard is "consideration of one spouse's needs and the other spouse's ability to pay." Keita v. Keita, 2012 ND 234, ¶ 25, 823 N.W.2d 726. The district court should also consider "the property owned by each party, their relative incomes, and whether property is liquid or fixed assets." Wanttaja v. Wanttaha, 2016 ND 14, ¶ 31, 873.

¶ 74. As explained in detail above, Robert experienced a significant decrease in earning ability, along with an increase in expenses related to his health conditions. In contrast, Clare continues to increase her income producing ability, making more than 2.5 times that of Robert. Further, due to the distribution of the property and the equalization payments ordered to be paid to Clare, Robert is in need of payment of his attorney's fees. Further, Clare has the ability to pay. Therefore, Robert respectfully requests that the district court's findings and Amended Judgment be reversed.

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CONCLUSION

¶ 75. Robert respectfully requests that the Amended Judgment be reversed. The district court's distribution of the marital estate was clearly erroneous. It committed errors of law and errors of fact. Further, its inclusion of the property deeded to Robert by his mother in the marital estate was clearly erroneous. Finally, the district court erred in failing to award Robert spousal support and attorney's fees.

ORAL ARGUMENT REQUESTED

¶ 76. Appellant respectfully requests oral argument. Oral argument would be helpful to the court as it would allow further clarification of the facts and legal issues, as well as provide the ability for the parties to answer any questions that the Court may have.

CERTIFICATE OF COMPLIANCE

¶ 77. The undersigned, as the attorney representing Appellant, Robert Messmer, and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 28 pages.

DATED this 6th day of December, 2019.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

CLARE MESSMER,)	
)	
Plaintiff/Respondent,)	AFFIDAVIT OF ELECTRONIC
)	SERVICE
vs.)	
)	Supreme Ct. Case No. 20190243
ROBERT RALPH MESSMER,)	District Ct. Case No. 45-2016-DM-00124
)	
Defendant/Appellant.)	
)	
STATE OF NORTH DAKOTA)	
) ss.	
COUNTY OF MERCER)	

JENNIFER M. GOOSS, being first duly sworn, does depose and state that she is of legal age and not a party to the above entitled matter and on December 6, 2019, the following documents:

- A. Appellant’s Brief
- B. Appendix
- C. Affidavit of Electronic Service

was filed electronically to the addresses as given below:

Supreme Court of North Dakota supclerkofcourt@ndcourts.gov	Dennis Linquist dwlindquist65@gmail.com
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/s/ Jennifer M. Gooss
JENNIFER M. GOOSS