

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME CASE NO. 20200087
DICKEY COUNTY CASE NO. 2012-PR-00011

In the Matter of the Estate of Delbert G.)
Moore, Deceased)
-----)
Charles Minard, individually and as)
Personal Representative of the Estate of)
Delbert G. Moore, deceased,)
)
Petitioner and Appellee,)
)
v.)
)
Donald B. Moore and Scott Moore,)
)
Respondents and Appellants,)
)
Glenn W. Moore & Sons,)
)
Claimant and Appellant, and)
)
Candice Eberhart and Terry Minard,)
)
Respondents and Appellees.)

**BRIEF OF APPELLANTS DONALD
B. MOORE, SCOTT MOORE, AND
GLENN W. MOORE & SONS**

APPEAL FROM THE JUNE 27, 2019 ORDER, THE DECEMBER 19, 2019 ORDER
FOR JUDGMENT, AND THE FEBRUARY 25, 2020 AMENDED JUDGMENT BY
THE DICKEY COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT,
THE HONORABLE CHERIE L. CLARK, PRESIDING

David J. Smith #06610
Tyler J. Malm #07575
Smith Porsborg Schweigert
Armstrong Moldenhauer & Smith
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Appellants

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I. STATEMENT OF ISSUES

[¶1] Whether the district court erred in excluding Scott Moore’s labor charge as agreed to be charged by the partners in accounting for the profits and losses of the Glenn W. Moore & Sons partnership from the date of Delbert Moore’s death until certain real property was sold.

[¶2] Whether the district court erred in denying Scott Moore’s claim for interest on distributions improperly withheld by the Estate of Delbert Moore for more than four years.

II. STATEMENT OF THE CASE

[¶3] This case was previously before this Court in 2018. See In the Matter of the Estate of Delbert G. Moore, Deceased, 2018 ND 221, 918 N.W.2d 69. At this Court’s direction, the matter was remanded “for an accounting of partnership profits and losses from Delbert Moore’s death until the property sold.” Id. at ¶ 15. Delbert Moore passed away in March 2012, and sale of the real property in question occurred in May 2015. Id. at ¶¶ 2, 4. On remand, Scott Moore, Donald Moore, and the Glenn W. Moore & Sons Partnership (the “Partnership”) renewed a previously filed petition for accounting and distribution of the Estate of Delbert G. Moore (the “Estate”). (Index # 139). The parties also stipulated to a scheduling order to address all accounting issues, including the accounting contemplated by this Court’s remand. (Index # 145).

[¶4] In March 2019, Thomas Ault (“Ault”), the independent accountant retained by the Partnership, submitted his Compilation Report outlining the Partnership’s position regarding profits and losses from the date of Delbert G. Moore’s death until the land sale

in May 2015. See Appellants' Appendix ("App.") at 19-24. Ault's report reflects a net loss to the Partnership of \$49,408. (Id.) In May 2019, the Estate, relying on its independent accountant Chad Weber ("Weber"), submitted its response, arguing that the Partnership had net income of \$316,366.88. (Index # 165).

[¶5] In May 2019, Scott Moore filed another motion with the district court for a distribution from the Estate under a specific devise by Delbert G. Moore of proceeds from the May 2015 land sale. (Index ## 160-163). This matter was heard separately by the district court on June 25, 2019¹, with the court issuing its order granting Scott Moore's motion for distribution on June 27, 2019. (App. 28-31).

[¶6] An evidentiary hearing on the parties' positions on the remanded accounting occurred on October 14, 2019. The matter was held under advisement until the December 19, 2019 order. (App. 32-37). Within that order, the district court adopted the position of the Estate, finding the Partnership was indebted to the Estate in the amount of \$140,206, plus interest from October 3, 2018. (Id. at ¶ 30). The Amended Judgment was entered February 25, 2020, and the Partnership, Scott Moore, and Donald Moore filed their Notice of Appeal on March 24, 2020. (App. 38-39).

III. STATEMENT OF RELEVANT FACTS

[¶7] Delbert G. Moore died testate in March 2012. (App. 33 at ¶4). His estate was admitted to probate and his stepson, Charles Minard, was appointed personal representative on March 20, 2012. (App. 33 at ¶5). Under the terms of the decedent's

¹ The evidentiary hearing on the accounting of partnership profits and losses was moved to October 2019 by stipulation of the parties due to the availability of the parties' retained experts. (Index ## 154, 159).

Last Will and Testament, Charles Minard, his two siblings Candice Eberhart and Terry Minard, and Delbert's nephew Scott Moore, were each devised a one-fourth (1/4) interest in Delbert G. Moore's real estate, save certain real estate interests devised to Delbert's brother, Donald Moore. (App. 12-13). This real estate devise directed the property to be sold in a commercially reasonable manner within six (6) months of Delbert's death. (Id.)

[¶8] Shortly after Charles Minard was appointed as Personal Representative, a series of contentious proceedings unfolded, pitting Minard and the Estate against the Partnership, Donald Moore, and Scott Moore. Such disputes were addressed by the district court from which the Estate appealed in Estate of Moore, 2018 ND 221, 918 N.W.2d 69. However, because this Court concluded the Estate remained a partner in the Partnership for a period of time after Delbert's death, this Court determined the Estate was entitled to a share of Partnership profits (or losses). Id. at ¶ 15. The timeframe designated by the Court was from March 5, 2012 (i.e. the date of Delbert Moore's death), until May 18, 2015 (i.e. the date certain land jointly owned by Donald and Delbert Moore, but pledged to the Partnership, was sold at auction). Id. This Court noted "the district court failed to account for the Estate's continued interest in the partnership until the May 2015 sale of Delbert Moore's property" and remanded the matter for an accounting of partnership profits *and losses*. Id. (emphasis added).

[¶9] Following the remand in October 2018, the district court set a telephonic status conference for November 20, 2018. (Index # 138). Prior to that conference, Scott Moore, Donald Moore, and the Partnership re-asserted motions outstanding prior to the 2018 appeal, namely renewing a petition for the Estate to provide an inventory and appraisal as required by N.D.C.C. § 30.1-18; to provide an accounting of income and

expenses incurred by the Estate; and to make distributions from the Estate to Scott Moore of a specific devise. (Index # 139). The Estate filed its response December 11, 2018, arguing that in relation to Scott Moore's distribution, the district court had not yet determined how expenses were to be apportioned – effectively that Scott Moore's distribution was residuary in nature, not a specific devise of real property. (Index # 143). On December 4, 2018, the parties entered into a stipulation to set deadlines related to all remaining issues, including the remanded accounting, and the district court adopted the stipulation by order on December 12, 2018. (Index # 145).

[¶10] On March 8, 2019, Thomas Ault, the CPA retained by Scott Moore, Donald Moore, and the Partnership, submitted his accounting of profits and losses incurred by the Partnership from the date of Delbert Moore's death in March 2012 to the May 2015 land sale of real estate pledged to the Partnership. (App. 19-24). Ault's report was based on his review of the Supreme Court's 2018 opinion, the brief partnership agreement dated January 1, 1990, the partnership tax returns from 2011 through 2015, partnership financial statements from 2012 through 2015, partnership cattle records, and calendars provided by Scott Moore as evidence of labor charges to the Partnership by agreement of the partners following Delbert Moore's death. (Id.) The conclusion reached by Ault was the Partnership had net losses totaling \$49,408.49 during the relevant timeframe, and that the Estate's share of losses equated to a loss of \$33,022 due to adjustments made from previous tax records. (Id.) On May 16, 2019, Scott Moore filed another motion requesting a distribution from the Estate for his specific devise of real property. (Index ## 160-163). Included in this motion was a claim for interest due to the fact the land sale

occurred more than four (4) years earlier and that the retained monies directly benefitted the residual beneficiaries to Scott Moore's detriment. (Id.)

[¶11] The Estate filed its response to Ault's report on May 23, 2019, which included an email/report prepared by Chad T. Weber ("Weber") of Eide Bailly in Aberdeen, South Dakota. (Index # 165). Weber's report directly challenged the inclusion by Ault of a labor expense, which does not appear on the tax returns of the Partnership. (Id.) Weber's report also treats certain depreciation differently (explained further below). (Id.) Ultimately, Weber concluded that the Estate was entitled to profits, not losses, in the amount of \$142,752. (Id.)

[¶12] On May 29, 2019, the Estate filed its response to Scott Moore's motion for distribution. (Index # 167). In this pleading, the Estate's position was that the devise to Delbert Moore's step-children of Delbert's interest in the Partnership was not a residuary devise, despite the clear language to the contrary in the decedent's will. (Id.) The Estate argued that with no residuary assets, the district court would need to make a determination as to how expenses were to be apportioned among the various gifts, including the specific devise to Scott Moore. (Id.) This issue was heard by the district court on June 25, 2019, and on June 27, 2019, the district court entered its order concluding that the devise to Scott Moore was, in fact, a specific devise, and that the devise of the decedent's share of the Partnership was part of the Estate's residue, but that the distribution to Scott Moore was to be held until the district court heard the accounting of profits and losses. (App. 28-31). As it relates to the subject-matter of the instant appeal, the district court denied Scott Moore's claim for interest on distributions improperly withheld by the Estate for more than four years. (Id.)

[¶13] The hearing on Partnership profits and losses was held October 14, 2019, at the LaMoure County Courthouse, before the Hon. Cherie L. Clark. As explained in more detail below, the Partnership’s accounting of profits/losses reflect a net \$49,408 loss during the relevant timeframe whereas the Estate’s accounting reflects a claimed share of profit to Delbert Moore in the amount of \$140,206. (App. 19-24). The only significant differences between the competing expert accounting reports is the Estate’s use of “book” depreciation over “tax” depreciation and the Estate’s exclusion of a labor charge by Scott Moore as agreed to be charged by the partners following Delbert Moore’s death.

[¶14] Thomas Ault testified first related to the preparation of his accounting. (App. 42-75). Ault is a Bismarck-based CPA and the principal of Point CPA, which provides accounting services to small businesses and individuals. (App. 42). Ault testified that he was familiar with preparing tax returns for partnerships and familiar with accounting matters for farming enterprises. (App. 43-44). Ault explained that he was engaged to prepare an accounting of the Partnership’s profits and losses for the timeframes required by this Court. (App. 44). Ault was familiar with the Court’s remand and testified that he had studied the Court’s opinion of the 2018 appeal. (App. 45-46). Ault explained that the directive on remand was broad and did not have specific instructions on how the accounting was to be prepared. (Id.)

[¶15] Ault’s testimony established that he had also reviewed the January 1, 1990 partnership document, which indicated that the Partnership would act as though it owned land that was owned by the partners individually (i.e. Donald Moore and Delbert Moore). (App. 47-48). Ault also indicated that he had met with the Moores and that they explained there was “significant labor provided in the course of generating revenues of

the Partnership.” (App. 48-49). Ault acknowledged that the inclusion of a labor charge would be a “special disclosure that’s not typical accounting on the income tax basis of accounting” but that it was a cost “consumed in the production of revenue” and would be included in the accounting of Partnership profits and losses. (Id.).

[¶16] Ault’s testimony continued through the accounting that he ultimately prepared, explaining his report was prepared based on the tax basis of accounting together with his review of the Supreme Court opinion, partnership document, relevant tax returns, relevant financial statements, cattle records, and the labor calendars of Scott Moore. (App. 50-53). In the third paragraph of the first page of Ault’s report, Ault explains that the inclusion of labor as an expense is a deviation from the tax basis of accounting. (App. 53-54). Ault also testified that the statements relied upon were prepared according to the tax basis accounting, which is also a deviation from the generally accepted accounting principles, which would call for accrual basis accounting. (App. 53-55). Further, partner labor would not be included on a partnership tax return because it is not deductible.

[¶17] Ault explained that he prepared the labor charge based on upon a rate of \$30 per hour, and records provided to him by the Moores. (App. 53-54). After reviewing all records, Ault’s conclusion was that the Partnership incurred a loss of approximately \$49,000.00. (App. 58). The final page of Ault’s report broke down the shares of losses and revised the loss to the Estate based on pre-death income from 2012 allocated to Delbert Moore. (App. 59-60). On cross-examination, Ault again explained that Scott Moore’s labor would not be included on Partnership tax returns. (App. 62). Ault also testified this was not a guaranteed payment as that would require documentation of a

contractual arrangement for a guaranteed payment. (Id.) Ault reiterated that his report was based upon the Supreme Court’s direction to “account for profits and losses as if the Estate remained partner from date of death that the sale of the land....” (App. 70).

[¶18] Scott Moore testified next and indicated that he became a member of the Partnership in approximately 1998. (App. 76). Scott testified that he did not recall executing any type of partnership agreement, or any other written agreement how partnership profits and losses were to be calculated for the Partnership. (Id.) Scott also explained that after Delbert Moore’s death, he began tracking his hours worked on behalf of the Partnership. (App. 77). Scott also testified that his father, Donald Moore, sent a letter to the Estate informing them of this decision. (App. 78).

[¶19] On May 11, 2012, two months after Delbert Moore’s death, and years before this Court’s remand for accounting, Donald Moore sent a letter to the Personal Representative of the Estate. (App. 17-18). The primary purpose of that letter was to address the parties’ joint property and debts and to make an offer to purchase Delbert Moore’s share of the real property that that was pledged to the Partnership. (App. 17). However, relating to partnership business, and relevant to this appeal, Donald Moore informed the Estate that Scott Moore would be charging for his labor and would be keeping records. (Id.) This letter was utilized by the Estate in a hearing in 2014, proving the Personal Representative was aware of this decision. (Index # 45).

[¶20] Following Scott Moore’s testimony, the Estate called Tim Bergstrom (“Bergstrom”) of Eide Bailly as a witness. (App. 83). Bergstrom is also a CPA and a partner at Eide Bailly. (App. 84). Bergstrom testified that he made an independent

review of the records previously provided to his fellow partner Chad Weber.² (App. At 86). Bergstrom also submitted a separate report. (App. 25-27). Bergstrom testified that it was not “untypical” for partnership accountings of profits and losses follow the tax basis of accounting (as was utilized by Ault), but there are generally accepted accounting principles that other partners follow. (App. 88). Bergstrom indicated that he also reviewed the partnership tax returns and financial statements prepared for the Partnership for 2012 through 2015. (App. 88-89). In fact, Bergstrom’s figures mainly matched Ault’s calculations with two exceptions: first, depreciation was calculated differently, and second, he did not deduct the labor expense. (App. 89).

[¶21] Bergstrom explained that wage expenses for a partner were “treated as a guaranteed payment and that’s reflected on the tax return.” (App. 90). Bergstrom also explained that he adjusted the depreciation in his calculation of profits and losses. (App. 93). Bergstrom calculated what he determined to be the useful life of equipment that was fully deducted on the income tax returns (which again served as the jumping off point for both Bergstrom and Ault’s determinations). (App. 93-94). Essentially, Bergstrom utilized “book” depreciation over “tax” depreciation. Regarding the labor expense, Bergstrom admitted he was “not aware of any agreement that there was to be wages paid to any of the partners.” (App. 98). On cross-examination, Bergstrom admitted that if the general partners of the Partnership had agreed to compensate a partner over and above any profits and losses allocation, then the labor wage could be allowed. (App. 106-107). Without consideration of the partners’ agreement to charge for Scott Moore’s labor following the death of Delbert Moore, Bergstrom’s ultimate conclusion was that \$140,206 was owed by

² Mr. Weber was unavailable at the time of the hearing due to ongoing health matters.

the Partnership the Estate for the Estate's share of profits and losses during the relevant timeframe. (App. 103).

[¶22] On December 19, 2019, the district court issued its order adopting both positions of the Estate: (1) the use of “book” depreciation over “tax” depreciation; and (2) the exclusion of the wage charge asserted by Scott Moore. (App. 32-37). The district court awarded the Estate the sum of \$140,206, plus interest at a rate of 7.5% per annum from October 3, 2018. (App. 36-37). An amended judgment was entered by the Court on February 25, 2020. (App. 38-39). Scott Moore, Donald Moore, and the Glenn W. Moore and Sons Partnership filed its notice of appeal on March 17, 2020. (App. 40-41).

IV. LAW AND ARGUMENT

A. Standard of Review.

[¶23] On remand from this Court in Estate of Moore, 2018 ND 221, 918 N.W.2d 69, the district court made findings as to the profits/losses of the Partnership during the relevant timeframe without considering the partners' agreement to charge for Scott Moore's labor. This Court has held that a district court's factual findings are reviewed under the clearly erroneous standard. See Motter v. Traill Rural Water Dist., 2017 ND 267, ¶ 9, 903 N.W.2d 725. “A finding of fact is clearly erroneous if there is no evidence to support it, if the finding is induced by an erroneous view of the law, or if the reviewing court is left with a definite and firm conviction a mistake has been made.” Rath v. Rath, 2018 ND 138, ¶ 8, 911 N.W.2d 919. The district court also concluded Scott Moore was not entitled to interest on distributions improperly withheld by the personal representative. Based on the language of the statute related to awarding interest, N.D.C.C. § 32-03-05, the district's award of interest is discretionary. The district court abuses its discretion

when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. J.B. v. R.B., 2018 ND 83, ¶ 5, 908 N.W.2d 687, 689.

B. The district court erred in excluding Scott Moore’s labor charge as agreed to be charged by the partners in accounting for the profits and losses of the Glenn W. Moore & Sons partnership.

[¶24] A partnership exists under North Dakota law with “the association of two or more persons to carry on as co-owners of a business for profit... whether or not the persons intend to form a partnership.” N.D.C.C. § 45-14-02. Generally, “[e]ach partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.” N.D.C.C. § 45-16-01(2). Usually, “[a] partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.” N.D.C.C. § 45-16-01(8). However, “[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners.” N.D.C.C. §45-16-01(10).

[¶25] Accordingly, the general rule in North Dakota is that each partner receives a proportional share of profits and losses and partners do not receive remuneration for services performed for the partnership (except when winding up the partnership). Here, this would bar Scott Moore’s charge for labor in compiling the accounting of profits and losses for the court-mandated timeframe. However, this is not the end of the analysis under North Dakota law.

[¶26] “[R]elations among the partners and between the partners and the partnership are governed by the partnership agreement.” N.D.C.C. § 45–13–03(1). A “partnership

agreement thus controls whether or not the partners are entitled to compensation for services provided to the partnership.” See First Nat'l Bank of Belfield v. Candee, 488 N.W.2d 391, 397 (N.D.1992); See also Akerlind v. Buck, 2003 ND 169, ¶ 21, 671 N.W.2d 256; Matter of Estate of Thomas, 532 N.W.2d 676, 682 (N.D.1995).

[¶27] In adopting the Estate’s version of the Partnership accounting, and rejecting the labor charge by Scott Moore, the district court indicated “[i]t is not appropriate to account for the wages unless an agreement by the partners existed for the payment of wages.” (App. 36 at ¶27). Such findings, however, ignore the reality of how the Partnership operated following Delbert Moore’s death and a partnership decision to charge for Scott Moore’s labor. Scott Moore testified that he did not recall executing any type of partnership agreement, or any other written agreement how partnership profits and losses were to be calculated for the Partnership. The only written partnership agreement that exists in this matter is the “Addition and Clarification of Partnership Agreement” dated January 1, 1990. (App. 16).

[¶28] However, following the death of Delbert Moore, Donald Moore informed the Estate that Scott Moore would be charging for labor in a letter dated May 11, 2012. (App. 17-18). Scott Moore confirmed this partnership decision in his testimony at the October 2019 hearing. (App. 77-78). The Estate was aware of this decision, having utilized Donald Moore’s May 2012 letter in a 2014 hearing in the matter. (Index #45). Notably, this Court recognized that while “Delbert Moore’s role in the partnership terminated, the [partnership] agreement states a deceased partner’s estate cannot make business decisions without the surviving partner’s approval” and “[t]his provision indicates Delbert and Donald Moore intended for a deceased partner’s estate to remain a

partner with limited decision making authority.” In the Matter of the Estate of Delbert G. Moore, Deceased, 2018 ND 221, ¶14, 918 N.W.2d 69; See also “Addition and Clarification of Partnership Agreement” dated January 1, 1990 at App. 16 (“This partnership is not automatically dissolved on death of a partner; however, the estate of a deceased partner cannot make business decisions for the partnership without the approval of the surviving partner.”). Accordingly, following Delbert Moore’s death, Donald and Scott had the authority to make partnership decisions, including the labor charge at issue. Further, the fact that this decision is not in a writing is not an issue as a partnership agreement may be oral. See e.g. Jones v. Jones, 310 N.W.2d 753, 755 (N.D. 1981); Gangl v. Gangl, 281 N.W.2d 574 (N.D.1979). Further, “[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners.” See N.D.C.C. §45-16-01(10).

[¶29] Scott Moore testified that he tracked his hours following Delbert’s death and that Scott and Donald provided Ault with a rate of \$30 per hour, which Scott believed to be low, but reasonable. (App. 77). Ault took this labor charge into account when compiling his accounting. Ault testified that while the inclusion of a labor charge did deviate from generally accepted account principles (or GAAP), labor was nevertheless a cost consumed in the production of income and appropriate to put into the report so long as the deviation from GAAP was disclosed. (App. 66). Further, this Court did not provide any specifics as to how the accounting for profits and losses was to be calculated. The parties were limited to their records and the guidance of their respective experts.

[¶30] Bergstrom, on cross-examination, admitted that a labor charge could be allowed if there was an agreement by the partners. (App. 109-110). This is precisely what

occurred. In sum, upon the death of Delbert Moore, the right to participate by the Estate in the management and conduct of partnership business terminated. Donald and Scott Moore, as surviving partners, had the full authority and right to make this labor modification. This modification is supported by the facts in the record and the testimony of Scott Moore. Bergstrom's testimony makes it clear he was unaware of the Partnership's 2012 decision to include a labor charge. This district court erred in failing to consider this partnership decision when making its findings regarding the accounting of profits and losses. We assert that this constitutes clear error by the district court.

[¶31] Also in rejecting the labor charge, the district court failed to distinguish and incorrectly characterized the labor charge as a "guaranteed payment" for purposes of the accounting and underlying Partnership tax returns. (App. 36 at ¶¶ 25, 27-28). The Appellants have never contended that the labor charge was a guaranteed payment. Rather, the idea of a guaranteed payment was repeatedly asserted by counsel for the Personal Representative while examining both experts. The district court's findings related to guaranteed payment are both unnecessary and do not relate to the labor charge asserted by the Moores.

[¶32] The accounting of profits and losses does not, nor should it, mirror a tax return. This Court directed a retroactive accounting of profits and losses from March 2012 through May 2015. The tax returns filed by the partnership do not reflect Delbert Moore of his Estate as a partner in the Partnership for those tax years. The Estate was not treated as a partner until this Court's opinion in 2018. Both experts utilized the partnership tax returns as a jumping off point, then made modifications, or deviations, to reflect economic realities. Bergstrom recharacterized tax depreciation as book

depreciation. This is a deviation from income tax-based accounting. Ault included a labor charge because he deemed that labor, which would not appear on a partnership income tax return, was nevertheless a cost consumed in the production of income for the Partnership and relevant for purposes of an accurate accounting of profits and losses. In addition to failing to recognize the 2012 partnership decision regarding the labor charge, the district also erred by excluding the labor charge on the basis that it was not included in tax returns or characterized as a guaranteed payment.

C. The district court erred in denying Scott Moore’s claim for interest on distributions improperly withheld by the Estate of Delbert Moore for more than four years.

[¶33] In its order dated June 27, 2019, the district court specifically states, “[i]t appears that Scott is not entitled to interest on the distribution. Scott argues that equitable interest is due, however, at this time, the Court has not reviewed evidence which would result in interest being assessed.” (App. 34). Within the same order, the district court determined that the devise of partnership proceeds to Candice Eberhart, Terry Minard, and Charles Minard was in fact a residual devise. *Id.* The rationale provided by the Estate for withholding money from Scott Moore was based on the incorrect premise that proceeds from the devise that included Scott (i.e. Paragraph 3B of Delbert Moore’s will) would be needed to pay the expenses of administering the Estate. (Index # 167). However, the Personal Representative had already disbursed funds from the residual gift (i.e. monies received by the Estate for the decedent’s one-third capital interest in the Partnership) to the three residual beneficiaries. (Index # 143 at ¶5). The Personal Representative disbursed the very funds that would be taxed by estate-related expenses and held onto

funds that were not subject to those expenses to the detriment of Scott Moore. This is clearly based on an erroneous interpretation of law.

[¶34] The Appellants contend that Scott is entitled to interest on the withheld specific devise under N.D.C.C. § 32-03-05:

32-03-05. When interest in discretion of court or jury. In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court or jury.

The obligation to disburse funds to Scott Moore arises out of N.D.C.C. § 30.1-18-03, which states in pertinent part, “A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this title, and as expeditiously and efficiently as is consistent with the best interests of the estate.” Id. It is well established in this matter that the sale of land pledged to the Partnership closed in May 2015 (it is the end date of this Court’s accounting directive).

[¶35] For a period of more than four years, the Estate held onto funds related to a real estate devise, while distributing funds to the Personal Representative and two other residuary beneficiaries from the residuary devise. The rationale provided for retaining funds owed to Scott Moore is unfounded in a law and we would argue is arbitrary, unreasonable, and based on a misapplication of law. We assert that the district court abused its discretion in failing to provide for interest on the retained funds rightfully owed to Scott Moore based on a specific devise of real estate proceeds. Accordingly, we request this Court award interest to Scott Moore on his held distribution from the date of the sale to the date of distribution. Alternatively, we request this Court remand the

matter to the district court with a directive that interest calculations be made and incorporated into a final judgment.

V. CONCLUSION

[¶36] For the foregoing reasons, the district court erred in excluding Scott Moore's labor charge in accounting for the profits and losses of the Glenn W. Moore & Sons partnership from the date of Delbert Moore's death until certain property was sold. The district court further erred in failing to award Scott Moore interest on an improperly held distribution of real estate proceeds. The determination of the district court should be reversed and the matter should be remanded for further proceedings consistent with this Court's decision.

VI. ORAL ARGUMENT WAIVED

[¶37] Appellants hereby waive oral argument.

VII. CERTIFICATE OF COMPLIANCE

[¶38] The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 12-point font and equals 21 pages.

[¶39] Dated this 1st day of July, 2020.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By: /s/ David J. Smith

David J. Smith #06610

Tyler J. Malm #07575

Smith Porsborg Schweigert

Armstrong Moldenhauer & Smith

P.O. Box 460

Bismarck, ND 58502-0460

(701) 258-0630

dsmith@smithporsborg.com

tmalm@smithporsborg.com

Attorneys for Appellants

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

**Supreme Court No. 20200087
Dickey Co. Court No. 2012-PR-00011**

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

Charles Minard, individually and as Personal Representative of the Estate of Delbert G. Moore, deceased,

Petitioner and Appellee,

v.

Donald B. Moore and Scott Moore,

Respondents and Appellants,

Glenn W. Moore & Sons,

Claimant and Appellant, and

Candice Eberhart and Terry Minard,

Respondents and Appellees.

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

[¶1] On the 1st day of July, 2020, I, Rachel DeRung, served the party(s) described below with the document(s) also described below by electronically filing the document(s) with the North Dakota Supreme Court Clerk of Court. The email addresses of each such party served are taken from the North Dakota Supreme Court website or are the last know email address. I am over the age of eighteen and not a party in this matter.

[¶2] **Document(s) Served:**

1. Brief of Appellants Donald B. Moore, Scott Moore, and Glenn W. Moore & Sons; and,
2. Appellants' Appendix.

[¶3] **Names & Address of Party(s) Served:**

Kimberly J. Radermacher
kimrader@radermacherlaw.com

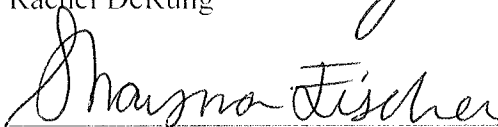
Terry Minard
btminard@msn.com

Candace Eberhart
eberbc@aol.com

Subscribed and sworn to before me
this 1st day of July, 2020.



Rachel DeRung



Notary Public / Burleigh County

