

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
Supreme Court No. 20200188  
McKenzie County District Court No. 27-2019-CV-00245

Timothy S. Dwyer a/k/a  
Tim Dwyer, Jr.

Plaintiff, Appellant,  
And Cross-Appellee

v.

Margret Sell, Co-Trustee of the Tim  
Dwyer Farm Trust; John Dwyer, Co-  
Trustee of the Tim Dwyer Farm Trust;  
Peggy Dwyer Sell a/k/a Margret Sell;  
John W. Dwyer a/k/a John Dwyer;  
Jane Dwyer Morgan; Barbara Dwyer  
Rice;

Defendants, Appellees,  
and Cross-Appellants

and

Ruth Dwyer Coleman; Michael A.  
Dwyer; Molly Binger; Dan Dwyer;  
Tommy Dwyer; Sadie Bro; Dana Dwyer;  
Sarah Grossman; Johnny Coleman;  
Ingrid Kalinowski a/k/a Ingrid A. Sell;  
Jack Dwyer; Sam Coleman; Johnny  
Dwyer; Rachel Meuchel; Andy Dwyer;  
Josh Dwyer; Katie Montplaisir; Anne  
Dwyer; Billy Morgan; Katie Joraanstad;  
Mike Morgan; Judah Coleman; Beky  
Olson; Will Rice; Janna Schmidt; Paul  
Rice; Olin Sell; Charles Coleman; Patrick  
Sell; David Morgan; Joey Dwyer; Taylor  
Dwyer; Tessa Dwyer; Teddi Dwyer;  
Tianna Dwyer,

Defendants and Appellees

---

**On Appeal from the Summary Judgment entered May 8, 2020 and  
Amended Judgment entered October 28, 2020  
Case No. 27-2019-CV-00245, County of McKenzie, Northwest Judicial District  
The Honorable Daniel El-Dweek, Presiding**

---

**BRIEF OF DEFENDANTS, APPELLEES, AND CROSS-APPELLANTS,  
MARGRET SELL, CO-TRUSTEE OF THE TIM DWYER FARM TRUST;  
JOHN DWYER, CO-TRUSTEE OF THE TIM DWYER FARM TRUST;  
PEGGY DWYER SELL A/K/A MARGRET SELL; and  
JOHN W. DWYER A/K/A JOHN DWYER**

**AND**

**BRIEF OF DEFENDANTS AND APPELLEES, PATRICK D. SELL,  
JOHNNY DWYER, MOLLY BINGER, OLIN SELL AND DANA DWYER**

---

Craig E. Johnson (ND #03670)  
Johnson Mottinger & Greenwood, PLLP  
15 South Ninth Street  
Fargo, North Dakota 58103  
Telephone: (701) 235-7501  
Facsimile: (701) 235-8906  
Email: cjohnson@jrmlawfirm.com  
Attorney for Defendants, Appellees,  
and Cross-Appellants, Margret Sell and  
John Dwyer, as Co-Trustees of the Tim  
Dwyer Farm Trust and Peggy Dwyer Sell,  
a/k/a Margret Sell, and John W. Dwyer,  
a/k/a John Dwyer, Individually

Klay C. (KC) Ahrens  
*Admitted pro Hac Vice*, ID #P02262  
Joseph M. Barnett, ID #07951  
8050 West 78<sup>th</sup> Street  
Edina, MN 55439  
Telephone: (952) 941-4005  
Facsimile: (952) 941-2337  
E-Mail: kahrens@hjlawfirm.com  
E-Mail: jbarnett@hjlawfirm.com  
Attorneys for Defendants and Appellees,  
Patrick D. Sell, Johnny Dwyer,  
Molly Binger, Olin Sell and Dana Dwyer

**TABLE OF CONTENTS**

	<u>Page No.</u>
TABLE OF CONTENTS.....	3
TABLE OF AUTHORITIES.....	4
	<u>Paragraph No.</u>
STATEMENT OF THE ISSUES.....	1
STATEMENT OF FACTS .....	8
ARGUMENT .....	25
I. Summary Judgment Standard.....	25
II. The Trust Agreement is plain, unambiguous and must be enforced as written.	27
II. Trustees have the right to sell or retain Trust property.....	29
III. Prepayment is prohibited.....	39
IV. Assignment is prohibited.....	58
V. No restraint on alienation.....	60
VI. The appraisals are valid.....	70
VII. Access granted for hunting, hiking and outdoor recreational activities is valid. .	76
VIII. The arguments set forth in Brief of Appellee Ingrid A. Sell are joined in and adopted herein.....	92
CONCLUSION .....	93

**TABLE OF AUTHORITIES**

<b><u>NORTH DAKOTA CASES</u></b>	<b>Paragraph</b>
<i>Anderson v. Marshall - Malaise Lumber Co.</i> , 66 N.D. 216, 263 N.W. 421 (ND 1935) . . .	83
<i>Bornsen v. Pragotrade, LLC</i> , 2011 ND 183, 804 N.W.2d 55 . . . . .	89
<i>Eldridge v. Evangelical Lutheran Goods Samaritan Society</i> , 417 N.W.2d 797 (N.D. 1987)	28
<i>Goetz v. Hubbell</i> , 66 N.D. 491, 266 N.W.2d 836 (ND1936) . . . . .	42
<i>Fredericks v. Vogel Law Firm</i> , 2020 ND 171, 946 N.W.2d 507 . . . . .	74
<i>Hamilton v. Woll</i> , 2012 N.D. 238, 823 N.W.2d 754 . . . . .	26
<i>Holien v. Trydahl</i> , 134 N.W.2d 851 (N.D. 1965) . . . . .	63, 64
<i>In re M.W.</i> , 2009 ND 55, 764 N.W.2d 185 . . . . .	88
<i>In re R.A.</i> , 2011 ND 119, 799 N.W.2d 332 . . . . .	88
<i>Investors Title Ins. Co. V. Herzig</i> , 788 N.W.2d 312 (N.D. 2010) . . . . .	27
<i>Kautzman v. Kautzman</i> , 2003 ND 140, 668 N.W.2d 59 . . . . .	62
<i>Little v. Tracy</i> , 497 N.W.2d 700 (N.D. 1993) . . . . .	89
<i>Lucas v. Porter</i> , 2008 ND 160, 755 N.W.2d 88 . . . . .	74
<i>Matter of Estate of Zimbleman</i> , 539 N.W. 2d 67 (ND 1995) . . . . .	68
<i>Nagel v. Emmons County, N.D. Water Resource District</i> , 474 N.W.2d 46 (N.D. 1991) . . .	81
<i>Pamida, Inc. v. Meide</i> , 526 N.W.2d 487 (N.D. 1995) . . . . .	28
<i>Public Serv. Comm’n v. Wimbledon Grain Co.</i> , 2003 ND 104, 663 N.W.2d 186 . . . . .	89
<i>Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.</i> , 2011 ND 95, 797 N.W. 2d 770, . . . . .	80
<i>Ruud v. Frandson</i> , 2005 ND 174, 704 N.W.2d 852 . . . . .	67
<i>Schank v. North Am. Royalties, Inc.</i> , 201 N.W.2d 419 (N.D. 1972) . . . . .	77
<i>State v. Dennis</i> , 2007 ND 87, 733 N.W.2d 241 . . . . .	89
<i>Storman v. Weiss</i> , 65 N.W.2d 475 (N.D. 1954) . . . . .	67

<i>Zuger v. State of North Dakota</i> , 673 N.W.2d 615 (N.D. 2004) . . . . .	25
--	----

**OTHER CASES**

<i>Blevins v. Pittman</i> , 189 Ga. 789, 7 S.E.2d 662 (1940) . . . . .	67
<i>Crowley v. Nixon</i> , 127 Kan. 178, 272 P. 104 (1928) . . . . .	67
<i>Kruse v. Planer</i> , 288 N.W.2d 12 (Minn. 1979) . . . . .	45, 46, 47
<i>MacIntyre v. Hark</i> , 528 So.2d 1276 (Fla.Dist.Ct. 1988) . . . . .	47
<i>Mandella v. Russo</i> , 294 So.2d 598 (La.App. 1974) . . . . .	47
<i>McCausland v. Banker’s Life Ins. Co.</i> , 110 Wash.2d 716, 757 P.2d 941 (1988) . . . . .	47
<i>Peryer v. Pennock</i> , 95 Vt. 313, 115 A. 105 (1921) . . . . .	45
<i>Peter Fuller Enterprises, Inc. v. Manchester Savings Bank</i> , 102 N.H. 117, 152 A.2d 179 (1959) . . . . .	47
<i>Westminster Investing Corp. v. Equitable Assn. Soc. of U.S.</i> , 443 F.2d 653 (D.C.Cir. 1970) 47	
<i>Young v. Sodaro</i> , 193 W.Va. 304, 456 S.E.2d 31 (1995) . . . . .	43, 46

**NORTH DAKOTA STATUTES & RULES**

N.D.C.C. § 1-02-02 . . . . .	88
N.D.C.C. § 1-02-05 . . . . .	87
N.D.C.C. § 9-07-03 . . . . .	28
N.D.C.C. § 9-07-04 . . . . .	28
N.D.C.C. § 9-07-06 . . . . .	27
N.D.C.C. § 20.1-02-27 . . . . .	86
N.D.C.C. § 47-02-26 . . . . .	61, 65
N.D.C.C. § 47-05-01 . . . . .	83
N.D.C.C. § 47-05-17 . . . . .	85
N.D.C.C. § 47-05-19 . . . . .	76
N.D.C.C. § 57-38-30.3(1)(e) . . . . .	53
N.D.C.C. § 59-16-15 . . . . .	31, 50

N.D.C.C. § 59-16-16(2).....	32
N.D.C.C. § 59-16-16(3).....	32
N.D. Admin. Code § 30-04-08-01 .....	86
N.D.R. Civ. P. 56(c)(3) .....	25

**SECONDARY SOURCES**

Shelley J. Lashkowitz, “Land Purchase Contracts in North Dakota,” 36 (3) N. D. L. Rev. 159 (1960). .....	51
PLOTS FAQs for landowners on the North Dakota Game & Fish Department’s website .	86
Restatement (Third) of Property: Servitudes §§ 1.1 and 1.2.....	80
Restatement (Third) of Property: Servitude § 1.2.....	82

## STATEMENT OF THE ISSUES

- ¶1 Is the Trust Agreement plain, unambiguous and enforceable as written?
- ¶2 Do the Co-Trustees have the right to sell or retain Trust property?
- ¶3 Is prepayment of the contract for deed prohibited?
- ¶4 Is assignment of rights personal to a beneficiary prohibited?
- ¶5 Is the prohibition of assignment and prepayment a prohibited restraint on alienation?
- ¶6 Are the appraisals valid?
- ¶7 Is the access granted for hunting, hiking and outdoor recreational activities valid?

## STATEMENT OF THE FACTS

- ¶8 This action involves a dispute over the terms of the Tim Dwyer Farm Trust dated the 6<sup>th</sup> day of December, 2004.
- ¶9 During his lifetime, William Dwyer, a/k/a Tim Dwyer, Sr., accumulated in excess of 7,000 acres of farmland in McKenzie County, North Dakota the surface rights of which he conveyed to John Dwyer and Margret Sell, as Co-Trustees of the Tim Dwyer Farm Trust, by Warranty Deed dated December 6, 2004 and recorded December 9, 2004 as Document No. 352809 in the office of the McKenzie County Recorder. App 44-46.
- ¶10 Prior to executing the Tim Dwyer Trust Agreement, Tim Dwyer, Sr. leased the surface of this property to his son, Tim Dwyer, Jr., the Appellant herein. App 198 and 280.
- ¶11 William Dwyer, a/k/a Tim Dwyer, Sr., died on January 7, 2005. App 195.
- ¶12 Tim Dwyer, Jr. has been the sole tenant of the farmland since November 2004. App 280.
- ¶13 Margret Sell and John Dwyer are the current acting Co-Trustees of the Tim Dwyer Farm Trust dated the 6<sup>th</sup> day of December, 2004.
- ¶14 Tim Dwyer, Jr., commenced this action seeking, among other relief, a declaration and order directing Margret Sell and John Dwyer, as Co-Trustees of the Tim Dwyer Farm Trust to offer to sell all 7,000 plus acres of land owned by the Trust to him. App 27 and 88.

[¶15] He further sought a declaration and order from the Court prohibiting Margret Sell and John Dwyer, as Co-Trustees from retaining any of the land currently owned by the trust. *Id.*

[¶16] The terms of the Trust direct that if Tim Dwyer, Jr. agrees to purchase the land offered for sale by the Co-Trustees he shall do so on a Contract for Deed extending for a period of 15 years at an interest rate of 4 ½ percent and payable in equal annual installments of interest and principal. App 36.

[¶17] Tim Dwyer, Jr. sought an order modifying these terms and directing Margret Sell and John Dwyer, as Co-Trustees of the Tim Dwyer Farm Trust, to enter into multiple contracts for deed each with the right to prepayment of the outstanding principal and interest to the date of payoff. App 28 and 88.

[¶18] Article VII of the Trust Agreement, between Tim Dwyer, Sr., as Trustor, and Margret Sell and John Dwyer, as Co-Trustees, states that the Co-Trustees are authorized to sell the land, if in their sole discretion, they believe it is in the best interest of the beneficiaries of the trust to do so. App 36.

[¶19] Article VII of the Trust Agreement provides that Tim Dwyer, Jr. has a right of first offer to purchase “all or any part of the land” approved to be sold by the Co-Trustees. *Id.*

[¶20] On October 3, 2018, the Co-Trustees gave notice to Tim Dwyer, Jr. by letter that they were going to initiate a sale of some or most of the Trust real property holdings and suggested the names of two appraisers to appraise the property. App 47-48.

[¶21] With the exception of 40 acres omitted in the Roger Cymbaluk appraisal, the appraisals were complete and provided to the Co-Trustees and Tim Dwyer, Jr. on or about June 25, 2020. App 279.

[¶22] The final Cymbaluk appraisal which included the additional 40 acres was provided on July 28, 2020. App 280.

[¶23] The Co-Trustees presented an Offer to Sell and proposed Contract for Deed offering to sell all of the trust land, consistent with the terms of the Trust to Tim Dwyer, Jr. on August 3,



2020. App 239-257.

[¶24] Tim Dwyer, Jr. failed to exercise his right of first offer and moved the District Court for a stay to prevent the Co-Trustees from offering the land for sale to his siblings. App 276-277.

## ARGUMENT

### I. Summary Judgment Standard

[¶25] Rule 56 of the North Dakota Rules of Civil Procedure allows for summary judgment for either party “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” N.D.R. CIV. P. 56(c)(3). “Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law.” *Zuger v. State of North Dakota* 673 N.W.2d 615, 619 (N.D. 2004). “Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial.” *Id.* A party resisting summary judgment cannot rely upon their pleadings or other unsupported, conclusory allegations. *Id.* The party resisting a motion for summary judgment must present competent, admissible evidence of an issue of material fact. *Id.* at 620.

[¶26] Whether the district court properly granted summary judgment is a question of law which is reviewed *de novo* on the entire record. *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754.

### II. The Trust Agreement is Plain, Unambiguous and Must be Enforced as Written

[¶27] In construing a trust agreement, the court’s primary objective is to ascertain the settlor’s intent. *Investors Title Ins. Co. v. Herzig*, 788 N.W.2d 312, 317 (N.D. 2010) (citation omitted). “When a trust instrument is unambiguous, the settlor’s intent is ascertained from the language of the trust document itself.” *Id.* Whether a trust agreement is ambiguous is a question of law,

and general rules of construction of written documents apply to the construction of trust agreements. *Id.* “The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others.” *Id.* (citing N.D.C.C. § 9-07-06).

[¶28] The interpretation of a written contract to determine its legal effect is generally a question of law. *Pamida, Inc. v. Meide*, 526 N.W.2d 487, 490 (N.D. 1995). A court must interpret a contract to give effect to the mutual intention of the parties as it existed at the time of contract. N.D.C.C. § 9-07-03; *Pamida* at 490. In interpreting a written contract, a court should ascertain the intention of the parties from the writing alone if possible. N.D.C.C. § 9-07-04. In construing a contract to determine its legal effect, a court will independently examine it in its entirety to determine the true intent of the parties. *Elridge v. Evangelical Lutheran Goods Samaritan Society*, 417 N.W.2d 797, 799 (N.D. 1987).

## **II. Trustees have the right to sell or retain Trust property.**

[¶29] The Trust Agreement here is plain and unambiguous, and as such, the trustor’s intention must be ascertained from the language of the Trust Agreement itself. It is plainly stated in the Trust Agreement that the Co-Trustees may sell the land if in their sole discretion they believe to do so is in the best interest of the beneficiaries. While the Trust Agreement does not specifically enunciate a power to sell only a portion of the land, there is likewise no indication from its text that all of the land is to be sold at once. Nor is Tim Dwyer, Jr., as beneficiary, granted authority to force a sale of all of the land at once.

[¶30] By its broad delegation of powers, the Trust Agreement gives the Co-Trustees the discretion to determine whether and how much, if any, of the Trust lands will be sold. Tim Dwyer, Jr.’s argument that the Trust Agreement requires the Co-Trustees to offer to sell all of the Trust lands to him if they offer to sell him an acre is not correct. The Trust Agreement cannot be more clear in its broad grant of authority over what and when to sell land from the Trust. On page 9 of the Trust, the Settlor provided:

ARTICLE XIII.

POWERS OF TRUSTEE. In addition to any and all powers conferred by law, the Trustee shall have the following powers and discretions:

- (1) \* \* \*
- (2) To hold and retain as long as they deem desirable any property which they may receive.

App 38.

[¶31] Unless restricted by the terms of the trust, a trustee in North Dakota has the authority to sell as much or as little of the property owned by the trust as the trustee in his or her discretion deems appropriate:

A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, all powers over the trust property which an unmarried owner, who is not an incapacitated person, has over individually owned property, any other powers appropriate to achieve the proper investment, management, and distribution of the trust property, and any other powers conferred by chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19. The exercise of a power is subject to the fiduciary duties prescribed by this chapter.

N.D.C.C. § 59-16-15.

[¶32] Without limiting the authority granted by Section 59-16-15, Section 59-16-16 states that a trustee may acquire or sell property for cash or credit at a public or private sale. N.D.C.C. § 59-16-16 (2). Section 59-16-16 further provides a trustee may exchange, partition, or otherwise change the character of trust property. N.D.C.C. § 59-16-16 (3).

[¶33] Nowhere in the Trust Agreement is it expressed that Tim Dwyer, Jr. has a right to force the sale of any of this land. Instead, the Trust Agreement clearly provides that the Co-Trustees can sell or hold and retain as long as they deem desirable any of the Trust Property.

[¶34] Tim Dwyer, Jr. only has the right to purchase all or any part of the property that the Co-Trustees, in their discretion, deem to be in the best interest of the beneficiaries to sell.

[¶35] The remainder beneficiaries who are the beneficiaries of the principal of this Trust are the Settlor's 33 grandchildren. The Settlor provided expressly in the Trust that upon the death of the last of his seven children, all principal and any accumulated interest shall be distributed

to the issue of his children as if by right of representation. App 36. The Settlor obviously had no intention or desire that all of this land be held together in one unit as argued by the Tim Dwyer, Jr. because if he had, he would not have directed it to ultimately be distributed to his 33 grandchildren.

[¶36] The Co-Trustees recognize that they have a fiduciary obligation to the grandchildren. That is why they informed Tim Dwyer, Jr. that they would not determine which parcels of land they are going to sell until after the agreed upon appraisals are complete and they know what the property is worth.

[¶37] There is no limitation contained within the Trust Agreement that specifically restricts what land may be sold. North Dakota law clearly states that as Co-Trustees, Margret Sell and John Dwyer have all powers over trust property which an unmarried person has over individually owned property, subject only to the limitations set out by the trust. There are no limitations contained in the Trust Agreement as to how much of the land may be sold by the Co-Trustees. That authority is given to the Co-Trustees. *See*. Article XIII (2). App 38.

[¶38] Nevertheless, afer receiving the appraisals the Co-Trustees have offered to sell all of the trust land to Tim Dwyer, Jr. at the average of the two appraisals as directed by the Trust Agreement. App 239-257.

### **III. Prepayment is prohibited.**

[¶39] Tim Dwyer, Jr.'s attempt to rewrite the Trust Agreement to provide him a right to prepayment must fail. The Trust Agreement cannot be more clear:

If TIM DWYER, JR., agrees to purchase the land, he shall do so on a Contract for Deed extending for a period of 15 years at an interest rate of 4½ percent. The Contract for Deed entered for this property shall require equal annual installments of interest and principal.

App 36. (Emphasis added)

[¶40] Obviously, you cannot have equal annual installments of interest and principal if the Contract allows for prepayment. It should not be required of Settlor to include redundant language that prepayment is prohibited.

[¶41] This provision lays out precisely the payment terms under which a sale to Tim Dwyer, Jr. must occur, and acts as a prohibitive measure to any other form of payment on the purchase by Tim Dwyer, Jr. Taking the clear and unambiguous language of this provision, the court must give weight to the Settlor's intention to require equal annual installments of interest and principal on a single contract for deed extending for a period of 15 years on any of the land purchased by Tim Dwyer, Jr. The Trust Agreement is clearly not silent on the payment terms for any land purchased by Tim Dwyer, Jr. Accordingly, any prepayment is prohibited.

[¶42] Even if it is determined the Agreement is silent on the right to prepayment, North Dakota follows the majority rule, which denies the right to prepay. See *Goetz v. Hubbell*, 66 N.D. 491, 266 N.W.2d 836, 838 (1936) where this court stated, "We do not make a contract for the parties. We declare what the contract is. The plaintiff is not bound to accept the purchase price in any other manner or form than that described in the contract, that is, monthly payments at \$50 per month."

[¶43] The majority rule, sometimes referred to as the default rule of perfect tender in time, may be expressed as follows: "Absent statutory authority or express contractual language to the contrary, a borrower has no right to prepay his mortgage or deed of trust obligation prior to the maturity date specified on the underlying promissory note and the agreed upon payment schedule is to be enforced." *Young v. Sodaro*, 193 W.Va. 304, 307, 456 S.E.2d 31, 34 (1995) (citations omitted).

[¶44] Justification of the rule of perfect tender in time has been expressed in both economic and philosophic terms. Conferring the right of prepayment when such right is absent from the note or mortgage instrument may cause economic hardships upon the lender, "not the least of which include the loss of the bargained-for rate of return, an increased tax burden, unanticipated costs occasioned by the need to reinvest the principal, and for those creditors anxious to ensure regular payments not unlike an annuity, it undoes the mortgagee's purpose in making the loan." *Id.* at 308 (citations omitted).

[¶45] The rule of perfect tender in time has further been rationalized philosophically, viewing the rights of creditor and debtor as equal and reciprocal:

A creditor can no more be compelled to accept payments on a contract before, by the terms thereof, they are due, than can a debtor be compelled to make such payments before they are due. The time of payment fixed by the terms of a pecuniary obligation is a material provision, and each party has the right to stand on the letter of the agreement and perform accordingly.

*Kruse v. Planer*, 288 N.W.2d 12, 14 (Minn. 1979) (citing *Peryer v. Pennock*, 95 Vt. 313, 115 A. 105 (1921)).

[¶46] “The time of payment fixed by the terms of a pecuniary obligation is a material provision, and each party has the right to stand on the letter of the agreement and perform accordingly.” *Young v. Sodaro*, 193 W.Va. 304, 308, 456 S.E.2d 31 (1995), citing *Kruse v. Planer*, 288 N.W.2d 12, 14 (Minn. 1979).

[¶47] At common law, in the absence of a provision allowing prepayment, a presumption exists that the payee is under no obligation to accept payment prior to maturity. *MacIntyre v. Hark*, 528 So.2d 1276 (Fla. Dist. Ct. 1988). Some jurisdictions do not allow prepayment even if the borrower offers to pay the full amount of interest. *See, e.g., Westminster Investing Corp. v. Equitable Assn. Soc. of U.S.*, 443 F.2d 653 (D.C. Cir. 1970) (dictum); *McCausland v. Banker's Life Ins. Co.*, 110 Wash.2d 716, 757 P.2d 941, 944 (1988). This is true even where a borrower attempts to use an “acceleration on default” clause to force a prepayment by defaulting on installment payments and then demanding an acceleration. In such a case, the prepayment clause will be interpreted to confer only on the lender an option to accelerate the note's maturity. *Peter Fuller Enterprises, Inc. v. Manchester Savings Bank*, 102 N.H. 117, 152 A.2d 179 (1959). Even when a purchase contract provided that a sum was to be paid by a definite time “if not sooner paid,” it has been held that a prepayment right was not conferred. *Kruse v. Planer*, 288 N.W.2d 12 (Minn. 1979). *See also Mandella v. Russo*, 294 So.2d 598 (La. App. 1974).

[¶48] Had the Settlor in this case intended to allow prepayment it would have been a simple matter to add the language: “Provided however, Purchaser shall have the right to prepay any

amount due at any time.”

[¶49] Article XIII of the Trust Agreement grants the Co-Trustees all powers conferred by law. Since the Settlor only specified how the price was to be determined and the terms for payment on land purchased by Tim Dwyer, Jr., the other terms of the proposed contract for deed are up to the Co-Trustees’ sound discretion.

[¶50] The law is clear on this point. The Co-Trustees may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, all powers over the trust property which an unmarried owner, who is not an incapacitated person, has over individually owned property. N.D.C.C. § 59-16-15.

[¶51] For the first time now on appeal Tim Dwyer, Jr. argues that the Trust Agreement is ambiguous because it did not specify every provision of the required contract for deed. However he fails to cite to any law to support this argument. Nor does he object to any of the normal usual and customary terms contained in the proposed contract for deed the Co-Trustees presented to him. For a discussion on the usual and customary terms found in land contracts, *see* Shelley J. Lashkowitz, “Land Purchase Contracts in North Dakota,” 36 (3) N. D. L. Rev. 159 (1960).

[¶52] Allowing prepayment would have significant adverse tax consequences to the intended beneficiaries of the principal of this Trust. The beneficiaries of the principal of the Trust are the Settlor’s grandchildren. The Settlor directed the principal of the trust be held and distributed upon the death of the last of his children to die:

This trust shall continue until the death of the last of my seven children at which time distribution of all principle (sic) and any accumulated interest contained therein shall be made to the issue of my children as if by right of representation.

App 36.

[¶53] Tim Dwyer, Jr. acknowledges that there is a zero tax basis in the trust land. Tim Dwyer, Jr. Appellant Brief at ¶72. Accordingly, if the Co-Trustees were to allow for prepayment of the entire \$6,269,700.00 purchase price in any one year, it would put the Trust in the maximum tax bracket for federal capital gains tax resulting in the Trust having to pay Federal Capital gains

tax at the maximum rate of 23.8% (App 286) and North Dakota State capital gains tax at the rate of 2.9%. N.D.C.C. § 57-38-30.3 (1)(e). This would result in a federal tax bill of \$1,492,188.60 and a state tax bill of \$181,821.30. All of these taxes would have to be paid from the principal of the trust. This would result in a reduction of 26.7% of the principal assets of the Trust which the Settlor intended to be distributed to his grandchildren, the intended beneficiaries of this Trust. Alternatively, if the purchase is paid in installments as the Settlor directed, the federal and state taxes can be paid from the interest income earned each year. The intended beneficiaries of the trust will not be prejudiced. There will be no reduction in the principal directed to be held for the intended beneficiaries of the trust.

[¶54] The Co-Trustees do not have the discretion to negotiate the payment terms on any sale to Tim Dwyer, Jr. The Settlor clearly spelled out the specific payment terms under which Tim Dwyer, Jr. is allowed to purchase any of the trust land.

[¶55] Their hands are tied. Unless the Court rewrites the Trust Agreement, to the detriment of the intended beneficiaries to benefit Tim Dwyer, Jr., the Co-Trustees are required to enter into a Contract for Deed for any of the land they offer to sell which Tim Dwyer, Jr. agrees to buy according to the terms set forth in the Trust Agreement.

[¶56] Fortunately, the Court does not have to speculate about what the Settlor intended regarding the terms of payment of the purchase price for any land purchased by Tim Dwyer, Jr. The Trust Agreement is not ambiguous and is clear on its face. The subjective beliefs of Tim Dwyer, Jr. and contingent beneficiaries, Barbara Dwyer Rice, and Jane Dwyer Morgan, are immaterial, legally irrelevant, and inadmissible, in the absence of ambiguity.

[¶57] The Co-Trustees are not forcing Tim Dwyer, Jr. to buy any of the Trust lands. If he declines to purchase Trust lands as offered consistent with the terms of the Trust Agreement as written, he is at liberty to seek out more favorable terms of purchase from other sellers.

#### **IV. Assignment is prohibited.**

[¶58] Tim Dwyer Jr. again ignores the plain, clear and explicit language in the Trust when



arguing that he has a right to assign his interest. The Trust could not be more clear:

**ARTICLE XII.**

**NO ENCUMBRANCES BY BENEFICIARIES.** No title to the property in this trust, or in the income thereof, shall be deemed vested in any beneficiary, and neither the principal nor the income of said Trust Estate shall be liable for the debts of any beneficiary or be subject to any legal process. No beneficiary shall have any right or power to sell, assign, anticipate or dispose of his or her interest in the Trusts or to the income produced therefrom prior to the actual distribution thereof by the Trustee to said beneficiary.

App 38.

[¶59] Clearly, Tim Dwyer, Jr. has no right to anticipate, sell or assign his right to purchase any of the Trust properties. His right to rent the farmland owned by the Trust on specified terms and his right of first offer to buy any of the land offered for sale by the Co-Trustees, on specified terms, are the only beneficial rights granted to him by the Settlor. These beneficial rights are personal to Tim Dwyer, Jr. and are not assignable.

[¶60] Allowing Tim Dwyer, Jr. to assign his right of first offer would frustrate the Settlor's intent to provide a secondary right of first offer to his other children. The primary right of first offer enjoyed by Tim Dwyer, Jr. is a personal one, and is limited to him alone.

**V. No restraint on alienation.**

[¶61] Tim Dwyer, Jr. argues for the first time on appeal that any prohibition of his right to assign his interest in the trust and/or prepay the contract for deed executed on any land purchased by him is void pursuant to the provisions of N.D.C.C. § 47-02-26 which provides:

**Restraints on alienation - When void.** Conditions restraining alienation, when repugnant to the interest created, are void.

[¶62] For an effective appeal on a proper issue, the issue must have been raised in the trial court so the trial court could rule on it. *Kautzman v. Kautzman*, 2003 ND 140, 10, 668 N.W.2d 59. This issue was not raised in the court below and should not be considered by the Court in this appeal. Nevertheless the Co-Trustees will briefly address it.

[¶63] Tim Dwyer, Jr. relies on *Holien v. Trydahl*, 134 N.W.2d 851, (ND 1965) to support this argument.

[¶64] In *Holien* the district court ruled that because the devisees had been given a fee-simple title, any subsequent attempt of the testatrix to limit the power of the devisees to dispose of such interests is in restraint of alienation of such fee-simple title, and therefore void. *Id.* at 855.

[¶65] This Court stated the general rule where an estate in fee simple in real estate is given by will, an attempted testamentary restraint on the devisee's power of alienation is void as repugnant to the nature of the estate given. *Id.* (citing N.D.C.C. § 47-02-26).

[¶66] The Court recognized, however, the absolute owner of the real estate has the absolute right to dispose of it as he or she sees fit. *Id.*

[¶67] *Accord, Ruud v. Frandson*, 2005 ND 174, 704 N.W.2d 852:

A competent testator may dispose of his property as he wishes without regard to the desires of prospective beneficiaries or the views of juries or courts so long as the terms of the will are not prohibited by law or opposed to public policy." *Stormon v. Weiss*, 65 N.W.2d 475, 505 (N.D.1954). " 'An estate may be granted upon a condition, either express or implied, upon performance or breach of which the estate shall either commence, be enlarged, or be defeated.' " *Blevins v. Pittman*, 189 Ga. 789, 7 S.E.2d 662, 664 (1940). When there is a testamentary gift upon a condition that is accepted by the legatee, "the legatee must perform the condition however burdensome." *Crowley v. Nixon*, 127 Kan. 178, 272 P. 104, 105 (1928).

*Id.* at ¶ 7.

[¶68] It is clear from the plain language of the Trust Agreement in this case that Tim Dwyer, Jr. is not given a fee simple title. Instead he is given a right of first offer to purchase under certain specific terms any land the Co-Trustees decide to sell. This right to purchase is conditioned on his acceptance of the terms set forth in the Trust Agreement. This is called a condition precedent. *See Matter of Estate of Zimbleman*, 539 N.W. 2d 67,71 (ND 1995). A condition precedent is a condition which must occur before an interest can vest. *Id.* It is not possible for the terms set forth in the Trust Agreement to be a restraint on alienation of Tim Dwyer, Jr.'s vested interest in this case because his interest does not vest unless he accepts and satisfies the requisite terms set forth in the Trust Agreement.

## **VI. The appraisals are valid.**

[¶69] There is no dispute that Tim Dwyer, Jr. and the Co-Trustees selected Rose Hoefs and

Roger Cymbaluk to be the appraisers to independently appraise the Trust property. App 272. Both appraisers preformed their professional duty.

[¶70] Despite attacks on their integrity and suggestions of bias and undue influence, Tim Dwyer, Jr. has presented no evidence that either appraiser was derelict in their duties or did or considered anything that they should not have done or considered when appraising the property.

[¶71] Tim Dwyer, Jr.'s recent challenge to the validity of the appraisals is also being raised for the first time on appeal and should not be considered by the Supreme Court.

[¶72] The amended Summons and Complaint in this matter is dated October 2, 2019. App 91 and 89. That was 13 days after Tim Dwyer, Jr. was informed by the Co-Trustees of their instruction letter to the appraisers (App 272) and 7 days after his attorney's letter to the Co-Trustees' attorney and the appraisers complaining about the instructions provided to the appraisers by the Co-Trustees. *Id.* If Tim Dwyer, Jr. had any concerns about the integrity of the appraisers and their ability to fairly and competently appraise the property he certainly could have raised that issue in the District Court below.

[¶73] Tim Dwyer, Jr. had every opportunity to present any available evidence to the District Court that these two renowned appraisers had ignored all of their training, education and experience and appraised the farmland without regard to the rules, regulations and standards of real estate appraisers in North Dakota, pursuant to the request of the Co-Trustees.

[¶74] No such evidence was presented to the District Court, nor has any been presented to this Court. Tim Dwyer, Jr. should not be allowed to split his causes of action. *Fredericks v. Vogel Law Firm*, 2020 ND 171, ¶ 19, 946 N.W.2d 507:

A party with a single cause of action generally may not split that cause of action and maintain several lawsuits for different parts of the action." *Lucas v. Porter*, 2008 ND 160, ¶ 10, 755 N.W.2d 88. *Res judicata* is premised upon the prohibition against splitting a cause of action. *Id.* "[T]he facts that establish the existence of a right in a plaintiff and an invasion of that right by the defendant constitute a cause of action, and if a right of recovery rests on the same state of facts, the cause of action may not be split." *Id.* at ¶ 18.

*Id.* at ¶ 19.

[¶75] This Court should rule that the appraisals are valid and that they, as directed by the Trust

Agreement, set the price at which Tim Dwyer, Jr. or his siblings can buy any farmland offered for sale by the Co-Trustees.

**VII. Access granted for hunting, hiking and outdoor recreational activities is valid.**

[¶76] N.D.C.C. § 47-05-19 prohibits the severance of hunting rights from the surface estate of all lands in North Dakota except for deeds, instruments or interests in property recorded before August 1, 2007.

[¶77] Sever means to separate or create two separate estates. For example, when mineral interests are severed from the surface two separate estates are created. *Schank v. North Am. Royalties, Inc.*, 201 N.W.2d 419, 429 (N.D. 1972) (after severance, surface and mineral estates are held by separate and distinct titles in severalty and each is a freeholder estate of inheritance.

[¶78] Article IX. of the Tim Dwyer Farm Trust states:

HUNTING AND OUTDOOR RECREATIONAL ACTIVITY. In addition to the above, my Co-Trustees and any successor Co-Trustee as well as any person receiving a conveyance from this trust shall reserve unto all of my descendants the right to have access to the subject property pursuant to guidelines established by the Co-Trustees of this Trust and the owner or tenant of the property for purposes of hunting, hiking and other outdoor recreational activity. (Emphasis added.)

App 37.

[¶79] The language of the Trust clearly does not direct the Co-Trustees to sever the hunting rights from the surface estate. Instead, the language directs that the descendants of Tim Dwyer, Sr. shall have co-access to the property for the purpose of hunting, hiking and other outdoor recreational activities. This language does not result in a severance of the hunting rights. It merely creates an easement or profit in favor of the descendants of Tim Dwyer, Sr.

[¶80] Easement and profit are legal concepts whereby one person has the legal right to a limited use of another person's real property. *See* Restatement (Third) of Property: Servitudes, §§ 1.1 and 1.2; *Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2011 ND 95, ¶ 8 & 9; 797 N.W.2d 770, 773-74.

[¶81] The Owner of an easement has a right to lawful but limited use of another person's property: *e.g.*, I have the right to drive across your land to reach my land. It is a burden on one

estate for the benefit of another. *See Nagel v. Emmons County, N.D. Water Resource District*, 474 N.W.2d 46 (N.D. 1991).

[¶82] Easement and Profit are similar; the primary difference is that a profit does not include a dominant tenement. However, profit is often also referred to as an easement. Restatement (Third) Property: Servitude §1.2.

[¶83] As part of the sale of property, a landowner has the right to impose restrictions on its future use as long as the restrictions are not contrary to public policy. *Anderson v. Marshall-Malaise Lumber Co.*, 66 N.D. 216, 263 N.W. 721, 723 (1935). It is not against public policy for the Settlor to provide a limited right of access for all of his descendants to enter upon his property for the purpose of hunting, hiking and other outdoor recreational activities. N.D.C.C. § 47-05-01 has a whole list of similar burdens or servitudes, which may attach to the land of another such as the right of fishing, the right of way, the right of transacting business upon the land, and the right of conducting lawful sports upon the land.

[¶84] The terms of the Tim Dwyer Farm Trust do not direct that the hunting rights be severed from the surface estate. It is clear upon its face that the Settlor was only providing for his descendants a limited right of access to the property for the purpose of hunting, hiking and other recreational activities. This did not create a separate estate, sever ownership from the surface, or deprive future surface owners from any rights to hunt, hike or pursue recreational activities on the property.

[¶85] The District Court's conclusion that allowing non-owners the right to hunt on another's land is contrary to the intent of N.D.C.C. § 47-05-17 is legally incorrect. If that were true, there could be no PLOTS (Private Land Open to Sportsman) Program in the State of North Dakota.

[¶86] The Plots Program allows landowners to enter into contracts with the North Dakota Game & Fish Department ranging from 2 to 30 years which allow non-landowners access to the owner's property for the purpose of hunting. *See* PLOTS FAQs for landowners on the North Dakota Game & Fish Department's website; N.D. Admin. Code § 30-04-08-01 and

N.D.C.C. § 20.1-02-27.

[¶87] When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05.

[¶88] Interpretation of a statute is a question of law. *In re R.A.*, 2011 ND 119, ¶ 24, 799 N.W.2d 332 (citing *In re M.W.*, 2009 ND 55, ¶ 6, 764 N.W.2d 185). We look at the plain language of the statute and give each word its ordinary meaning. *Id.* Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained. N.D.C.C. § 1-02-02.

[¶89] When engaging in statutory interpretation, this Court has consistently recognized that it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed. *See e.g., Bornsen v. Pragotrade, LLC*, 2011 ND 183, ¶ 14, 804 N.W.2d 55; *State v. Dennis*, 2007 ND 87, ¶ 12, 733 N.W.2d 241; *Public Serv. Comm'n v. Wimbledon Grain Co.*, 2003 ND 104, ¶ 28, 663 N.W.2d 186; *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993). It is clear under the unambiguous language of N.D.C.C. § 47-05-17 that the legislature did not intend to prevent landowners from granting a right of access to non-owners to hunt on their property. To do so would invalidate and essentially eliminate the right of non-landowners to hunt in North Dakota. Instead, the legislature used the word sever (i.e. separate) ownership of the right of access for hunting from ownership of the surface rights. If its intent was to also restrict a landowner from granting access for hunting to a non-owner it could easily have said so.

[¶90] Likewise, even though this Trust Agreement was executed in 2004 prior to the time N.D.C.C. § 47-05-17 was enacted, it is clear the Settlor had no intention of severing ownership of the hunting rights from the surface. He did not intend for his descendants to have the right to lease or sell the hunting rights as would have been the case if he had severed mineral rights. He did not intend to take this right of access away from the surface owner. Instead, he was granting a right of access to a limited class of people for the purpose of hunting, hiking, and

other outdoor recreational activities. This is a right personal to his descendants. Unlike a severance, his descendants will not own the hunting rights and have no right to sell or assign their interest in this profit.

[¶91] The Trial Court's Order on this issue should be reversed.

**VIII. The arguments set forth in Brief of Appellee Ingrid A. Sell are joined in and adopted herein.**

[¶92] Appellees, and Cross-Appellants, Margret Sell and John Dwyer Co-Trustees of the Tim Dwyer Farm Trust; Peggy Dwyer Sell, a/k/a Margret Sell; and John W. Dwyer a/k/a John Dwyer join in and adopt by this reference the arguments set forth in the Brief of Appellee Ingrid A. Sell.

**CONCLUSION**

[¶93] For the foregoing reasons, the Court should;

[¶94] Affirm that part of the Amended Judgment declaring the Co-Trustees have full discretion to determine whether the sale of the Trust's real property is in the best interests of the Trust beneficiaries; that the Co-Trustees are not required to sell any or all of the Trust's real property; that if the Co-Trustees decide to sell the Trust's real property, the Co-Trustees may sell any or all of the real property at once; and that the Co-Trustees may withdraw all or some real property from any proposed sale if the appraised valuations of the real property are not satisfactory.

[¶95] Affirm that part of the Amended Judgment finding the Tim Dwyer Farm Trust Agreement is not ambiguous and declaring that if the Co-Trustees decide in their sole discretion to sell any or all of the real property, Tim Dwyer, Jr. has the right of first offer to purchase the land offered for sale. The right of first offer is personal to Tim Dwyer, Jr. and cannot be assigned. If the Co-Trustees sell the real property to Tim Dwyer, Jr., the Co-Trustees must do so under a Contract for Deed extending for a period of 15 years at an interest rate of 4½ percent and requiring equal annual payments of principal and interest without a right of prepayment.

If Tim Dwyer Jr. does not exercise his right of first offer, the other children of William Dwyer, a/k/a Tim Dwyer and Tim Dwyer Sr. may purchase the real property on a per capita basis at the same price and on the same terms as Tim Dwyer, Jr., including a Contract for Deed extending for a period of 15 years at an interest rate of 4½ percent, and requiring equal principal and interest payments without a right of prepayment.

¶96 Reverse that part of the Amended Judgment which declared the reservation of rights under Article IX of the Tim Dwyer Farm Trust agreement for beneficiaries to access the Trust's real estate for hunting, hiking and recreational activities following any conveyance of the real estate is invalid as a matter of law under N.D.C.C. § 47-05-17.

¶97 Order that the appraisals of Rose Hoefs and Roger Cymbaluk are valid and, as directed by the Trust Agreement, set the price at which Tim Dwyer, Jr., or his siblings, can buy any farmland offered for sale by the Co-Trustees.

¶98 Order that Tim Dwyer, Jr. has 14 days from the date this court's opinion becomes final to exercise his right of first offer to purchase such of the trust lands offered for sale to him pursuant to the terms of the offer to sell and contract for deed noted at pages 239 to 257 of the appendix filed herein.

Dated this 2nd day of March, 2021.

JOHNSON, MOTTINGER & GREENWOOD, PLLP.

By /s/ Craig E. Johnson  
Craig E. Johnson (ND #03670)  
15 South Ninth Street  
Fargo, North Dakota 58103  
Telephone: (701) 235-7501  
Facsimile: (701) 235-8906  
Email: cjohnson@jrmlawfirm.com  
Attorney for Defendants, Appellees,  
and Cross-Appellants, Margret Sell and  
John Dwyer, as Co-Trustees of the Tim  
Dwyer Farm Trust and Peggy Dwyer Sell,  
a/k/a Margret Sell, and John W. Dwyer,  
a/k/a John Dwyer, Individually



HELLMUTH & JOHNSON

By /s/ Klay C. (KC) Ahrens  
*Admitted pro Hac Vice, ID #P02262*  
Joseph M. Barnett, ID #07951  
8050 West 78<sup>th</sup> Street  
Edina, MN 55439  
Telephone: (952) 941-4005  
Facsimile: (952) 941-2337  
E-Mail: kahrens@hjlawfirm.com  
E-Mail: jbarnett@hjlawfirm.com  
Attorneys for Defendants and Appellees,  
Patrick D. Sell, Johnny Dwyer,  
Molly Binger, Olin Sell and Dana Dwyer

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

[¶98] I certify this Brief contains 25 pages, excluding this certificate. I certify this Brief complies with the type face requirements of N.D.R.App P. 32(a) and the type style requirements of that Rule, because it has been prepared in a proportionally-spaced typeface using a WordPerfect, Times New Roman, 12 point font.

By: /s/ Craig E. Johnson  
Craig E. Johnson (#03670)

## CERTIFICATE OF SERVICE

[¶99] I hereby certify that true and correct copies of the Brief of Defendants, Appellees, and Cross-Appellants, Margret Sell, Co-Trustee of the Tim Dwyer Farm Trust; John Dwyer, Co-Trustee of the Tim Dwyer Farm Trust; Peggy Dwyer Sell a/k/a Margret Sell; and John W. Dwyer a/k/a John Dwyer, were on the 2<sup>nd</sup> day of March, 2021, served electronically on the following:

Seymour R. Jordan: [srj@nefflawnd.com](mailto:srj@nefflawnd.com)  
Dwight C. Eiken: [nefflaw@nemont.net](mailto:nefflaw@nemont.net)  
Attorneys for Plaintiff

Lynn M. Mesteth: [lynn@ndwaterlaw.com](mailto:lynn@ndwaterlaw.com)  
Dwyer Law Office, PLLC  
Attorney for Michael A. Dwyer and Ruth Dwyer Coleman

James A. Lodoen: [lodoenj@ballardspahr.com](mailto:lodoenj@ballardspahr.com)  
Ballard Spahr LLP  
Attorney for Jane Dwyer Morgan and Barbara Dwyer Rice

Ingrid A. Sell, Esq. Pro Se: [Ingrid.A.Sell@gmail.com](mailto:Ingrid.A.Sell@gmail.com)  
NY Bar No. 4776324 & MN Bar No. 0395146  
6702 West Wakefield Drive, # B1  
Alexandria, Virginia 22307  
917-693-3653

Sean T. Foss: [sean@okeeffeattorneys.com](mailto:sean@okeeffeattorneys.com)  
O’Keeffe, O’Brien, Lyson & Foss, Ltd.  
Attorneys for Andy Dwyer, Jack Dwyer, Rachel Meuchel, Dan Dwyer,  
Tommy Dwyer and Joey Dwyer

[¶100] I further served copies of the Brief upon the following persons on this date, by depositing a copy thereof in the United States mail at Fargo, North Dakota, enclosed in an envelope addressed to the following named persons at the address following their names with postage prepaid, by first class mail:

Sadie Bro, 12309 28<sup>th</sup> Street NW, Bismarck, ND 58503-8474  
Sam Coleman, 15823 Cattle Drive, Baldwin, ND 58521  
Sarah Grossman, 9442 225<sup>th</sup> Street West, Lakeville, MN 55044  
Johnny Coleman, 9050 Apple Creek Road, Bismarck, ND 58504  
Katie Montplaisir, 3712 Tommy Armour Circle, Billings, MT 59106  
Charles Coleman, 9025 Apple Creek Road, Bismarck, ND 58504  
Katie Joraanstad, 2018 9-1/2 Street North, Fargo, ND 58102  
Anne Dwyer, 1101 17<sup>th</sup> Avenue, Unit 201, Seattle, WA 98122  
Josh Dwyer, 5137 12<sup>th</sup> Avenue S, Minneapolis, MN 55417

Beky Olson, 12755 12<sup>th</sup> Street NE, Baldwin, ND 58521  
Mike Morgan, 1047 132<sup>nd</sup> Street SW, Brainerd, MN 56401  
Billy Morgan, 12260 Danbury Way, Rosemount, MN 55068  
Paul Rice, 3556 52<sup>nd</sup> Avenue NE, Maddock, ND 58348  
Will Rice, 3556 52<sup>nd</sup> Avenue NE, Maddock, ND 58348  
Judah Coleman, 832 Crescent Lane, Bismarck, ND 58501  
David Morgan, 4785 Dodd Road, Eagan, MN 55123  
Janna Schmidt, 318 22<sup>nd</sup> Avenue N, Fargo, ND 58102  
Taylor Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270  
Tessa Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270  
Teddi Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270  
Tianna Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270

By: /s/ Craig E. Johnson  
Craig E. Johnson (#03670)

## AMENDED CERTIFICATE OF SERVICE

[¶99] I hereby certify that true and correct copies of the Brief of Defendants, Appellees, and Cross-Appellants, Margret Sell, Co-Trustee of the Tim Dwyer Farm Trust; John Dwyer, Co-Trustee of the Tim Dwyer Farm Trust; Peggy Dwyer Sell a/k/a Margret Sell; and John W. Dwyer a/k/a John Dwyer, and of Defendants and Appellees, Patrick D. Sell, Johnny Dwyer, Molly Binger, Olin Sell and Dana Dwyer were on the 2<sup>nd</sup> day of March, 2021, served electronically on the following:

Seymour R. Jordan: srj@nefflawnd.com  
Dwight C. Eiken: nefflaw@nemont.net  
Attorneys for Plaintiff

Lynn M. Mesteth: lynn@ndwaterlaw.com  
Dwyer Law Office, PLLC  
Attorney for Michael A. Dwyer and Ruth Dwyer Coleman

James A. Lodoen: jlodoen@spencerfane.com  
Ballard Spahr LLP  
Attorney for Jane Dwyer Morgan and Barbara Dwyer Rice

Ingrid A. Sell, Esq. Pro Se: Ingrid.A.Sell@gmail.com  
NY Bar No. 4776324 & MN Bar No. 0395146  
6702 West Wakefield Drive, # B1  
Alexandria, Virginia 22307  
917-693-3653

Sean T. Foss: sean@okeeffeattorneys.com  
O’Keeffe, O’Brien, Lyson & Foss, Ltd.  
Attorneys for Andy Dwyer, Jack Dwyer, Rachel Meuchel, Dan Dwyer,  
Tommy Dwyer and Joey Dwyer

[¶100] I further served copies of the Brief upon the following persons on this date, by depositing a copy thereof in the United States mail at Fargo, North Dakota, enclosed in an envelope addressed to the following named persons at the address following their names with postage prepaid, by first class mail:

Sadie Bro, 12309 28<sup>th</sup> Street NW, Bismarck, ND 58503-8474  
Sam Coleman, 15823 Cattle Drive, Baldwin, ND 58521  
Sarah Grossman, 9442 225<sup>th</sup> Street West, Lakeville, MN 55044  
Johnny Coleman, 9050 Apple Creek Road, Bismarck, ND 58504  
Katie Montplaisir, 3712 Tommy Armour Circle, Billings, MT 59106  
Charles Coleman, 9025 Apple Creek Road, Bismarck, ND 58504  
Katie Joraanstad, 2018 9-1/2 Street North, Fargo, ND 58102  
Anne Dwyer, 1101 17<sup>th</sup> Avenue, Unit 201, Seattle, WA 98122  
Josh Dwyer, 5137 12<sup>th</sup> Avenue S, Minneapolis, MN 55417  
Beky Olson, 12755 12<sup>th</sup> Street NE, Baldwin, ND 58521  
Mike Morgan, 1047 132<sup>nd</sup> Street SW, Brainerd, MN 56401  
Billy Morgan, 12260 Danbury Way, Rosemount, MN 55068  
Paul Rice, 3556 52<sup>nd</sup> Avenue NE, Maddock, ND 58348  
Will Rice, 3556 52<sup>nd</sup> Avenue NE, Maddock, ND 58348  
Judah Coleman, 832 Crescent Lane, Bismarck, ND 58501  
David Morgan, 4785 Dodd Road, Eagan, MN 55123  
Janna Schmidt, 318 22<sup>nd</sup> Avenue N, Fargo, ND 58102  
Taylor Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270  
Tessa Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270  
Teddi Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270  
Tianna Dwyer, 15991 Bennie Peer Road, Sidney, MT 59270

By: /s/ Craig E. Johnson  
Craig E. Johnson (#03670)