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STATE OF NORTH DAKOTA

IN SUPREME COURT

STATE OF NORTH DAKOTA

Michael Pomarleau, Michael – Appellant v. Tanya Pomarleau, Tanya - Appellee, and State of North Dakota, Statutory Real Party in Interest	Supreme Court Case No.: 20210083 District Court Case No.: 08-2018-DM-826

Appeal from the Memorandum and Order (Docket #179) dated December 28, 2020, Judgment (Docket #199) dated January 20, 2021, Order on Post-Trial Motions to Amend the Court's Memorandum and Order (Docket #228) dated May 13, 2021 and Amended Judgment (Docket #237), dated July 9, 2021 all issued and entered by the Honorable David Reich, District Court Judge for South Central Judicial District, Burleigh County, North Dakota.

BRIEF OF APPELLANT

- ORAL ARGUMENT REQUESTED -

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2. Did the District Court err in it's tax dependency / child tax credit findings.

3. Did the District Court err in valuing the parties' marital home.

4. Did the District Court err in how it valued, accounted for, and awarded business assets of the parties.

5. Did the District Court err in how it valued, accounted for, and distributed various personal property.

6. Did the District Court err in how it valued, accounted for, and distributed certain financial assets of the parties.

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8. Did the District Court err in off-setting the equity payment to be made by appellee to appellant by 50% of the health insurance premium paid by her as required by the summons.

STATEMENT OF THE CASE

¶1 This is an appeal from the Memorandum and Order (Docket #179) dated December 28, 2020, Judgment (Docket #199) dated January 20, 2021, Order on Post-Trial Motions to Amend the Court's Memorandum and Order (Docket #228) dated May 13, 2021 and Amended Judgment (Docket #237), dated July 9, 2021 all issued and entered by the Honorable David Reich, District Court Judge for South Central Judicial District, Burleigh County, North Dakota.

¶2 This is a divorce case in which the parties were the parents of three minor children and had been married for nearly 19 years at the time of their separation. Following a two-day trial, the District Court entered an order for Equal Residential Responsibility as well as an equitable distribution of the marital estate, from which Michael appeals herein.

STATEMENT OF THE FACTS

¶3 As indicated above, this is a divorce case in which the parties were the parents of three minor children (one of whom is now no longer a minor) and had been married for nearly 19 years at the time of their separation. Following a two-day trial, the District Court entered an order for Equal Residential Responsibility as well as an equitable distribution of the marital estate, from which Michael appeals herein.

¶4 Michael Pomarleau and Tanya Pomarleau were married on September 4, 1999 and separated on June 27, 2018. (Appendix, p. 71, Hereinafter "App-"). The parties had three minor children at the time of trial, one of whom is no longer a minor. (App-71). At the time of trial, Michael was 43 years old and self-employed as a landman (App-71). Tanya was 42 years old and employed as a mortgage broker for Anytime Mortgage (App-73).

¶5 Michael does not appeal the District Court's determination on Equal Residential Responsibility nor the Trial Court's decision as to the parenting plan moving forward. As such, no other facts relevant to the children are addressed nor stated herein. Rather the nominal facts associated with some of the District Court's residual Orders as associated with the child support obligation of the parties, as well as the tax dependency / child tax credit situation will be addressed, as needed, in Michael's argument below.

¶6 As to the marital estate, at the time of separation, the parties held various properties including a marital home, business assets, miscellaneous vehicles and household personal property, and financial assts which Michael asserts the court erred in interpreting the evidence presented and thus erred in calculating an equitable distribution of the marital estate. This similarly occurred in the context of the marital debts and obligations and finally in the context of the off-set which the District Court applied to

Tanya's obligation so as to account for an equity payment to Michael. Again, as those matters are very fact specific, they are best addressed in the context of the argument below.

ARGUMENT

A. Standard of Review

¶7 The standard for reviewing the distribution of marital property is well-established:

> A district court's distribution of marital property is treated as a finding of fact, which we review under the clearly erroneous standard of review. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. This Court views the evidence in the light most favorable to the findings, and the district court's findings of fact are presumptively correct.
>
> Fugere v. Fugere, 2015 ND 174, ¶7, 865 N.W. 2d 407 (Citations Omitted).

¶8 Similarly, the valuation of property in a marital estate by the district court is also subject to a clearly erroneous standard of review.

> The value a trial court places on marital property depends on the evidence presented by the parties. Because a trial court is in a far better position than an appellate court to observe demeanor and credibility of witnesses, we presume a trial court's property valuations are correct. We will not reverse a trial court's findings on valuation and division of marital property unless they are clearly erroneous.
>
> Langwald v. Langwald, 2016 ND 81, ¶6, 878 N.W.2d 71

¶9 Finally, this court has relative to child support, stated as follows:

> [c]hild support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review. A court errs as a matter of law when it fails to comply with the requirements of the child support guidelines in determining an obligor's child support obligation. As a matter of law, the district court must clearly set forth how it

> arrived at the amount of income and level of support. The trial court's findings of fact in making its child support determination are overturned on appeal only if they are clearly erroneous.
>
> Lauer v. Lauer, 2000 ND 82, ¶3, 609 N.W.2d 450 (citations omitted).

B. The District Court erred in failing to provide an explanation, basis or reasoning as to how it arrived at it's child support calculations and determination in the Memorandum and Order and in the associated original Judgment and subsequently erred in it's child support calculations as provided in the Amended Judgment

¶10 The Trial Court provided a calculation for the parties' incomes and child support obligations in the Original Judgment. However, in the original Judgment, there was no explanation, basis, nor reasoning as to how the Court arrived at these income figures. Michael submits that it was erroneous for the Trial Court not to detail how it arrived at these figures for purposes of the parties' incomes and their child support obligations. (See Machart v. Machart, 2009 ND 208, ¶15, 776 N.W.2d 795 and Langwald v. Langwald, 2016 ND 81, ¶18, 878 N.W.2d 71).

¶11 Subsequent to Michael's appeal, the Trial Court entered an Order on Post-trial motions and this Court returned the case to the Trial Court to address those post-trial motions, which included Michael's concern with the lack of support for the child support calculations. Upon reconsideration and re-briefing, the Trial Court then entered an Amended Judgment which resulted in Michael having an off-setting net support obligation to Tanya in the amount of $114 per month (rather than $1,494 per month as required by the Original Judgment). While obviously significantly better than $1,494 per month and based on an actual calculation, Michael submits that this off-setting amount is also incorrect and has been erroneously calculated.

¶12 Neither party, prior to Judgment being entered, disputed Michael's income as calculated by the Trial Court. Both parties agreed at the time of trial and based on his income taxes, that Michael's average self-employment income was $145,036 annually, resulting in a net monthly income of $8,099 and a child support obligation of $2,752 per month for three children.

¶13 The initial issue in dispute is what Tanya's income should be for purposes of her child support obligation.

¶14 At the time of trial, Tanya had been employed as a mortgage lender since 2016. (Trial Transcript, day 2, Hereinafter "T2", 195:2-14). During those 4 1/2 years, her income increased every year. (T2 195:2-14). In 2019 Tanya earned $259,853 as a mortgage lender. (T2 195:12-14). Per her interrogatory responses and her own testimony, Tanya professed in early 2019 that she was expecting her income to decrease from 2018 due to the difficult mortgage / lending situation. (T2 197:16-199:25). Contrary to Tanya's statement to this effect under oath, and in her discovery responses, Tanya's 2019 income actually increased from $228,799 in 2018 to $259,853 in 2019. (T2 197:16-199:25, supported by Exhibits 10 and 11, Index 41 and 42). Prior to trial, in early April of 2020, Tanya voluntarily resigned from the position which paid her $259,853 and took a job as a mortgage lender at Anytime Mortgage. (T2 195:15-196:18). Her testimony was that at her new position she would be making $10,500 per month at Anytime Mortgage, or $126,000 annually. (T2 196:19-25). This is obviously a significant decrease from Tanya's 2019 income of $259,853. Further, this is a decrease in income which Tanya voluntarily accepted, knowing very well that she would need to account for this in the context of a child support obligation. (T2 200:1-15)

¶15 North Dakota law provides that where an obligor voluntarily and knowingly foregoes income and/or terminates employment to knowingly take a position which is lower paying, the obligor should not be allowed to pay child support based on this knowing reduction in income (See N.D.A.C. §75-02-04.1-07(7)). Furthermore, North Dakota law provides that a party's recent past circumstances are typically the most accurate indicator of that parties' future income / income ability (See N.D.A.C. §75-02-04.1-02(8)). Finally, even in situations which are not specifically self-employment scenarios, where income has been subject to fluctuation, a five-year averaging may be utilized by the court. (See N.D.A.C. §75-02-04.1-02(7)).

¶16 Based upon the application of the facts of this matter (Tanya clearly voluntarily giving up the capacity and ability to make income and taking a job which would result in less income than she had made in 2016, 2017, 2018 or 2019), knowing full well that she was going to be obligated to pay child support in some capacity and making misleading statements that her income would be lower in both 2019 and 2020, Michael submits that Tanya's child support should have been based on her 2019 income taxes as the most recent and reasonable indicator of her income ability. If such income is utilized, Tanya's net monthly income is $14,820, resulting in a child support obligation of $3,913. As a result of the parties having equal residential responsibility, Tanya would then have a net support obligation of $1,161 per month.

¶17 Alternatively, Michael submits that it would have also been proper for the Trial Court to recognize that Tanya's income as a mortgage lender has varied over the past 5 years and due to Tanya's argument that the market has been inconsistent, the Trial Court could use a five-year average for Tanya also, which would have result in average gross

income of $178,230, net monthly income of $10,699 and a child support obligation of $3,476. As a result of the parties having equal residential responsibility, Tanya would then have a net support obligation of $724 per month.

¶18 The Trial Court chose to simply accept that Tanya had voluntarily changed her position and given up tens of thousands of dollars in historical income to accept a position at Anytime Mortgage and thus her new Anytime Mortgage income would now apply, thus ignoring and entirely overlooking Tanya's historical income and income history as a mortgage broker. Michael respectfully submits that this was error.

¶19 In addition to these asserted errors, the Trial Court's Memorandum and Order, as well as the Judgment, provided that the post-separation investment income (both rental income and oil income) of Michael, in the total sum of $28,282 be split with Tanya (App-140). While this was not known prior to Trial, the Trial Court, via it's Order and Judgment, very clearly split this income. As a result of this split, Michael's income on his income taxes was in fact overstated (because Michael's taxes claimed *all* of this rental and royalty income) and Tanya's income on her taxes was in fact understated (because Tanya's taxes claimed *none* of this income). Thus, the Judgment as entered, when actually applied, results in Michael having a larger child support obligation than he should have, and Tanya having a lower child support obligation than she should have. Michael did not present these figures, nor make this argument at Trial because the Trial Court at that time did not require that 50% of this income actually be awarded to Tanya. When the Trial Court entered it's Judgment splitting this income, it should have also taken this income impact into consideration in the context of child support.

¶20 The effect of the Trial Court's Judgment as it currently exists is that $28,282 of post-separation investment income is required to be split. However, rather than allowing the income to be properly transferred to Tanya through the companies, the court chose to offset it against other marital assets. Nonetheless, it is income, for purposes of child support, which Michael claimed and income which Tanya did not recognize.

¶21 Michael's tax returns (as used to calculate his income for CS purposes) do not reflect that half of the investment income was transferred to Tanya. Rather, Michael's tax return reflects Mike keeping 100% of that income. Again, on top of creating a situation wherein Michael bears all of the tax burden associated with this income, this also impacts child support as well based on that, now unrealized, income. Similarly, Tanya's income for purposes of child support should also reflect that the Trial Court ordered that she is entitled to 50% of this income and thus it is income for purposes of calculating her child support obligation. As a result of the Court's Judgment, Tanya has, in reality and as a result being awarded half of the oil and investment income, more income than her taxes reflect and Michael has less.

¶22 Based on the above, Michael submits that the amount by which Tanya's income is understated and Mike's income is overstated can be easily calculated. The $28,282 was income for a period of 2.5 years (June 2018 through December 2020), so adjusted for 1 year, that total income would be $11,312.80 annually. As that income has been split equally, half of that amount should be added to Tanya's income and subtracted from Michael's income. Therefore, Michael's annual income has been overstated and Tanya's annual income understated by $5,656.40 annually for this 2.5 year period of time as a

direct result of how the Trial Court chose to handle the post separation investment income.

¶23 Michael further submits that if in fact it was determined that this income adjustment should not occur since it was treated as a property distribution (even though this is unquestionably income), then at a minimum this would also need to be treated as a property distribution to Michael rather than income for purposes of child support and his income should then be reduced by the full amount of the income ($28,282 over 2.5 years) which he claimed on his income taxes. While this would create a fictional income situation for Michael, it would at least provide some appropriate relief by neither party having this income considered in the context of a child support obligation.

¶24 Michael seeks remand of the child support matter back down to the Trial Court to properly account for Tanya's employment income and the investment income distribution as provided herein.

C. <u>The District Court erred in it's tax dependency / child tax credit findings.</u>

¶25 As demonstrated by Exhibits 10 and 11 at Trial and an issue which is undisputed, Tanya claimed 2 of the 3 children as dependents on her taxes for both the years 2018 and 2019. This was done without any agreement by Michael. Tanya simply took this action as she was the first to file her income taxes in both 2018 and 2019. The Trial Court's Judgment (entered in January of 2021) provided that on even numbered years, Tanya shall claim the extra child if there is an odd number or a single child to be claimed. This provision allowed Tanya to claim 2 of the 3 children for tax year 2020, resulting in her claiming 6 dependents (2 for each year) for tax years 2018-2020, and Michael only

claiming 3 dependents (1 each year) for those same years. The Trial Court directed that the parties were to equally share the right to receive tax credits for the children but then allowed Tanya to still claim the extra child in 2020, thus giving her the extra tax credits for three consecutive years. (App-135)

¶26 Michael brought this inequity up to the Trial Court and it was one of the subjects considered by the Court in the context of post-trial motions, however the Trial Court did not address the matter nor make any further modification. Michael submits that if there is to be an equal sharing of tax credits, then the Judgment should provide that Michael shall be allowed to claim 2 of the 3 children for tax years 2021 – 2022. Then, beginning in 2023, the language as exists in the current Amended Judgment would be implemented and that it is error and inconsistent to not allow for the same.

D. <u>The District Court erred in valuing the parties' marital home.</u>

¶27 Michael submits that the District Court erred in how it valued and accounted for various other personal property and assets.

¶28 As this court is aware,

> Under N.D.C.C. § 14-05-24(1), the district court is required to make an equitable distribution of all the divorcing parties' marital property and debts. 'All 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.
>
> <u>Brouillet v. Brouillet</u>, 875 N.W.2d 485, 2016 ND 40, ¶25 (citations omitted).

¶29 An essential component of providing for the equitable distribution of the assets of the marriage is to appropriately value and account for the same. Starting with the marital

home, Michael hereinafter points to the following assets / valuations as demonstrating clear error.

¶30 The parties presented two competing appraisals on the marital home in which Tanya continued to reside and own subsequent to divorce. The Trial Court accepted Tanya's valuation, noting that it "more accurately reflected the value at the time of separation". (App-91). Michael submits that his higher value more accurately reflected the value at the time of trial, a date which was two years after the parties' separation and during which time the value of the marital home unquestionably increased. The fact is that the marital home is a marital asset which remained a marital asset and into which neither party contributed their separate post-separation incomes. If the home was valued at $300,000 at the time of separation and the housing market got remarkably hot during the years prior to the actual date of divorce such that the value of the home increased by $100,000 to have a value of $400,000 at the time of the actual divorce, the value of that asset should be $400,000, not $300,000. Neither party contributed any post-separation income or post-separation assets to such property which resulted in the increase. To award a $400,000 asset to one party for a lesser value of $300,000 in such situation results in one party receiving an inequitable financial windfall of a marital asset.

¶31 Michael submits that the similar scenario applies to the marital home here, albeit on a lesser scale. It is undisputed that Tanya's appraisal showed a value of $378,000. It is undisputed that Michael's appraisal showed a value of $400,000. It is also undisputed that Michael's appraisal occurred later in time (Tanya's occurring on July 23, 2018 and Michael's occurring on August 15, 2018). While less than one month may seem insignificant, as testified by Michael, by the time his appraisal was done the half-bath had

been completed and included in the appraisal, whereas Tanya's appraisal did not include this half bath. (Trial Transcript, Day 1; Hereinafter "T1" 171:14-172:14). The fact that the half bath was not finished and not included in Tanya's appraisal and was in fact included in Mike's appraisal was clearly demonstrated via testimony at trial and via the appraisal exhibits presented at trial. (T1 171:14-172:14). Michael submits that the evidence clearly established that his appraisal is more accurate, and timely, and should have been utilized by the court as the value of the property. The only justification provided by the Trial Court in utilizing Tanya's value is that it was the value closer to the time of separation (less than 1 month closer than Michael's), even though this was always a marital asset and no party provided any proof that they contributed post-marital funds to increase the value of that marital asset while it appreciated during the two years leading up to trial. Michael submits that utilizing this value was clearly erroneous.

E. The District Court erred in how it valued, accounted for, and awarded Business Assets of the parties.

¶32 Michael submits there are multiple errors in the valuation of the business assets and breaks these up, for purposes of clarification, as follows:

- *(American Land Fixed Assets from Balance Sheet) - $13,619.35. Amended Judgment (App-137))*.

¶33 The value of $13,619.35 utilized by the Trial Court is a figure derived from the fixed assets columns of the balance sheet submitted at trial (App-16) and represents the *original purchase price* of the office equipment from years ago. Michael testified that Exhibit 24a accounted for all assets of American Land (T1 190:7-13). Tanya testified that she took the $13,619 figure from Michael's balance sheet but she did not allow for any

depreciation in the value of the furniture assts. (T2 210:12-212:14). When questioned on cross-examination, however, Tanya admitted that depreciation of these assts should be allowed. (T2 212:3-14). With Tanya admitting that depreciation should be allowed, there was no testimony or evidence to support the $13,619.35 value of this asset which was attributed to Michael.

¶34 Further, Michael submits that the value the Trial Court should be utilizing is the replacement cost or current fair market value, not the original purchase price. (See Evenson v. Evenson, 2007 ND 194 ¶6, 742 N.W.2d 829, Peterson v. Peterson, 1999 ND 191, ¶11, 600 N.W.2d 851 and Boehm v Boehm, 2002 ND 144, ¶13, 651 N.W.2d 672). This is office furniture should be treated in a manner similar to how household furniture would be treated. The only difference between the American Land furniture and equipment and the parties' personal furniture is the room in which it is located. Michael submits that the current fair market value of the American Land Furniture and Equipment, which was purchased for $13,619.35 over a period of 10 years, would much more closely reflect the depreciated value which he utilized ($50.47) or at a minimum that the Trial Court should have utilized some figure between these figures to adjust for the fact that this is not new, recently purchased property. Failure to do so, in light of the above and in light of Tanya's own admission, is clear error.

- *Business Assets (Sparrow Investments Fixed Assets from Balance Sheet) - $37,766.18 Amended Judgment (App-137)).*

¶35 Michael testified at trial that the entirety of this Furniture and Equipment value of $37,766.18 for Sparrow Investments is comprised of a single asset, that being a mobile home that was purchased and moved onto the Belfield property. (T1 182:4-16). As testified by Michael, the $37,766.18 is part of the Belfield rental property and NOT a

separate asset of Sparrow investments (T1 182:4-16). Tanya testified that she did not know where the $37,666.18 figure came from and had no idea how to value the furniture and equipment of Sparrow nor what those assets were (T2 214:1-12). As such, the only actual evidence presented as to what this asset actually was and what the value actually was, was provided by Michael.

¶36 The Trial Court's Memorandum and Order states that testimony was given that a house was built on the Belfield property. (App-71). This is incorrect. There was no testimony of this nature by either party. The testimony given was that a mobile home was purchased and moved onto a lot and this consisted of the Belfield Property (T1 182:4-16). The clarification between a home being built and a mobile home being purchased and moved onto the property is significant. Unlike a home built on site, which is real estate and permanently affixed to the land, a mobile home is a titled asset no different than an automobile and could be moved off the land. The Memorandum and Order correctly states that testimony was given that Tanya and Michael entered into a partnership with Roger and Rosie Decker (Tanya's parents), and the Belfield property as well as the mobile home that was purchased and moved onto that property was turned into a rental property. (App-71).

¶37 Paragraph 65 of the Memorandum and Order addresses the Belfield property. The court assigned "no value" to the property and rather ordered that "the parties share in the property to be equally divided among the parties". (App-91). This included sharing in the rental income and proceeds from any future sale of the property which "shall be governed by the terms of the existing partnership agreement governing the management of the property." (App-91). The Partnership, Operating, and Buy/Sell agreement was

entered into on 11/28/2014 by and between Roger Decker and Rosie Decker, individually and as husband and wife, and Mike Pomarleau and Tanya Pomarleau, individually and as husband and wife, and DBA "Sparrow Investments, LLC". This agreement was entered into evidence as Exhibit 21 (App-12). This corroborates the fact that the portion of the manufactured home on the Belfield property which was owned by Michael and Tanya (as governed by the partnership agreement) was recorded on the books of Sparrow Investments as previously stated. The partnership agreement governs both assets, being the lot and garage as well as the manufactured home.

¶38 This partnership agreement which the Trial Court ordered to govern the management of the Belfield property specifies precisely how profits from the rental are to be distributed between the parties. The partnership agreement also specifies precisely how the proceeds from the sale of the property either (1) in its entirety (i.e. the lot with the garage and mobile home all together) or (2) mobile home only (i.e. the mobile home is sold and moved off the lot, and the lot/garage and mobile home are sold separately). In both of these scenarios, the partnership agreement provides for Tanya to receive her proportional share (i.e. ½ of what was owned by Tanya and Michael) from the sale of the lot/garage and/or the mobile home.

¶39 There is a conflict in the Court's Memorandum and Order, and thus the Judgment, in that *it distributes the Belfield Property (i.e. the mobile home) twice and in 2 different ways*.

¶40 First, the mobile home is listed on the Sparrow Investments Balance sheet with a value of $37,766.18. At Paragraph 23 of the Amended Judgment the Trial Court awards this asset to Michael. (App-137).

¶41 Second, at Paragraph 22 of the Amended Judgment, the Trial Court orders the Belfield property to be governed by the partnership agreement, which awards the mobile home equally to Tanya and Michael. (App-136). If indeed the Trial Court's intention was to equally award this property to Tanya, then there must be *no value assigned to the Furniture and Equipment listing on the Sparrow Investments Balance sheet and, respectfully, the court should exclude the assets of $37,766.18 from the value of those assets awarded to Michael*. Once again and re-stated, the $37,766.18 for Sparrow Investments is the very same mobile home / asset which the Trial Court awarded equally to the parties' and it is an error to distribute this same asset twice. There is no testimony or evidence to the contrary and it was thus clearly erroneous to award the same asset in two different ways.

- *Business Assets (American Land Services accounts receivable) - $12,401 and Business Assets (American Land "other" business assets) - $2,250. Memorandum and Order – Paragraph 66, , Judgment page 12, Paragraph 23)*.

¶42 Exhibit 24A (App-16) is the American Land Services Balance sheet as of the date of separation. It shows an asset of "Accounts Receivable" of $12,401. Paragraph 23 of the Amended Judgment awards this asset to Michael. (App-137). In addition to the Accounts Receivable, Exhibit 24A (App-16) also shows an "Accounts Payable" value for American land services of $9,901. This liability of Accounts Payable was entirely overlooked and thus not taken into consideration in the Trial Court's Judgment, award and valuation of the American Land Services business asset.

¶43 Paragraph 66 of the Trial Court's Memorandum and Order states that "the parties" agree to line item #10 on the property and debt listing, which is a $2,550 asset described simply as "Sparrow and ALS Assets from Balance Sheet". (App-92, App-66). Paragraph

23 of the Amended Judgment awards this $2,550 asset to Michael (App-137). Neither the American Land Services balance sheet (App-16) (App), nor the Sparrow Investments balance sheet (App-15) list an asset in the amount of $2,550. This $2,550 is not a specific asset in of itself, but rather a calculation of assets based on the balance sheets and is specifically derived from the following, which was testified upon by Michael (See T1 189:11-190:13):

$12,401.00	(American Land Services Accounts Receivable from Balance Sheet)
- $9,901.00	(less American Land Services Account Payable from Balance Sheet)
+ $50.00	(plus approximate value of American Land Services Furniture and equipment less accumulated depreciation (actual value $50.47) from Balance sheet)
= $2,550	(Equals Total)

¶44 The Judgment as entered considers the American Land Accounts Receivable assets, but does not consider the American Land Accounts Payable liability. Michael submits that this is an error by the Trial Court when there was no contrary evidence to support that accounts payable should be disregarded.

¶45 As is indicated by the comments on line item 10 on the Property and Debt listing, (App-66) the parties did not agree on this value and how to represent it. Michael used the $2,550 figure based on the calculation above, and therefore did not give a separate value to the accounts receivable, accounts payable, or the American Land furniture and equipment assets since these were already considered in the above calculation. Tanya's comments on line item 10 on the Property and Debt listing showed a value of $0 for the assets if it was included elsewhere, or $2,550 if it was not included elsewhere. (App-66).

¶46 The Trial Court's Amended Judgment at Paragraph 23 (Business Assets) awards the asset of $13,619.35 to Michael, which, as previously discussed above, is the full

original purchase value of the American Land Services Furniture and Equipment listed on the balance sheet. As previously referenced, this $13,619.35 figure disregards reducing the value of these assets by the depreciated value of these assets which would resulting in a value of $50.47. Thus, the $50.47 value of this Furniture and Equipment should have already been considered by the Trial Court in the award of this asset. Regardless of this award, the Trial Court then awards $2,550 to Michael, $50.47 of which is included in the $13,619.35 (erroneously not reduced by depreciation) already awarded to Michael.

¶47 Michael's second concern is that the Order and Judgment has the effect of awarding a portion of the same assets twice. First, the Trial Court's Judgment awards the entire value of the accounts receivable valued at $12,401 to Michael. (App-137). Second, the Order also awards a value of $2,550 to Michael, $2,500 of which is a portion of the accounts receivable that were already awarded to Michael via the $12,401 and which failed to consider the Accounts Payable ($9,901) (App-137). The other $50 being the depreciated value of the Furniture and Equipment. As such, this "asset" is thus awarded twice.

¶48 Michael's third assertion of error follows up on the second in that the Order and Judgment it affect awards a portion of the same assets twice as related to the Furniture and Equipment. First, the Order awards the value of the full value of the American Land Furniture and Equipment to Michael (as previously referenced above). Second, the Order also awards a value of $2,550 to Michael, (again $50 of which is a portion of the American Land Furniture and Equipment that were already awarded to Michael).

¶49 To address these errors, Michael respectfully requests the matter be remanded back to the Trial Court with a direction that the Court award to Michael both the accounts

receivable asset of $12,401 as well as the accounts payable liability of $9,901. Thereafter, Michael submits the Trial Court should disregard the entirety of the $2,550 asset listed on line item 10 of the Property and Debt Listing, as $2,500 of that amount was already addressed in the award of the accounts receivable and accounts payable, and $50 is addressed in the award of the American Land Services furniture and equipment.

F. The District Court erred in how it valued, accounted for and distributed various personal property.

¶50 Lumping personal property together. The Trial Court lumped the parties personal / household property together and placed a value of $10,000 to the value of the property awarded to Tanya, and that same value of $10,000 on the value of the property awarded to Michael. (App-138). The Trial Court stated that Tanya testified that Michael removed more valuable property than he left behind for her. (App-93). However, there was no evidence presented to support this. In fact, upon review of the listing of personal property items one can see that they consist of regular household items, and the types of items taken by Michael are nearly identical in many cases in terms of the nature of the items that were left behind, but not directly comparable in quantity. The detail below lists all of the household items listed on the property and debt listing:

What Michael took	**Compared to what Michael left behind**
Weber Grill from the patio	all of the patio furniture
1 bed/mattress	3 beds/mattresses
1 TV	2 TVs (not including the projector theater system)
couch, bar chairs, chair, end tables, and lamps from the basement	Couch, chairs, end tables, entertainment center, lamps from the main level living room
1 vacuum cleaner	1 vacuum cleaner, kitchen aid, blenders, sowing machine, griddle, coffee makers
Ice house, coolers, and fishing heater from garage	Coolers, garden tools/hoses, camping gear, tools, shovels, bike in garage

Halloween decorations and luggage	Wall hangings, decorative items, Christmas decorations, luggage
Guns	(no compare)
(no compare)	Upright freezer
(no compare)	Washer and Dryer
(no compare)	Kitchen table and chairs
(no compare)	Household rugs
(no compare)	Lawn mower and weed eater
(no compare)	Beverage fridge
(no compare)	Laptop computer, i-pads

¶51 For the items that can be logically compared, Tanya more often than not, was left a larger quantity of items than Michael took. There is only 1 example (guns) where Michael took items to which there is no comparable item left behind for Tanya. There are 7 examples where items were left behind for Tanya where there is no comparable item which Michael took. As such, it is difficult to conceive how the Trial Court determined the value of items Michael took was similar to the value of Tanya's items as left behind.

¶52 Two further items are noteworthy. First, when one removes the Gents 1.75 carat ring (App-67, #28) which was in dispute, as well as removing the value of Tanya's ring (App-67, #27) ($12,417) which was awarded to her, the difference in the parties' values for the *non-jewelry property awarded to Michael* is only $914 ($11,700 as Mike's value compared to $12,614 as Tanya's value). On the other hand, when one compares the parties' differences in value of *personal property awarded to Tanya* and removes the jewelry from the equation, the difference is $21,386 ($28,450 as Mike's value compared to $7,064 as Tanya's value). This is a monumental difference in values and demonstrates how under-valued Tanya valued the personal property in her own possession.

¶53 Second, Michael submits that the Trial Court failed to consider that Michael was much more consistent and equitable in his valuations. Examples of this include him valuing the basement furniture he received at the exact same value as the living room

furniture which Tanya received (App-67, 68 #20 and 39) whereas Tanya valued the items Mike receive $5,000 higher (App-67, 68 #20 and 39). Mike testified as to his basis for the valuations and reasoning behind it. (T1 197:8-198:8) Tanya testified that the $8,000 on the basement furniture was her "estimate" and that she just felt the "personal property should be a wash." (T2 217:6-12).

¶54 In terms of jewelry, line item 26 (Michael's wedding ring) was awarded to Michael. Line item 27 (Tanya's 1.5 carat diamond ring) was not specifically awarded to anyone, but rather included in line item 48 (Tanya's jewelry). At trial, testimony was given that Tanya's jewelry included not only her 1.5 carat diamond ring, but also a diamond necklace. Line item 28 (gents ring) was also not included in the distribution of personal/household property, but rather addressed separately.

¶55 Based on the aforementioned, Michael submits that it cannot be concluded that the parties were awarded equal, "$10,000" values in household/personal property and such a broad determination is not based on evidence and was clearly erroneous.

¶56 Michael additionally submits that it is impossible to determine whether an equitable distribution of these assets have been made without the court actually placing a value on the assets. The Court determined it would lump multiple assets together to value them at roughly $10,000 for Michael and then also lump multiple assets together to value them at roughly this same value for Tanya. Such a process leaves the parties guessing as to what value the Court placed on the items listed in the property and debt listing and whether or not such a distribution was truly equitable as to each item of property. "All 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 cited by Fugere v. Fugere, 2015 ND 174, ¶8, 865 N.W.2d 407, 410.

¶57 Michael submits that each item of personal property, including the jewelry, furnishing, etc. should be given a separate value and then an equitable distribution occur thereafter.

¶58 Gents 1.75 Carat Ring. Paragraph 71 of the Trial Court's Memorandum and Order states that Michael is in possession of a 1.75 carat diamond ring, that the ring was given to Michael by his father in 2013, and it has been in Michael's possession for approximately 7 years. The Trial Court goes on to state that Tanya and Michael had the ring appraised, which was an indication that Michael exercised ownership of the ring. (App-93-94). Michael provided testimony that his father brought various items to him for safekeeping in late 2012, that his father died intestate in 2013, and that the ring was his father's such that by law the ring belongs to his mother, Geraldine Pomarleau. (T1 199:22-201:6). Michael as well as Geraldine Pomarleau both testified that the ring belongs to Geraldine and should not be included as a marital asset. (T1 122:13-123:20). Factually, there is no dispute that the ring originally belonged to Michael's father. Although Tanya asserted that this ring somehow belongs to Michael, the evidence very clearly established that Michael's father died intestate (T1 199:22-201:6) and upon cross examination, Tanya was unable to establish any discussion or event at which she recalls Michael's father gifting the ring to Michael (T2 217:24-219:23). Tanya testified that her "gut" tells her that Michael's father gifted him the ring before he passed away. (T2 2129:17-18) and it is apparently this "gut" evidence without any actual testimony or proof that allowed the Trial Court to assess, contrary to the actual factual testimony and

assertions of Michael and Geraldine, that this was a marital asset. Michael submits that such a finding, lacking any evidence to support it, is clearly erroneous.

¶59 Additionally, there was absolutely no evidence presented that Michael was involved in getting an appraisal on the ring and this was in fact the sole action of Tanya. Exhibit 65 was presented as the appraisal of the ring prepared by Riddles jewelry, dated 8/29/2014. Although that the appraisal lists the ring as property of "Tanya & Michael Pomarleau", it was clearly established that Tanya acted alone in taking the ring in to be appraised and that information is based solely on what Tanya would have told the appraiser. (T2 219:24-220:13; T1199:22-201:6).

¶60 Michael submits that it was error to include the ring as a marital asset based on the testimony given not only by the parties but also by Michael's mother. Further, if this is a marital asset, then Michael submits that it should have been awarded to Tanya at the value of $25,813 as she is the one who has asserted ownership whereas Michael has denied ownership and she is the one who has valued the ring at $25,813.

¶61 Finally, Michael submits that even if the Trial Court persisted in the ring being a marital asset when there is clearly a dispute in the ownership of the same and the value is significantly contested, it should have been ordered sold with any marital value being equally split between the parties.

¶62 Silver and Gold Bullion. Paragraph 4 of the Trial Court's Memorandum and Order states that Geraldine Pomarleau (Michael's mother) testified that her husband (Michael's father) gave gold coins to Michael in 2013 for safekeeping. (App-71) Michael's father passed away shortly thereafter. Geraldine also testified at trial that she owns those coins as the sole heir to her husband's estate, who died intestate. She testified

that Michael was instructed by this father, to hold onto the coins, as it was his father's wishes that each of his grandchild (being Michael's children, nieces, and nephews) be given a gold coin when they turned 18. It was not the intention of Michael's father that these coins were to be Michael's property. (T1 120:12-128:12). In addition, undisputed testimony was that two of the coins have already been distributed as two of the grandchildren had reached the age of 18 as of the date of the trial. (T1 121:25-122:12) Michael provided similar testimony. (T1 213:14-22). Tanya testified that she did not know what Michael did or did not have and that the gold and silver bullion she had in her possession was worth $16,869. (T2 224:25-226:25)

¶63 Exhibit 71 presented at trial was an email dated 3/29/2019 (approximately 12 months prior to trial) from Michael to Tanya as well as both of the parties' attorneys. In the email, Michael disclosed having taken a small amount of bullion out of the bedroom safe and an explanation of why he did it. Exhibit 72 as presented at trial was a video clip showing Michael removing the tub of change from the marital home and is consistent with Michael's email. It is and was impossible to see what was in the plastic tub by viewing the video. Exhibit 73 as presented at trial showed some receipts of gold and silver bullion which were located in the bedroom safe (marital property). Exhibit 74 was presented at trial was a photograph of the contents of the office safe, which contents included the 1.75 carat gents ring, and the gold and silver coins given to Michael by his father for safekeeping. Exhibit 37 as presented at trial was an appraisal of the gold and silver bullion which was contained in the bedroom safe, which contained valuations on 4 groups of bullion which in total equaled $33,738.30.

¶64 The Trial Court simply lumped together all of this gold and silver bullion and described it as Tanya and Michael's bullion collection and then split the value in half such that each party received a value of $16,869. (App-139). The Judgment doesn't specifically refer to (1) the bullion left in Tanya's possession in the bedroom safe, (2) the 4 gold coins Michael removed from the bedroom safe, or (3) the gold and silver bullion located in the office safe which Michael removed and gave back to his mother. This leaves questions as to what the Trial Court considered to be marital assets or not marital assets, whether some or all of the coins were still considered to belong to Michael's mother, what value has been established for the "marital" coins in Michael's possession v. Tanya's possession, etc.

¶65 If the Trial Court is asserting that only the gold and silver bullion located in the bedroom safe which remained with Tanya (which was appraised in Exhibit 37) as well as the 4 gold coins Michael removed (as described in Exhibit 71 email) was marital property, and therefore the gold and silver bullion located in the office safe (as was photographed in Exhibit 74) was not marital property, then Michael submits such a finding of an equitable distribution is clearly erroneous as Tanya will have been awarded gold and silver bullion appraised at $33,738, and Michael will have been awarded only 4 gold coins.

¶66 If the Trial Court is asserting that all of the gold and silver bullion referenced was marital property, then Michael asserts such a determination is clearly erroneous in regards to the gold and silver bullion which was located in the office safe, as he asserts that property belongs to Geraldine Pomarleau as described in the aforesaid testimony and was returned to her back in 2018. Further, there was no evidence presented by Tanya that

she actually witnessed or observed any actual gift of these coins from Michael's father to Michael. The only testimony as to actual ownership of these coins is in the context of that provided by Michael and his mother. Relying upon no evidence to establish actual right of ownership is clearly erroneous.

¶67 If in fact, the only evidence presented as to actual ownership of these items is ignored and the these items are still considered marital assets, then as with the Gents 1.75 carat ring, Michael submits that these items should have been awarded to Tanya because Michael has denied ownership of the same whereas Tanya and Geraldine Pomarleau have asserted ownership of the same such that they may need to litigate that matter to determine true ownership. Michael submits that it is error to award assets to a party who disputes ownership of the same and in fact concedes ownership in a non-party.

G. The District Court erred in how it valued, accounted for and distributed certain financial assets of the parties.

¶68 Tanya's Plains Commerce Bank Account. A value of $65,110.76 was used for Tanya's cash at Plains Commerce Bank. According to the Judgment, this value was derived by using Tanya's corrected Exhibit No. 68). (App-46). During trial, Michael's attorney argued that, although that is technically correct, there were multiple large cash withdrawals made by Tanya from these two Commerce Bank accounts in the days immediately leading up to the separation date. The details of these withdrawals are as follows and are also demonstrated in Exhibit 68 (App-46) as well as Exhibit 30A (App-17) at trial:

Account	Date	Amount	Exhibit
Savings	6/11/2018	$500	App-18
Savings	6/18/2018	$500	App-48

Checking	6/22/2018	$500	App-52
Savings	6/25/2018	$5,000	App-48
Total		**$6,500**	

¶69 This practice by Tanya continued for several weeks after the separation date. As is evidenced by the Exhibit 68 (App-46), Tanya made multiple additional cash withdrawals post separation. At trial, Tanya was unable to provide any explanation of why the withdrawals were made, or what the cash was used for other than attorney's fees. (T2 221:24-224:21) Tanya had prior knowledge that the separation date would occur on or around 6/27/2018, as it was her actions regarding the DVPO matter that caused Michael to be removed from the house. (T2 221:24-224:21) The date Michael was removed from the house became the separation date used in these proceedings. In short, Tanya knew that a divorce was going to happen, withdrew significant sums of money, as well as paid her attorney's fees from marital assets. There was no evidence that Michael used any marital assets to pay for his attorney's fees.

¶70 Exhibit 30A (App-18) as presented at trial demonstrated that before Tanya filed for the Domestic Violence Protection Order which was dismissed and before she started cleaning out accounts, the Plains Commerce Bank account, on June 7, 2018, had a value of $76,701.86. Michael submits that it was error to use the value of $65,110.76 for the cash Tanya had in her possession at the time of separation and submits that such finding awards a party for intentionally hiding and / or expending assets pre-divorce. Such a finding allows parties to empty bank accounts prior to the actual date of commencement of divorce or separation and apparently get away with such an action. The money that Tanya possessed and was unable to explain as to it's use should be added to the documented amount that she had in the bank accounts.

¶71 Rental Income since separation (valued at $9,500) and Oil Royalites since separation ($18,782). The rental income received by Sparrow Investments between the date of separation through the trial date totaled $9,500 as recognized by the Judgment (App-140). The Oil Royalties received by both Sparrow Investments and American Land Services from the date of separation through the trial date totaled $18,782 as recognized by the Judgment. (App-140). The total of these amounts for rental/royalty incomes received between the separation date and the trial date is $28,282. Michael does not dispute this amount. Rather, he disputes how this amount is then distributed (as an asset rather than as income which Michael claimed on his income taxes and which should, as a result of the Trial Court ordering these amounts to be equally split, be claimed as income on Tanya's taxes as well).

¶72 Rental and royalty income is taxable income as defined by the IRS. The impact of the Trial Court's Judgment is to create an unfair a tax burden for Michael for 2018, 2019, 2020, and possibly into 2021. Equity or equalization payments as the result of divorce proceedings are not taxable income as defined by the IRS.

¶73 Again, Michael makes no objection to the fact that Tanya is entitled to ½ of these rental and royalty incomes from the date of separation through the date of the Notice of Entry of Judgment as is defined by the Judgment. Michael does assert however, that in receiving ½ of these rental and royalty incomes, Tanya should also incur the associated tax burden. Michael objects to the manner in which the Judgment moves the income from Michael to Tanya. Listing the $9,500 and $18,782 as assets, and then awarding those assets to Michael, in affect reduces the amount of the equalization payment by exactly ½ of the income amounts. The result is that Michael continues to assume 100% of

the tax burden for the income. Michael submits that the Order should allow for the associated tax burden for the incomes to be transferred from Michael to Tanya.

¶74 Michael submits that the Trial Court should have excluded the rental and royalty incomes from the property and debt listing and/or not include these as assets when calculating the equity payment to be made from Tanya to Michael. Michael submits that the proper action for the Trial Court to take in the context of these items is to require Sparrow Investments and American Land Services to provide a full accounting of and distribute to Tanya ½ of the aforesaid rental and royalty incomes between the separation date and the date of the Notice of Entry of Judgment, these incomes to include ½ of the aforesaid $9,500 and $18,782 as well as ½ of any addition rental and royalty incomes received by the companies between the trial date and the date of Notice of Entry of Order. Sparrow Investments and American Land Services would then 1099 Tanya for the incomes transferred to her. This would create an equal and equitable tax burden to both parties rather than placing the entire tax burden on Michael and then allowing for an offsetting this from the property equity payment which Tanya is to make to Michael. Doing otherwise is clearly an inequitable distribution of the marital estate and clearly erroneous.

H. The District Court erred in how it valued, accounted for and distributed various debts of the parties.

¶75 Citi Credit Card - $4,145. The Judgment provides that Michael is equally responsible for half of a Citi credit card debt totaling $4,145 (App-140-41). The associated credit card statement is listed in exhibit 75, pages 3-5. (App-56-58) The credit card statement details the related charges totaling the specific amount of $4,145.45,

which were made between the dates of 5/9/2018 and 6/8/2018. Michael agrees with the court's assertion that the charges were made prior to separation, and were for family related expenses as defined in the order.

¶76 However, as pointed out by Michael, Exhibit 30B was also presented as a bank statement from Tanya's Plains Commerce Bank checking account. (See App-27). At the first line item on page 7 (App-33), the Trial Court could clearly see an ACH payment to Citi card in the amount of $4,145.45. That payment cleared the account on 6/18/2018. This was nine days proper to the separation date of June 27, 2018. This payment fully satisfied the Citi Credit Card debt prior to separation and out of marital assets. As such, the debt was fully paid with pre-separation marital assets and effectively no longer existed at the time of separation. The Trial Court was insistent on maintaining that post-separation assets are not marital assets. It is inconsistent, and clearly erroneous, to then given Tanya credit and an offset for a pre-separation debt which was paid pre-separation with marital assets and income.

¶77 Citi Credit Card - $1,926. The Judgment provides that Michael must reimburse Tanya for ½ of a Citi credit card debt totaling $1,926. (App-140-41). The associated credit card statement is listed in exhibit 75, pages 6-8 (App-59). The credit card statement details the related charges totaling the specific amount of $1,926.14, which were made between the dates of 4/11/2018 and 5/9/2018. Michael agrees with the court's assertion that the charges were made prior to separation and were for family related expenses.

¶78 Once again, however, the Trial Court was presented with affirmative evidence via Exhibit 30C, page 2 (App-41) that this amount of $1,926.14 had been paid out of marital assts prior to separation. Exhibit 30C (App-41) is a bank statement from Tanya's Black

Ridge Bank checking account. At the first line item on page 2, under "Account Activity", it can be clearly seen that a check #9906 in the amount of $1,926.14 was paid out and that check cleared the account on 6/4/2018. This payment fully satisfied the debt prior to separation.

¶79 Similar to the above, Michael submits that reimbursing Tanya for ½ of the stated amount and treating it as a marital debt existing at the time of separation is clearly erroneous. That liability was paid on 6/4/2018, 23 days prior to the separation date of 6/27/2018.

I. The District Court erred in off-setting the equity payment to be made by appellee to appellant by 50% of the health insurance premium paid by her as required by the summons.

¶80 Finally, upon calculating the equity payment which Tanya was obligated to pay to Michael, the Trial Court determined that the equity payment would need to be $62,654. However, the court then allowed for a deduction of $12,926 off this equity payment as a result of finding that Michael is obligated to reimburse Tanya for 50% of the health insurance premiums made to continue to cover the family during the course of the divorce.

¶81 As this court is aware, North Dakota law, as provided the summons in each and every divorce case in North Dakota, includes a provision which states that "All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation." N.D.R.Ct. 8.4(a)(3). This is a provision which is required by Rule 8.4 of the North Dakota Rules of Court. It is a mandatory restraining

provision for which Rule 8.4 provides that "If either spouse violates any of these provisions, that spouse may be in contempt of court". N.D.R.Ct. 8.4(a).

¶82 Michael submits that an offset against his equitable property distribution is improper and clearly erroneous for several reasons, including the following:

a. To Michael's knowledge there is no prior case law nor statutory law which would allow for such an offset when the providing of insurance is mandatory under North Dakota law.

b. As this Court is aware, all assets and debts are distributed based on their valuations at the time of separation or divorce. Requiring Michael to reimburse Tanya for insurance which she was required to provide by application of law and which is provided post-divorce effectively obligates Michael to pay for a post-divorce debt obligation, and

c. Tanya, at any point during the divorce process, had the right to seek interim relief from the obligation and failed to do so.

CONCLUSION

¶83 Based on the aforementioned law and reasoning, Michael respectfully requests this Court hold that the District Court's Memorandum and Order (Docket #179) dated December 28, 2020, Judgment (Docket #199) dated January 20, 2021, Order on Post-Trial Motions to Amend the Court's Memorandum and Order (Docket #228) dated May 13, 2021 and Amended Judgment (Docket #237), dated July 9, 2021 were clearly erroneous and this matter should be remanded back to the trial court to reconsider the same and enter Judgment consistent with the law and evidence actually presented.

ORAL ARGUMENT / CERTIFICATION OF COMPLIANCE

¶84 Oral argument is requested and submitted to be of assistance to provide more detailed explanation of legal arguments and facts as relevant to this appeal.

¶85 The undersigned certifies that this Brief complies with the page limitations as provided by Rule 32.

Dated this 11th day of August, 2021.

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