North Dakota Law Review

Volume 75 | Number 4 Article 5

1999

Business-Divorce Distribution: The North Dakota Supreme Court Affirms Disentanglement of a Jointly Owned Close Corporation Involved in a Divorce Action

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BUSINESS-DIVORCE DISTRIBUTION: THE NORTH DAKOTA SUPREME COURT AFFIRMS DISENTANGLEMENT OF A JOINTLY OWNED CLOSE CORPORATION INVOLVED IN A DIVORCE ACTION

Fisher v. Fisher, 1997 N.D. 176, 568 N.W.2d 728

I. FACTS

Gene and Sheila Fisher were married in 1968.[1] Gene Fisher brought real estate and interests in several businesses to their marriage, while Sheila Fisher brought no major assets to the marriage.[2] One of Gene's premarital interests was one-fourth of a family-owned business, Fisher Sand & Gravel.[3] After the couple married, Gene inherited his father's one-fourth interest in the company, and Gene and Sheila then purchased the remaining two-fourths interests, giving them full control of Fisher Sand & Gravel.[4] Once they had full control of Fisher Sand & Gravel, Gene began gifting stock to Sheila and their children for tax planning purposes.[5] In 1983, Gene gave controlling stock to Sheila for the purpose of gaining contracting preferences for minority-owned businesses.[6]

Gene predominantly ran Fisher Sand & Gravel until June 1992, with Sheila becoming more involved as the years passed.[7] Ultimately, Sheila took control of the company in 1992 by having herself and two directors elected to the five-member board.[8] At this point, Gene sued for divorce, but the couple was able to reconcile.[9] By December 1992, Gene

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1. Fisher v. Fisher, 1997 N.D. 176, ¶ 2, 568 N.W.2d 728, 729.

2. *Fisher*, ¶ 2, 568 N.W.2d at 729. Gene claimed that he brought $1,910,000 worth of assets to the marriage. Brief for Appellee at 4-5, Fisher v. Fisher, 1997 N.D. 176, 568 N.W.2d 728 (No. 960211). Sheila disputed this amount, claiming that Gene's premarital assets were only worth $291,500. *Id.* at 6. Sheila stated that the only evidence submitted by Gene to prove his premarital worth consisted of his own testimony regarding the property's value. Brief for Appellant at 4, Fisher v. Fisher, 1997 N.D. 176, 568 N.W.2d 728 (No. 960211).

3. *Fisher*, ¶ 2, 568 N.W.2d at 729.

4. Brief for Appellant at 4, *Fisher* (No. 960211). The total purchase price for the remaining stock interest was $160,000; this amount was split between Gene's two brothers, who were in control of the other half of Fisher Sand & Gravel. *Id.*

5. *Fisher*, ¶ 3, 568 N.W.2d at 729.

6. *Id.* Gene claimed that the company only briefly benefited from the minority certification. Brief for the Appellee at 8, *Fisher* (No. 960211). The company later lost the certification because it exceeded allowable sales. *Id.* at 8-9. At that point, Gene asked Sheila to return the controlling interest in Fisher Sand & Gravel. *Id.* at 9. Sheila refused to agree to this and maintained the controlling interest in the corporation. *Id.*

7. *Fisher*, ¶ 4, 568 N.W.2d at 729.

8. *Id.*

9. *Id.* Before the reconciliation occurred, Gene seized control of the company for a brief period through an Ex Parte Interim Order. Brief for the Appellee at 9, *Fisher* (No. 960211). Once the couple reconciled, the Ex Parte Interim Order was dismissed, leaving Sheila in control of Fisher Sand

was removed from the company presidency and was demoted to the position of field consultant for Fisher Sand & Gravel.[10]

Gene sued for divorce again in 1994, seeking an equitable division of the couple's property, their major marital asset being the combined business entity known as Fisher Industries.[11] Before trial, the court issued an Amended Interim and Extended Temporary Protection Order.[12] This order gave Sheila protection from Gene by prohibiting him from coming within 150 feet of her.[13] The court also ordered Gene to refrain from communicating with company employees and gave Sheila use of the family home.[14] The couple stipulated to Sheila's adultery and Gene's spousal abuse at the trial,[15] which prevented evidence of the party's relationship and the physical violence involved from being used at trial.[16]

Gene and Sheila both testified to the value of property that Gene brought into the marriage.[17] The trial court accepted Gene's premarital property figures, and it therefore awarded him a $500,000 credit against divided assets.[18] Sheila and Gene each separately claimed to be responsible for the great success of the business entity known as Fisher Industries, which was valued at $21,600,000.[19] Therefore, both Gene and

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& Gravel. *Id.*

10. *Fisher*, ¶ 4, 568 N.W.2d at 729. Gene claimed that the demotion came in 1992, shortly after the couple had reconciled, since Sheila had maintained control of the company because of their reconciliation. Brief for Appellee at 9, *Fisher* (No. 960211).

11. *Fisher*, ¶¶ 5-6, 568 N.W.2d at 729. Fisher Industries is the trade name for three businesses, including Fisher Sand & Gravel and its subsidiaries, General Steel and Supply Company and Green Acres Farm. *Id.* ¶ 6.

12. *Id.* ¶ 7. The protection order was issued pursuant to repeated physical and mental abuse claimed and documented by Sheila Fisher, much of which was not allowed in as evidence due to Gene's stipulation to this fact. Brief for Appellant at 8-10, Fisher v. Fisher, 1997 N.D. 176, 568 N.W.2d 728 (No. 960211).

13. *Fisher*, ¶ 7, 568 N.W.2d at 729.

14. *Id.*

15. *Id.* ¶ 8.

16. Brief for Appellant at 8, *Fisher* (No. 960211). Sheila was allowed to admit small portions of police reports and medical records of treatments she received for recent incidents of physical abuse that took place during the marriage. *Id.* Sheila also claimed that had she been aware of the lower court's decision to keep the couple as joint owners, the evidence would have been relevant to show the deterioration of the marriage to the point that joint ownership would not be practical. *Id.*

17. *Fisher*, ¶ 8, 568 N.W.2d at 729-30. The couple disputed the actual amount of property that was premarital; Gene claimed the valuation was $1.91 million, while Sheila asserted his assets were worth only $291,500. Brief for Appellee at 4-6, Fisher v. Fisher, 1997 N.D. 176, 568 N.W.2d 728 (No. 960211). Sheila backed up the valuation with an example of over-valued property, arguing that while Gene claimed that his one-fourth interest in Fisher Sand & Gravel was worth $200,000, the couple had purchased two other equal-sized shares from Gene's brothers for $80,000 each. Brief for Appellant at 5, *Fisher* (No. 960211).

18. *Fisher*, ¶ 10, 568 N.W.2d at 730. The premarital credit award was based on Gene's testimony that he owned $1.91 million worth of property prior to the couple's marriage. Brief for Appellee at 4-5, *Fisher* (No. 960211). The court also awarded Sheila $1,000 in attorney fees for Gene's violation of the protection order. *Fisher*, ¶ 10, 568 N.W.2d at 730.

19. *Id.* ¶ 8, 9. The valuation of the company at $21.6 million was for the purpose of an Employee Stock Option Plan proposed by Sheila. Brief for Appellant at 7, *Fisher* (No. 960211). However, Sheila claimed that an outright sale of Fisher Industries would have brought closer to $37.9 million. *Id.*

Sheila made proposals to the court for the distribution of Fisher Industries interests, each in his or her own favor.[20]

Sheila's proposal was in the form of an employee stock option plan by which the company would purchase Gene's shares.[21] As part of Sheila's plan, Gene would also have to agree to a covenant not to compete.[22] Gene had two proposals, the first being that he would buy Sheila's shares at a discounted price, based on her alleged economic fault, and would pay some of the price over time.[23] The second was to have the court award Gene majority control, for which he could arrange immediate funding of an equalizing payment of five million dollars to Sheila.[24] The court rejected all of the proposals as presented, but it accepted Gene's division of the stock, which gave him 1,212 shares and Sheila 869 shares, leaving the couple in joint ownership of the business.[25] However, since the distribution of stock was not equal, the trial court ordered an initial cash payment to Sheila from Gene of $2,365,070.34 within ninety days in order to balance the split of the marital estate.[26]

Sheila made a motion to have the trial court reconsider its decision, but the court denied the motion and entered a decree.[27] Sheila then appealed, moved for a stay, and sought $250,000 per year in spousal support during the appeal.[28] Gene resisted and counter-moved to stay the court-ordered cash payment of $2,365,070.34 during the time of the appeal.[29] The court stayed the cash payment and ordered Gene to pay $20,000 monthly to Sheila for spousal support during the appeal.[30]

Sheila appealed, contesting the trial court's stock split, asserting that because of the couple's mutual animosity and Gene's abuse there was

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at 8.

20. *Fisher*, ¶ 9, 568 N.W.2d at 730.

21. *Id.* The plan would have allowed the company to purchase Gene's stock without having to incur additional debt. Brief for Appellant at 14, *Fisher* (No. 960211). The plan also would have resulted in a tax-free purchase of all shareholders' stock and would have kept the business operating in the family by leaving Sheila and the children in charge. *Id.* at 15. Sheila's agreement on the stipulated value of $21.6 million depended on this plan; otherwise, she argued that the valuation of $37.9 million was appropriate. *Id.*

22. *Fisher*, ¶ 9, 568 N.W.2d at 730.

23. *Id.* Gene's claim of economic fault arose because of unwarranted expenditures he argued Sheila made with Fisher Industries money, including paying for consultant and attorney fees as well as lavish spending on herself and others. Brief for Appellee at 15, *Fisher* (No. 960211).

24. *Fisher*, ¶ 9, 568 N.W.2d at 730. The second plan was in response to the court's warning that it would not rule in favor of Gene on the economic fault issue. Brief for Appellant at 14, *Fisher* (No. 960211).

25. *Fisher*, ¶ 11, 568 N.W.2d at 730. The split of stock in this manner left Gene in control of 51% of Fisher Industries and put Sheila in a minority stockholder position with only a 37% interest. *Id.*

26. *Id.*

27. *Id.* ¶ 12.

28. *Id.*

29. *Id.*

30. *Id.*

no way they could continue to remain in business together.[31] Sheila claimed that since her buy-out plan was not accepted, all of the stock should have gone to Gene and she should have been awarded offsetting payments.[32] Sheila also argued that as a minority stockholder, her corporate remedies were inadequate to protect her interest.[33] Sheila's final contention on appeal was that if the stock was correctly split, the value of her shares should have been discounted and the cash payment to her increased accordingly to accomplish an equal division.[34]

The North Dakota Supreme Court affirmed the trial court's premarital property credit and stock valuation without discount, but it reversed and remanded the decision to split the corporation stock between Gene and Sheila Fisher.[35] The court held that, on remand, joint ownership of the corporation should be severed, but that an equal division of the marital property should still be maintained.[36]

II. LEGAL BACKGROUND

A. RUFF-FISCHER GUIDELINES FOR PROPERTY DISTRIBUTION AND ALLOWANCE OF PREMARITAL PROPERTY CREDIT

The subject of divorce in North Dakota, including the allowable causes of divorce, is covered in North Dakota Century Code Chapter 14-05.[37] According to this chapter, if there is no agreement between the parties on how to divide the marital property at divorce, the court retains the power to make a division. This rule is found in section 14-05-24, which states that "the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper . . . having regard to the circumstances of the parties respectively."[38]

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31. *Id.* ¶ 13.

32. *Id.* Sheila believed that without distribution in this manner, Gene had exclusive use of her only income-producing asset. *Id.* Sheila's position was that as a minority stockholder she had no voice or share in corporate income. *Id.*

33. *Id.* Sheila argued that Gene could sidestep the corporate remedies available to her as a minority stockholder if Gene used the broad powers of the corporation. *Id.* If the powers were thus infringed, Sheila argued, she would be required to commence further litigation, possibly in the form of a corporate dissolution, which the trial court could more easily address as part of the original divorce proceeding. Brief for Appellant at 25-26, Fisher v. Fisher, 1997 N.D. 176, 568 N.W.2d 728 (No. 969211).

34. *Fisher*, ¶ 13, 568 N.W.2d at 730.

35. *Id.* ¶ 36, 568 N.W.2d at 735.

36. *Id.*

37. N.D. CENT. CODE §§ 14-05-01 to -26 (1997). For the purposes of Gene and Sheila Fisher's divorce, the court entered a decree of irreconcilable differences. *See Fisher*, ¶ 10, 568 N.W.2d at 730; *see also* N.D. CENT. CODE § 14-05-03(8) (1997) (listing irreconcilable differences as one of the eight allowable causes of divorce in North Dakota). Irreconcilable differences are defined as grounds by which a court determines there are substantial reasons for not continuing the marriage and, therefore, the marriage should be dissolved. *See* N.D. CENT. CODE § 14-05-09.1 (1997).

38. N.D. CENT. CODE § 14-05-24 (1997).

Once the trial court has made distribution of the marital property, the decision will not be overturned on appeal unless it is shown to be unfair and inequitable in relation to the facts of each particular case.[39]

In *Ruff v. Ruff*[40] and *Fischer v. Fischer*,[41] the North Dakota Supreme Court adopted guidelines for the trial courts to follow when making a distribution of property upon the dissolution of a marriage.[42] According to the guidelines, the distribution of property does not necessarily have to be equal, but it must be equitable under the circumstances of each particular case.[43] To achieve this end, the court listed a series of factors to be considered in making an equitable division of property.[44] This list, which has become known as the *Ruff-Fischer* guidelines, includes,

> the respective ages of the parties . . . their earning ability; the duration of and the conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned . . . its value . . . its income-producing capacity, if any, and whether accumulated or acquired before or after the marriage.[45]

These factors were affirmed by later decisions, establishing them as the framework around which a divorce property distribution takes place.[46]

One of the *Ruff-Fischer* guidelines is whether the property in question was acquired before or after the marriage.[47] Generally, the court has determined that individual assets must remain part of the marital estate for the purposes of determining an equitable division.[48] Once these

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39. Fischer v. Fischer, 139 N.W.2d 845, 850 (N.D. 1966).

40. 52 N.W.2d 107 (N.D. 1952).

41. 139 N.W.2d 845 (N.D. 1966).

42. *See* Ruff v. Ruff, 52 N.W.2d 107, 111 (N.D. 1952) (adopting Nebraska law from *Holmes v. Holmes*, 41 N.W.2d 919, 921 (Neb. 1950)); *see also* Agrest v. Agrest, 27 N.W.2d 697, 703 (N.D. 1947) (stating similar circumstances as those adopted from Nebraska in *Ruff* without giving authority for their origin).

43. Fischer v. Fischer, 139 N.W.2d 845, 849 (N.D. 1966).

44. *See Ruff*, 52 N.W.2d at 111.

45. *See id.*; *see also Fischer*, 139 N.W.2d at 852 (citing both *Ruff*, 52 N.W.2d at 111, and *Holmes*, 41 N.W.2d at 921).

46. *See Fischer*, 139 N.W.2d at 852-53 (citing Fleck v. Fleck, 58 N.W.2d 765, 772 (N.D. 1953)). Courts continually followed the *Ruff* and *Fischer* cases, and the test drawn from them has become known as the *Ruff-Fischer* guidelines. Fisher v. Fisher, 1997 N.D. 176, ¶ 10, 568 N.W.2d 728, 730.

47. *See Fischer*, 139 N.W.2d at 852; *see also* Fraase v. Fraase, 315 N.W.2d 271, 273-74 (N.D. 1982).

48. Heley v. Heley, 506 N.W.2d 715, 718 (N.D. 1993) (citing Gronneberg v. Gronneberg, 412 N.W.2d 84, 92 (N.D. 1987)); *see also* Anderson v. Anderson, 368 N.W.2d 566, 568 (N.D. 1985); *Fraase*, 315 N.W.2d at 274; Hultberg v. Hultberg, 259 N.W.2d 41, 44 (N.D. 1977); Fine v. Fine, 248 N.W.2d 838, 841 (N.D. 1977).

assets are figured into the marital estate, the court can then go forward in applying the *Ruff-Fischer* guidelines for making a property division.[49]

Once the court has applied the guidelines, it can decide to shift the division one way or the other depending on the amount of property or gifts a spouse acquired prior to the marriage.[50] The North Dakota Supreme Court has allowed for a premarital property credit by noting that when "property subject to distribution was acquired . . . prior to the marriage [it] is a consideration weighing in favor of that party, but it does not prevent the court from awarding part or all of the property to the other party should an equitable distribution require it."[51] Determining pre-marital property credits and property distributions thus ultimately lies in the court's discretion.[52] The court also applies these principles of equitable distribution when it distributes corporate property owned jointly by divorcing spouses.[53] Such a distribution also raises other issues, however, including the problem of leaving a recently divorced couple in joint control of a business.

B. MINORITY STOCKHOLDER POSITION AND THE TREATMENT OF CORPORATIONS UNDER THE BUSINESS CORPORATION ACT

The North Dakota Supreme Court in *Fisher* gave consideration to the problem of continued joint ownership of a corporation by a divorced couple, and it recognized that the "at-odds-with-the-majority" minority shareholder in a closely held corporation is subject to the power of the majority.[54]

This issue is not unique to divorce situations, and a substantial body of law has developed to deal with it. As a general matter, when a disagreement arose in the corporate setting, early American courts tended to follow the business judgment rule, which presumed that the actions of the directors and officers of a corporation were done in good faith and therefore were not questioned by the court.[55] Judicial deference has not

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49. *See* Gualrapp v. Gualrapp, 510 N.W.2d 620, 621 (N.D. 1994) (citing Freed v. Freed, 454 N.W.2d 516, 520 (N.D. 1990)).

50. VanOosting v. VanOosting, 521 N.W.2d 93, 99 (N.D. 1994); *see also* Laura R. Ellis, Note, *Divorce*, 33 U. LOUISVILLE J. FAM. L. 1027, 1029 (1995) (commenting on the North Dakota case of *VanOosting v. VanOosting* and the inclusion of non-marital property in determining an equitable distribution).

51. *Fraase*, 315 N.W.2d at 274 (citing *Fine*, 248 N.W.2d at 841). The trial court in *Fraase* had allowed Mark Fraase approximately $215,000 more of a distribution due the fact that he owned farmland and a lake lot prior to the marriage. *Id.*

52. *Id.*

53. *See generally* Fisher v. Fisher, 1997 N.D. 176, ¶ 10, 568 N.W.2d 728, 730 (discussing the *Ruff-Fischer* guidelines and their implementation in relation to Gene and Sheila's combined interest in Fisher Industries stock).

54. *See id.*

55. Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its*

remained so broad, however, and courts do not always recognize a director's decisionmaking as the final word.[56] This holds true particularly for relationships among shareholders of closely held corporations, in which courts have imposed standards of fiduciary duty among the shareholders.[57] In a closely held corporation, a small number of people hold a majority of the stock, and the stockholders are usually well acquainted with one another and with each other's business techniques.[58] In most cases, the shareholders are also usually active in the business, often serving as key participants.[59]

However, for a minority shareholder in a closely held corporation, it is not always guaranteed that what is good for the corporation through the eyes of the majority shareholder or shareholders is equally good for the minority shareholder.[60] Due to the close relationship of the parties and the view that no "prudent person" would purchase minority shares in a corporation suffering from dissension, there is no established market for shareholders to sell their stock when and if they need to do so.[61] This limited market and other problems have caused the North Dakota Supreme Court, as well as many others, to recognize that a minority stockholder may be subject to oppressive tactics by a majority stockholder when a dispute arises between the parties.[62] Therefore, courts

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Impact Upon Valuation of Minority Shares, 65 NOTRE DAME L. REV. 425, 429 (1990). Murdock cites early New York and Illinois case law for the proposition that courts will refrain from interfering with corporate disputes whenever possible. *See id.* at 429 (citing Wheeler v. Pullman Iron & Steel Co., 32 N.E. 420, 423 (Ill. 1892); Pollitz v. Wabash R.R. Co., 100 N.E. 721, 723-24 (N.Y. 1912)).

56. *See id.* at 431 (discussing the "duty of care/duty of loyalty" dichotomy).

57. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 268 (3d ed. 1983). By describing the duty of directors towards shareholders through the term "unfairly prejudicial," the Business Corporation Act in North Dakota has imposed what can be considered a fiduciary duty upon directors. *See* N.D. CENT. CODE § 10-19.1-115(1)(b)(3) (1985 & Supp. 1997). This duty requires that the shareholders and directors of a closely held corporation act in an "honest, fair, and reasonable manner in the operation of the corporation." N.D. CENT. CODE § 10-19.1-115(4) (1985 & Supp. 1997). Therefore, the court is free to look at these actions in determining whether or not to allow dissolution of the corporation or to allow for other less drastic measures. *Id.*

58. *See* Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) (stating that one of the characteristics of a close corporation is that the shareholders are limited in number, usually to one or two); *see also* N.D. CENT. CODE § 10-19.1-01(8) (1985 & Supp. 1997) (defining a closely held corporation as one in which there are not more than 35 shareholders). For the purposes of Gene and Sheila's case, the stock control prior to the divorce included Sheila holding 1,391 shares and Gene holding 690 shares, for a total of 88% of the corporation's total stock. *See* Fisher v. Fisher, 546 N.W.2d 354, 355 (N.D. 1996). This information, however, was from an earlier case in which Gene and Sheila's children attempted to intervene in the divorce to stop the court-appointed receiver from taking over the company. *Id.*

59. *See Balvik*, 411 N.W.2d at 386.

60. *See* Murdock, *supra* note 55, at 431.

61. *See Balvik*, 411 N.W.2d at 386; *see also* Murdock, *supra* note 55, at 425 (discussing the likelihood of a person purchasing shares from a minority shareholder in conflict with the majority).

62. *See Balvik*, 411 N.W.2d at 386; *see also* Murdock, *supra* note 55, at 455-61 (setting out the history of court-recognized oppression). Illinois was the first state to recognize the concept of oppression by majority stockholders over minority stockholders, which it did in its adoption of the Business Corporation Act of 1933. Murdock, *supra* note 55, at 455.

have imposed a fiduciary responsibility toward minority stockholders on the part of majority stockholders.[63]

1. *"Freeze-out" Tactics and Court Valuation of Stock With or Without the Effects of a Minority Discount*

The oppressive tactics of a majority stockholder towards a minority stockholder have come to be known as a "freeze-out."[64] A freeze-out has the effect of depriving the minority shareholder of the economic benefit the shareholder received from being part of the corporation, such as salary or dividend payments, which in some instances may be the shareholder's sole income.[65] The difficulty with freeze-out tactics is in determining whether a court would rely on the business judgment rule in an attempt to allow the business to function on its own accord.[66] The other option is to look to the majority stockholders as having a fiduciary duty to the minority, a duty which would force them to refrain from employing freeze-out tactics.[67]

In relation to these two theories, most courts see the remedy of judicial dissolution of a corporation as an extreme measure that has the effect of disadvantaging all interests in the corporation.[68] However, the advent of alternative remedies to dissolution has given the court other options, including the permanent solution of a court-ordered buy-out of the minority shares.[69] However, a major problem for the court is determining whether the price the minority will receive in a buy-out will be fair.[70] This leads to the question of whether a discount should be applied to the value of the minority shareholder's stock for the purpose of determining the fair value the majority or other purchaser will have to

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63. *See* Murdock, *supra* note 55, at 433 (citing HENN & ALEXANDER, *supra* note 57, § 240, at 653).

64. *See Balvik*, 411 N.W.2d at 386; *see also* Schumacher v. Schumacher, 469 N.W.2d 793, 797 (N.D. 1991). A variety of freeze-out techniques exist, including withholding dividends, discharge from employment, and removal from the board of directors. *See* D. Charles McDonald, *Corporate Behavior and the Minority Shareholder: Contrasting Interpretations of Section 10-19.1-115 of the North Dakota Century Code*, 62 N.D. L. REV. 155, 164-65 (1986).

65. McDonald, *supra* note 64, at 165.

66. Murdock, *supra* note 55, at 427.

67. Murdock, *supra* note 55, at 427.

68. Murdock, *supra* note 55, at 427-28.

69. Murdock, *supra* note 55, at 428. There are three types of alternative remedies to dissolution: 1) judicial action through an injunction in which the court might mandate a declaration of dividends; 2) appointment of a director or custodian for the corporation; or 3) a judicially ordered buy-out of minority shares, which must be accomplished by valuing the shares at a "fair price." Murdock, *supra* note 55, at 427-28.

70. Murdock, *supra* note 55, at 428. Murdock notes that majority and minority shareholders have very different views as to what is a fair price for minority stock. Murdock, *supra* note 55, at 428. One of the examples Murdock uses to illustrate this concept is the use of excessive salaries by majority stockholders. Murdock, *supra* note 55, at 428. If the majority is taking excessive salaries, the earnings of the corporation will be reduced, affecting the total value used to determine the fair price for the minority stockholders' shares. Murdock, *supra* note 55, at 428.

pay, either in absence of a buy-out agreement or in spite of one.[71] To value a minority interest stock with a discount means that the majority or purchasing party would have to pay the minority stockholder less than he or she would otherwise pay.[72]

North Dakota law on the application of a minority discount prior to *Fisher* has varied.[73] In 1971, the North Dakota Supreme Court heard *Brown v. Hedahl's-Q B & R, Inc.*,[74] the first North Dakota case dealing with the valuation of shares.[75] A minority shareholder of Q B & R dissented to a merger with Hedahl's, Inc. after Hedahl's had obtained fifty-one percent of the Q B & R stock.[76] Quanrud, the minority shareholder, and Hedahl's could not agree on the value of the minority shares and called upon the court to determine the method of valuation.[77] The court found that there were primarily three types of valuation used by courts to determine the fair value of stock.[78] After application of each of the three different valuation methods, the asset, market, and earnings methods, the court determined that it could arrive at a "fair value" of the stock by taking a fixed percentage of each.[79]

In 1989, the court in *KBM, Inc. v. MacKichan* affirmed this type of valuation[80] by refusing to accept the plaintiff's value of the stock with a thirty-three percent minority discount, and applying instead a fixed "fair value" standard.[81] KBM was a closely held corporation in which MacKichan was an employee and stockholder; he resigned employment

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71. *Id.*; *see also* N.D. CENT. CODE § 10-19.1-115(3)(a) (1985 & Supp. 1997) (stating the court should follow the agreement but leaving the issue of fair value to the discretion of the court if it determines that the price terms set forth in any agreement made by the shareholders are unreasonable).

72. Murdock, *supra* note 55, at 478-79. This concept is predicated on two theories, the first being that the value of the minority stock is less because it is not a controlling interest in the corporation. Murdock, *supra* note 55, at 478. The second theory is based on the view that closely held corporation stock is not marketable and is therefore worthless. Murdock, *supra* note 55, at 479.

73. *See generally* Fisher v. Fisher, 1997 N.D. 176, ¶ 21, 568 N.W.2d 728, 732 (discussing briefly the minority discount application in North Dakota).

74. 185 N.W.2d 249 (N.D. 1971).

75. *See* Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249, 258 (N.D. 1971) (finding the issue of stock value to be one of first impression in North Dakota, which required the court to look to Delaware law for guidance).

76. *See id.* at 251-52.

77. *See id.* at 252.

78. *Id.* at 254. The court outlined a discussion of the three methods; the market value method, the asset value method, and the investment or earnings value method. *Id.* The market value method establishes value based on the price at which the stock was currently selling or for which it could be sold. *Id.* The asset method looks to the net assets of the corporation as a going concern and values shares by a pro rata share of the total value of the net assets. *Id.* The earnings method involves an attempt to predict the future income of the corporation based on previous earnings records and makes a valuation of stock based on these predictions. *Id.*

79. *See id.* at 259.

80. 438 N.W.2d 181 (N.D. 1989).

81. *See* KBM, Inc. v. MacKichan, 438 N.W.2d 181, 183 (N.D. 1989) (accepting the plaintiff's valuation without the use of a minority discount but giving no reasoning for its refusal to do so).

from the corporation but refused to sell his stock after KBM declined his first offer.[82] After MacKichan declined to sell, KBM sued, requesting the court to order MacKichan to sell for the book value of $100.28 per share, pursuant to the stockholders' agreement.[83] The trial court determined that MacKichan was required to sell for $100.28 per share, and MacKichan appealed.[84] On appeal, through the use of asset value and earning value methods, the North Dakota Supreme Court determined that the use of the $100.28 per share, or book value, was the fairest way to value MacKichan's minority stock.[85] The court followed this approach again in 1990, when it found that the use of an adjusted book value represented a fair price without the use of a minority discount.[86]

Despite the use of book value figures, the most recent valuation approach prior to Gene and Sheila Fisher's case did apply a minority discount.[87] In *Kaiser v. Kaiser,*[88] the court upheld an 11.3 percent discount on Mrs. Kaiser's minority stock.[89] Lillian and Marvin Kaiser were married and had interests in a closely held corporation and one other business that needed to be split during a divorce.[90] Lillian Kaiser desired a minority discount of between twenty-five and forty percent on her stock valuation, so that the cash coming to her in the equitable distribution might be greater.[91] However, the court noted that she was afforded protection under the Business Corporation Act, which would help to insure an equitable division under the divorce, and therefore an 11.3 percent discount was found to be sufficient.[92] Thus, the court relied on

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82. *See id.* at 182. MacKichan had offered to sell his 916 shares of stock, according to the stockholders' agreement, at $100.28 per share. *Id.* Pursuant to the agreement, the stock was offered to both the corporation and individual stockholders, all of whom rejected the original offer. *Id.* Then, before the agreement period ended, KBM made an attempt to purchase the stock, which MacKichan refused. *Id.*

83. *Id.* MacKichan counterclaimed, seeking liquidation of the corporation and distribution of assets to the shareholders. *Id.*

84. *Id.*

85. *Id.* at 183-84 (determining that the net asset method without discount was the best approach; finding a fair value at the time of $73.45; and since this was less than the agreed book value, awarding $100.28 per share).

86. *See* Davis v. Davis, 458 N.W.2d 309, 315 (N.D. 1990). However, the court will not accept an unadjusted book value. *See* Wald v. Wald, 556 N.W.2d 291, 295 (1996) (deciding to apply a buy-out situation in which Mr. Wald had to pay off Mrs. Wald's share of their stock).

87. *See* Kaiser v. Kaiser, 555 N.W.2d 585, 588 (N.D. 1996).

88. 555 N.W.2d 585 (N.D. 1996).

89. *See* Kaiser v. Kaiser, 555 N.W.2d 585, 588 (N.D. 1996).

90. *See id.* at 586.

91. *See id.* at 588. Note that this seems to be the same type of formula Sheila Fisher used to increase the cash payment she would receive by requesting that the court apply a discount to her shares. Fisher v. Fisher, 1997 N.D. 176, ¶ 18, 568 N.W.2d 728, 731. Normally, it would be the majority stockholder seeking a discount of the minority shares.

92. *See Kaiser*, 555 N.W.2d at 588 (finding that the argued discount had been too severe and stating that the court's reduction of the discount was not clearly erroneous, without making an express determination that a minority discount should be applied in a divorce action).

the Business Corporation Act as sufficient to protect the minority shareholder's interest.[93]

2. *North Dakota's Business Corporation Act; Alternatives to Judicial Dissolution.*

A minority shareholder who has been frozen out may have recourse against the majority shareholder under North Dakota's revised Business Corporation Act.[94] The primary recourse for a shareholder dealing with a freeze-out is the involuntary dissolution provision provided for as part of the Business Corporation Act.[95]

Involuntary dissolution is the process by which a court forces a corporation to dissolve and liquidate its assets.[96] The proceeds of the liquidation are then distributed to the shareholders pro rata, and the corporation is thus ended.[97] Involuntary dissolution is considered an extreme remedy, and therefore the North Dakota statute also allows courts to grant any equitable relief they deem just and reasonable under the circumstances of a particular case.[98] To do this, a court can look to the duty the shareholders owed to each other and the reasonable expectations of the shareholders both at inception of the corporation and as the corporation developed.[99] By looking at these factors, a court could determine the fair value of stock by using whichever valuation method it desired, employing whichever factors of the case it deemed relevant.[100]

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93. *Id.*

94. *See* Business Corporations Act of Apr. 4, 1985, ch. 147, 1985 N.D. Sess. Laws 332 (codified at N.D. CENT CODE §§ 10-19.1-01 to -131 (1985 & Supp. 1997)).

95. N.D. CENT CODE § 10-19.1-115 (1985 & Supp. 1997). Section 10-19.1-115(1)(b)(3) provides, for purposes related to Gene and Sheila Fisher's case, that:

> (1) A court may grant any equitable relief it deems just and reasonable in the circumstance or may dissolve a corporation and liquidate its assets and business:
>
> * * *
>
> (b) In an action by a shareholder when it is established that:
>
> * * *
>
> (3) The directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of a corporation that is not a publicly held corporation or as officers or employees of a closely held corporation.

N.D. CENT. CODE § 10-19.1-115(1)(b)(3) (1985 & Supp. 1997).

96. N.D. CENT. CODE § 10-19.1-115 (1985 & Supp. 1997).

97. N.D. CENT. CODE § 10-19.1-115(1) (1985 & Supp. 1997).

98. *Id.*

99. *See* N.D. CENT. CODE § 10-19.1-115(4) (1985 & Supp. 1997). This section provides in part:

> In determining whether to order equitable relief or dissolution, the court shall take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner . . . and the reasonable expectations of the shareholders as they exist at the inception and develop during the course of the . . . relationship with the corporation and with each other.

Id.

100. *See* N.D. CENT CODE § 10-19.1-88(10) (1985). The dissenters' right statute provides that

C. DISENTANGLEMENT OF A CLOSE CORPORATION HELD BY SPOUSES PARTY TO A DIVORCE

When a divorcing couple owns a business and cannot agree on how to handle their business relationship, the court must determine distribution of the business so that the couple is not forced to remain connected in a business atmosphere, which would make for an intolerable situation.[101] There is little case law in North Dakota dealing directly with court distribution of a divorcing couple's closely held stock, making it helpful to look outside North Dakota for several examples of how courts address this problem.[102]

For example, in *Robbins v. Robbins*[103] a Florida court granted Mrs. Robbins an undivided one-half interest in the couple's amusement park corporation's closely held stock.[104] The Florida District Court of Appeals reversed, reasoning that the failure of the trial court to grant Mrs. Robbins the value of the stock was a denial of her ability to benefit from "full and complete" equitable distribution.[105] In *Argyle v. Argyle,*[106] the Utah Supreme Court similarly upheld a cash award over a stock division of closely held corporation stock.[107]

The North Dakota Supreme Court has followed a similar pattern of reasoning in relation to business interests generally, and in 1996 it noted that in making a division of the marital estate it would "seek to disentangle the parties' financial affairs."[108] In *Heggen v. Heggen,*[109] the court found that when a cash payment was awarded, the term for payment should be for as little time as possible, which would help serve to disentangle the parties.[110] In this case, John Heggen was drawing a salary from Heggen Equipment, Inc.; his cash payments had been drawn out over many years and would not conclude for a period of twenty-five

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once the dissenting shareholder has petitioned the court to determine the fair value of the stock, the court can then determine a fair value of the stock in question by "any and all factors the court finds relevant, computed by any method or combination of methods." *Id.*

101. *See* Robbins v. Robbins, 549 So. 2d 1033, 1033 (Fla. Dist. Ct. App. 1989); *see also* Argyle v. Argyle, 688 P.2d 468, 471 (Utah 1984) (stating that leaving a divorced couple in a business relationship has the effect of adding further tension, friction, and the possibility of further litigation).

102. *See* Fisher v. Fisher, 1997 N.D. 176, ¶ 10, 568 N.W.2d 728, 730 (discussing other states' case law as to the distribution of closely held stock).

103. 549 So. 2d 1033 (Fla. Dist. Ct. App. 1989).

104. *See* Robbins v. Robbins, 549 So. 2d 1033, 1033 (Fla. Dist. Ct. App. 1989).

105. *Id.* at 1034. The *Robbins* court considered the fact that Mr. Robbins would not be able to make the lump payment at one time, and it was therefore willing to consider alternatives such as installment payments or sale of the stock to achieve complete equitable division. *Id.*

106. 688 P.2d 468 (Utah 1984).

107. *See* Argyle v. Argyle, 688 P.2d 468, 471 (Utah 1984).

108. *See* Heggen v. Heggen, 541 N.W.2d 463, 465 (N.D. 1996) (quoting from 27B C.J.S. *Divorce* § 30, at 540 (1986)).

109. 541 N.W.2d 463 (N.D. 1996).

110. *See* Heggen v. Heggen, 541 N.W.2d 463, 465 (N.D. 1996) (citing Hanson v. Hanson, 672 S.W.2d 274, 279 (Tex. App. 1984)).

years.[111] The court decided that it needed to disentangle the parties, and it thus reduced the amount of time John Heggen had to pay the divorce judgment.[112]

The North Dakota Supreme Court has also determined that when there is sufficient animosity between the parties, and one party has made a request that the couple's property be divided, the trial court should grant this request and completely disentangle the couple.[113] While divorce distribution need not be completely separate in every instance, the court in *Volk v. Volk*[114] noted that when there exists ill will between the parties and a party maintains a desire to be completely disentangled, the trial court should seek to achieve this result.[115]

III. CASE ANALYSIS

In *Fisher v. Fisher,*[116] an opinion written by Justice Meschke, the North Dakota Supreme Court affirmed the premarital property credit and the trial court's valuation of Sheila's minority stock without applying a discount.[117] However, the court reversed and remanded to the lower court for reconsideration of the split of stock that would have left the couple in joint ownership of Fisher Industries.[118] Justice Sandstrom concurred with the premarital property credit and the determination to value the stock without a discount, but he dissented from the theory of disentanglement and the directions to be followed on remand of the case.[119]

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111. *Id.* 464-65.

112. *Id.* at 465.

113. *See* Volk v. Volk, 404 N.W.2d 495, 499 (N.D. 1987) (relying on the previous decision of Graves v. Graves, 340 N.W.2d 903 (N.D. 1983)).

114. 404 N.W.2d 495 (N.D. 1987).

115. *See* Volk v. Volk, 404 N.W.2d 495, 499 (N.D. 1987). The North Dakota Supreme Court has continued to use the disentanglement principle in relation to farm business ownership as well, making disentanglement a principle the court will strive to use in divorce situations. Linrud v. Linrud, 552 N.W.2d 342, 346 (N.D. 1996). In *Linrud*, the court wrote that it would refuse to keep the farm as an economic unit if it would pose potential economic hardship for one of the spouses party to a divorce. *Id.* The court found that this situation would create a windfall, and it relied on *Heley v. Heley* for the continued proposition that disentanglement was the appropriate means by which to accomplish an equitable distribution of marital assets. *See id.* (citing Heley v. Heley, 506 N.W.2d 715, 718 (N.D. 1993)).

116. 1997 N.D. 176, 568 N.W.2d 728.

117. Fisher v. Fisher, 1997 N.D. 176, ¶ 36, 568 N.W.2d 728, 735.

118. *Id.*

119. *See id.* ¶ 38 (Sandstrom, J., concurring and dissenting).

A. CREDIT FOR PREMARITAL ASSETS

Sheila first sought review of the trial court determination that Gene was entitled to a $500,000 premarital property credit.[120] The court determined that the premarital property credit was not clearly erroneous, based on the fact that the credit came to only two percent of the $23 million estate.[121] The court determined that the trial court had reasonably explained the credit and that it did not affect the overall division of the property.[122]

The court also concluded that in making an equal division of property all assets must be included in the marital estate, but that once included, however, the origin of the property could be examined to determine the proper division.[123] If there is a major disparity in the division of the property, the court noted that there must be an explanation for the substantial disparity.[124] Using as an example the case of *VanOosting v. VanOosting*,[125] in which the court upheld a property credit for gifts from a parent to a child resulting in a twenty-five percent distribution of gifts to one spouse, the *Fisher* court determined that Gene's credit was relatively modest.[126] The court reasoned that this credit resulted in an effective distribution in which Sheila received around thirty-five percent of the premarital assets.[127]

The court also addressed Sheila's argument that the premarital property valuation was incorrect.[128] Sheila argued that a valuation of premarital assets was speculative because valuing thirty-year-old property would require an analysis of economic influences and inflation on 1968 dollars.[129] The court did not accept this argument and determined that the evidence was sufficient to justify the $500,000 credit.[130]

B. DISCOUNTING MINORITY STOCK

Sheila also contested the trial court's split of Fisher Industries stock, asserting that she only had two alternatives: sell her stock to the corpora-

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120. *Id.* ¶ 14, 568 N.W.2d at 730.
121. *Id.* ¶ 16, 568 N.W.2d at 731.
122. *Id.*
123. *See id.* ¶ 15 (citing Gaulrapp v. Gualrapp, 510 N.W.2d 620, 621 (N.D. 1994)).
124. *See id.* (citing VanOosting v. VanOosting, 521 N.W.2d 93, 96 (N.D. 1994); Heley v. Heley, 506 N.W.2d 715, 718 (N.D. 1993)).
125. 521 N.W.2d 93 (N.D. 1994).
126. *Fisher*, ¶ 15, 568 N.W.2d at 731.
127. *Id.*
128. *Id.* ¶ 17.
129. *Id.*
130. *See id.* (relying on *Wald v. Wald*, 556 N.W.2d 291, 295 (N.D. 1996) for the premise that property valued within the range of the evidence will not be considered clearly erroneous).

tion or a third party or petition the court for involuntary dissolution.[131] Sheila contended in connection with this argument that neither alternative was adequate to compensate her justly for her interest in the corporation.[132] Instead, she claimed that the trial court should have applied a minority discount to the stock it was willing to allocate to her to reflect its real value, and then it should have increased the cash payment due from Gene to equalize the discount by returning them to the prior equilibrium in the distribution of their property.[133]

The court declined to do so.[134] While recognizing that a buyer is less willing to purchase a minority interest in a corporation than a majority interest, and thus that Sheila might be correct that her stock would be worth less to a buyer, the court nevertheless determined that Sheila was not correct in her statement that the value of her shares would be discounted upon dissolution.[135] Rather, the court determined that the North Dakota Business Corporation Act would give Sheila significant protection in relation to her minority shareholder position.[136]

Under the Business Corporation Act, North Dakota Century Code section 10-19.1-115(1)(b)(3), Sheila or any mistreated shareholder of a closely held corporation is able to obtain corporate involuntary dissolution.[137] The court also recognized that, should she petition for such relief, the court to which she brought the matter would be required to consider alternatives to dissolution.[138] For example, the court could force the majority shareholder or shareholders to purchase the minority

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131. *See id.* ¶ 18 (citing Schumacher v. Schumacher, 469 N.W.2d 793, 797 (N.D. 1991) (giving examples of oppressive conduct that would be adequate to enforce the corporate remedy of involuntary dissolution, such as refusal to declare dividends, large salaries and bonuses to majority, and high rent payments for leased property)).

132. *See id.* Sheila asserted that selling her stock would not work because a purchaser would not want to pay for a non-controlling interest in the corporation. *Id.* She also asserted that dissolution would have the effect of discounting her shares in the corporation. *Id.*

133. *Id.*

134. *Id.* The court noted that if a minority discount was appropriate in this situation, it could not fault the trial court for not applying the discount. *Id.* ¶ 18 n.1. The court stated that Sheila had submitted no evidence to allow for a discount, and the court was unwilling to take up new arguments not made to the trial court. *See id.*

135. *Id.* ¶ 18 (citing Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987)). The court recognized that controlling stock is by nature more valuable than non-controlling stock because a buyer will pay more to be able to influence the affairs of the corporation. *Id.* (citing 18A AM. JUR. 2d *Corporations* § 795 (1985)). In its discussion of this issue, the court referred to Gene and Sheila Fisher's children's case, in which the court noted that the "valuation of minority shares in a close corporation . . . is problematic at best." *Id.* ¶ 20 (quoting Fisher v. Fisher, 546 N.W.2d 354, 357 (N.D. 1996)).

136. *Id.*

137. *Id.*, 568 N.W.2d at 732. The cited section of the Century Code deals with the standard for determining unfairly prejudicial conduct of the majority towards the minority shareholder. *Id.* Fisher Industries qualified as a closely held corporation under North Dakota's definition of a closely held corporation because it had fewer than 35 stockholders. *See* N.D. CENT. CODE § 10-19.1-01(7) (1985 & Supp. 1997).

138. *Fisher*, ¶ 20, 568 N.W.2d at 732.

shareholder's stock for "fair value" if it determined such a result to be "fair and equitable" to all concerned under the circumstances.[139] Further, if the court does determine the fair value of the stock, it has the option of using any method or combination of methods for valuation that it sees fit.[140]

In reviewing the North Dakota history on the minority discount, the court looked to the case of *Kaiser,* which upheld an 11.3 percent discount in a family-held corporation involved in a divorce action.[141] However, the court countered the application of this type of discount by looking to the case of *Brown,* in which the court had previously discussed and applied a fixed and undiscounted fair value to minority stock.[142] The court also affirmed a fair value determination without a discount for the minority shareholder in *KBM, Inc. v. MacKichan,*[143] and therefore the court held that this type of valuation could be fairly applied in *Fisher.*[144]

This application of the fair value standard is in agreement with almost all other jurisdictions, most of which have refused to require a minority discount.[145] The *Fisher* court looked at the fact that other courts have recognized the diminished value of a minority interest, but it found this irrelevant when it is the corporation or its shareholders that will be purchasing this interest.[146] The court noted that since the purpose of the corporate remedy statutes is the protection of the minority shareholder interest, especially in the closely held corporation, no minority shareholder discount should be needed.[147] When courts fix the

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139. *Id.* (citing N.D. CENT CODE § 10-19.1-115(3)(a) (1985 & Supp. 1997)). The court also noted that if the parties could not agree upon fair value, the court would have the option of determining fair value under section 10-19.1-88(10) of the North Dakota Century Code. *Fisher* ¶ 20, 568 N.W.2d at 732.

140. *Fisher,* ¶ 20, 568 N.W.2d at 732 (citing N.D. CENT CODE § 10-19.1-88(10) (1985 & Supp. 1997)).

141. *See id.* ¶ 21 (citing Kaiser v. Kaiser, 555 N.W.2d 585, 588 (N.D. 1996)). The contention in the *Kaiser* appeal, however, was only that the discount of the stock should have been greater, not that there should be no discount. *Kaiser,* 555 N.W.2d at 588. The *Kaiser* court refused to order a greater discount. *Id.*

142. *See Fisher,* ¶ 21, 568 N.W.2d at 732 (citing Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249, 258 (N.D. 1971)).

143. 438 N.W.2d 181 (N.D. 1989).

144. *Fisher,* ¶ 21, 23, 568 N.W.2d at 732.

145. *Fisher,* ¶ 22 (citing Christopher Vaeth, Annotation, *Propriety of Applying Minority Discount to Value of Shares Purchased by Corporation or its Shareholders from Minority Shareholders,* 13 A.L.R.5th 840, 850 (1993)).

146. *Id.* (citing Charland v. Country View Golf Club, Inc., 588 A.2d 609, 611-12 (R.I. 1991)).

147. *See id.* ¶ 22-23 (citing Brown v. Allied Corrugated Box Co., Inc., 154 Cal. Rptr. 170, 176 (Cal. Ct. App. 1979) (explaining that a minority shareholder should not receive less through a buy-out remedy than under a dissolution proceeding); MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 388 (Minn. Ct. App. 1992) (determining that the legislature's adoption of a statute protecting minority shareholders required that the court refrain from applying a minority discount when determining fair value); Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 349 (N.Y. App. Div.

fair value, it is not uncommon to disallow a minority discount of that stock.[148] The court concluded by agreeing with the Delaware Supreme Court's opinion in *Cavalier Oil Corporation v. Harnett,*[149] in which the court determined that a stock discount adds into the valuation process speculation on factors that affect marketability of minority shares and thus fails to give minority shareholders the proportionate value of their stock.[150]

Upon review of the treatment of the minority discount, here and elsewhere, the *Fisher* court concluded that when determining fair value under the North Dakota Business Corporation Act, a court need not automatically apply a discount.[151] In the case before it, in which Gene and Sheila had already set the value of their stock at $9,094 per share through an agreement, albeit for a different purpose in this case, the court would not apply a minority discount to effect an increase in the marital division cash payment to Sheila.[152] Stating that Sheila's corporate remedies were adequate, the court noted that on remand the trial court should implement the corporate remedy concurrently with the divorce to avoid an excess of litigation.[153]

C. DISENTANGLEMENT

The final issue the court addressed in this case dealt with disentangling the Fishers' interests to allow a complete separation of the parties.[154] The court determined that a marital property distribution is a finding of fact and will not be changed unless it is determined that the original distribution was clearly erroneous.[155] The standard for a distribution of property in a North Dakota divorce case is to make an equitable division of the marital assets.[156] In this case, the court stated that it was "definitely and firmly convinced that it was a mistake to keep these former spouses together in a business relationship that will inevitably

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1985) (finding the fact that the valued interest represented a minority did not, by itself, justify a discount)).

148. *See id.* ¶ 23 (citing *In re* Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997, 1003 (Me. 1989); Columbia Management Co. v. Wyss, 765 P.2d 207, 213-14 (Or. 1988)).

149. 564 A.2d 1137 (Del. 1989).

150. *See Fisher,* ¶ 23, 568 N.W.2d at 732 (citing Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) (concluding that imposing a discount penalizes the minority shareholder for his or her lack of control, which allows the majority to "reap a windfall" when buying out the minority shareholder)).

151. *Id.*

152. *See id.*, 568 N.W.2d at 732-33.

153. *Id.* ¶ 24-25, 568 N.W.2d at 733. On a final note, the court made it clear that if the couple could not get along in their personal relationship, it was inappropriate for the trial court to think that they could get along in a business relationship. *Id.*

154. *Id.* ¶ 26.

155. *Id.* ¶ 27 (citing Linrud v. Linrud, 552 N.W.2d 342, 345 (N.D. 1996) (explaining the standard to mean that the court must have "a definite and firm conviction that a mistake has been made"); Heley v. Heley, 506 N.W.2d 715, 718 (N.D. 1993)) (stating the clearly erroneous standard).

156. *Id.* (citing N.D. CENT. CODE § 14-05-24 (1997)).

lead to more litigation."[157] Therefore, it was necessary to determine a method for splitting the Fisher Industries stock.[158]

The trial court had noted that Gene and Sheila Fisher exhibited "substantial hostility" toward one another, and the court had earlier appointed a receiver to protect the couple's Fisher Industries stock.[159] The receiver had noted in a report to the court that the biggest problem Fisher Industries faced was the conflict between Gene and Sheila.[160] The receiver's conclusions were that Gene's and Sheila's ideas were incompatible and that they would not be able to work together as co-owners of Fisher Industries.[161] The court also noted that, according to the docket sheets in the case, the couple's quarrelsome behavior had caused them to file 500 separate items before the trial, which lasted twelve days and included more than 350 exhibits, and the court concluded that the bitterness of this conflict clearly called for a complete disentanglement of the parties.[162]

The court noted that other courts have avoided splitting stock between divorcing parties who exhibit hostile characteristics toward one another.[163] The court also looked to *Robbins,* in which a Florida court stated that leaving a couple in a financial relationship in which one is a minority shareholder places that spouse without any real control and at a disadvantage in the corporation.[164] The court also pointed to a Utah Supreme Court case in which the court determined that, wherever possible, a division of stock will be avoided, because forcing the couple to remain in the relationship as business partners risked further friction.[165]

The court determined that North Dakota also prefers the type of marital distribution that will completely disentangle the parties' financial affairs.[166] One of the spouses can thus operate the business without conflict between the two.[167] The *Fisher* court affirmed that when a couple

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157. *Id.*

158. *Id.*

159. *Id.* ¶ 28. The receiver was appointed in November of 1995, despite the objection of Sheila and three of her children. *Id.* Their objections were resolved in the earlier *Fisher v. Fisher* decision, in which the court stated that the children could not intervene in the divorce action. *Id.* ¶ 29 (citing Fisher v. Fisher, 546 N.W.2d 354, 355 (N.D. 1996)). The argument made on behalf of the children was that their interest would be diminished by the appointment of a receiver. *Id.*

160. *Id.* ¶ 30. The receiver determined that both Gene and Sheila wanted to control the corporation, both had very different management styles, and neither had a desire to share the power base as they had in the past. *Id.*

161. *Id.*, 568 N.W.2d at 733-34.

162. *Id.* ¶ 31, 568 N.W.2d at 734.

163. *Id.* ¶ 32 (citing Sonja A. Soehnel, Annotation, *Divorce: Propriety of Property Distribution Leaving Both Parties with Substantial Ownership Interest in Same Business*, 56 A.L.R.4th 862 (1987)).

164. *Id.* (citing Robbins v. Robbins, 549 So. 2d 1033, 1033-34 (Fla. Dist Ct. App. 1989)).

165. *Id.* (citing Argyle v. Argyle, 688 P.2d 468, 471 (Utah 1984)).

166. *Id.* ¶ 33 (quoting Heggen v. Heggen, 541 N.W.2d 463, 465 (N.D. 1996)).

167. *Id.* (citing Linrud v. Linrud, 552 N.W.2d 342, 346 (N.D. 1996); Heley v. Heley, 506 N.W.2d

specifically requests that their relationship be completely divided and there is conflict between the parties which cannot be resolved, the trial court should effect a total separation.[168] The court concluded by stating that Gene and Sheila had demonstrated that they could not work together, and therefore disentanglement was preferred in their situation.[169]

D. REMAND

The primary issue on remand will be to reconsider the split of stock ownership between Gene and Sheila, the possibilities for redistributing the estate including either a buy-out by one spouse, or one or more spin-offs, split-offs, or split-ups severing the subsidiaries of Fisher Industries and allocating each severed to one party or the other.[170] Doing this split will require the lower court to take into consideration the tax consequences of the corporate separations, and to make any adjustments necessary to equitably divide the property.[171] The supreme court noted that if the trial court ordered a buy-out involving deferred payments, the payments should be secured and structured to insure that the seller receives payment in as little time as possible.[172] In conclusion, the court suggested that the trial court use the buy-out method, if possible, to effect an equal division, or if the trial court cannot find any appropriate manner of disentangling the parties, the court should make findings to support the other disposition ordered.[173]

E. CONCURRENCE AND DISSENT

Justice Sandstrom both concurred in and dissented from the majority opinion.[174] Justice Sandstrom's main contention was that the majority professed, as required by the "clearly erroneous" standard, to be firmly convinced that a mistake occurred by keeping the parties together, but then went on to only suggest that the trial court reconsider its stock split.[175] He elucidated the point by quoting the majority's conclusion

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715, 718 (N.D. 1993); Martin v. Martin, 450 N.W.2d 768, 769-70 (N.D. 1990); Linn v. Linn, 370 N.W.2d 536, 543 (N.D. 1985); Graves v. Graves, 340 N.W.2d 903, 907 (N.D. 1983)).

168. *Id.* (citing Volk v. Volk, 404 N.W.2d 495, 499 (N.D. 1987)).

169. *Id.* ¶ 34.

170. *See id.* ¶ 35 (suggesting that it might be possible to split the General Steel subsidiary or the Green Acres subsidiary from Fisher Industries). The court had a difficult time expounding precisely how the stock split should occur, as shown by the lengthy paragraph on options available to the trial court without any clear indication as to the desired means to achieve this split. *Id.*

171. *Id.* ¶ 35, 568 N.W.2d at 734-35 (noting that there might be tax consequences if the court decided to split off a subsidiary, gauging the consequences of which would require expert testimony). This type of problem is not new to the court which had noted in *Kaiser* that the trial court should consider tax consequences when valuing the marital estate. *See id.* (citing Kaiser v. Kaiser, 474 N.W.2d 63, 69-70 (N.D. 1991)).

172. *See id.* (citing Heggen v. Heggen, 541 N.W.2d 463, 465 (N.D. 1996)).

173. *See id.* ¶ 36, 568 N.W.2d at 735.

174. *Id.* ¶ 38 (Sandstrom, J., dissenting).

175. *Id.* ¶ 39.

that "if" disentanglement can be accomplished, then it should be.[176] In his view, a "nagging concern" that an error may have occurred is not a "definite and firm" conviction that a mistake has been made, and thus it is not enough to justify a reversal.[177] Justice Sandstrom pointed to this lack of internal coherence on the part of the majority, but he did not suggest how or if the court should have split the stock.[178] He would have affirmed the lower court's decision, which would have had the effect of leaving the parties in joint ownership of Fisher Industries with Sheila in the minority.[179]

IV. IMPACT

The majority's principal point seems to be that splitting the couple's stock would only condemn the parties, and the courts, to inevitable further litigation, in which Gene will be ordered to buy out Sheila, and that this is something that may as well be accomplished now if possible.[180] Thus, the *Fisher* court left the lower court with the task of determining whether to order a buy-out, determine the best split distribution, or leave its original stock split intact.[181] The immediate impact of this decision is then that the lower court must undertake substantial efforts in previously unopened issues, and, if none of those considerations point the right way, re-enter its prior distribution with findings establishing that none of the alternatives was either feasible or prudent.[182]

The decision in *Fisher* has, however, reaffirmed several principles of North Dakota divorce law, such as the credit for premarital property and the court's goal of trying to disentangle a couple's relationship as much as possible upon dissolution of the marriage.[183] In these situations, the *Fisher* court has not departed from earlier cases, and on the issue of disentanglement, it has synthesized North Dakota's case law.[184]

It is on the issue of minority discount and valuation of stock that the *Fisher* case will most likely have the most confusing impact.[185] The *Fisher* opinion seems to undercut *Kaiser*, in which a discount was approved, albeit in a case in which none of the parties was arguing that there should have been no discount. Contrarily, *Fisher* may suggest that

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* ¶¶ 32-33, 568 N.W.2d at 734.
181. *Id.* ¶ 36, 568 N.W.2d at 735.
182. *Id.*
183. *Id.* ¶ 15, 33, 568 N.W.2d at 731, 734.
184. *See id.* ¶ 33, 568 N.W.2d at 734 (giving North Dakota's background on the disentanglement principle and affirming its use in this case).
185. *Id.* ¶ 24, 568 N.W.2d at 733.

in a divorce situation there may be no need to enforce a minority discount.[186] However, *Fisher* does not clearly delineate the circumstances in which a minority discount might or should be applied.[187]

Tracy A. Fischer[188]

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186. *Id.*; *see* Kaiser v. Kaiser, 555 N.W.2d 585, 588 (N.D. 1996) (applying a minority discount in a divorce action).

187. *See Fisher*, ¶ 18, 568 N.W.2d at 731 (determining that although it will not apply a minority discount, the court in footnote one wavers by suggesting that a minority discount may still be applicable in a divorce action).

188. The author wishes to extend special thanks to Professor Randy Lee and Delvin Losing for their helpful input into the writing and editing of this article.