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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

In the Matter of the Estate of Sharleen Albrecht, Deceased Mark Albrecht, Personal Representative, Petitioner and Appellee, v. Alan Albrecht and Matthew Albrecht, Respondents and Appellees, and Glenvin Albrecht, Claimant and Appellant.	Supreme Court No. 20190180 Southeast Judicial District, Stutsman County 47-2013-PR-00075 The Honorable Troy J. LeFevre

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT ENTERED ON APRIL 10, 2019 (DKT. 398) AND JUDGMENT ENTERED ON APRIL 22, 2019 (DKT. 406)

BRIEF OF APPELLEE MARK ALBRECHT AS PERSONAL REPRESENTATIVE

ORAL ARGUMENT REQUESTED

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[¶2] Whether the district court correctly concluded that Sharleen Albrecht had a one-half interest in the sale proceeds for the 2012 crop.

[¶3] Whether the district court's finding that Glen and Sharleen Albrecht jointly owned the farm checking account is clearly erroneous.

[¶4] Whether the district court abused its discretion in approving attorney fees incurred by defending against Glen's claim as a creditor of the Estate and certain expenses of administration.

[¶5] Whether the district court abused its discretion in approving fees to the Personal Representative in the amount of $25,480.

STATEMENT OF THE CASE

[¶6] Sharleen Albrecht ("Sharleen") and Glenvin Albrecht ("Glen") married in March 1962. They had three sons—Alan, Matthew, and Mark. After nearly 50 years of marriage, Glen commenced a divorce proceeding against Sharleen in February 2010.

[¶7] On October 19, 2012, the district court entered a judgment divorcing Glen and Sharleen but reserving division of their property. An evidentiary hearing for the property division occurred on March 5, 2013. Glen and Sharleen owned, among other things, farm equipment, machinery, and vehicles. They also had a farm checking account. Before the district court issued its final order, Sharleen passed away on July 29, 2013.

[¶8] The district court issued an opinion distributing their property on August 2, 2013. Glen was ordered to pay Sharleen in excess of $815,000. An Application for

Informal Probate of Will was filed on August 15, 2013, and Mark Albrecht ("Mark" or "Personal Representative") was appointed personal representative of Sharleen's Estate. Judgment was entered in the divorce on September 27, 2013.

[¶9] Glen appealed on November 26, 2013. On the same day, Alan Albrecht ("Alan") filed a Petition to Set Aside or Prevent Informal Probate of a Will and Request for Restraining Order. (Dkt. 12). Alan's claims were litigated for nearly five years. Alan dismissed his Petition six days before a jury trial was scheduled to begin on October 22, 2018. (Dkt. 345).

[¶10] On January 9, 2015, this Court reversed and remanded for dismissal holding the divorce abated upon Sharleen's death. One month later, Glen filed a Notice of Claim against the Estate. (Dkt. 41). Glen did not make an elective share claim; he asserted the claim as a creditor of the Estate. The Estate disallowed Glen's claim on February 17, 2015. (Dkt. 43).

[¶11] On May 13, 2015, Glen filed a Petition for Allowance of Claim and Exempt Property. (Dkt. 68-83). Glen alleged Sharleen took certain actions during the divorce that were in violation of the restraining orders, and alleged the Estate was in possession of property belonging to him. Glen also sought a determination that he was entitled to exempt property as the surviving spouse. On June 11, 2015, the district court declared Glen the surviving spouse, which this Court later upheld on appeal. (Dkt. 98); Estate of Albrecht, 2018 ND 67, ¶ 17, 908 N.W.2d 135.

[¶12] The allegations raised in Glen's Petition were extensively litigated, and a bench trial occurred on October 19, 2016. On January 19, 2017, the district court issued an order denying Glen's claim against the Estate. One month later, the Personal

Representative filed a Petition for Return, Partition, and Sale of Estate Assets, in which the Personal Representative asserted partition and sale was necessary to close the Estate. (Dkt. 210). On February 27, 2017, Glen and Alan filed a Petition for Review of Compensation of Personal Representative and Employees of the Estate, requesting a review of the Personal Representative's compensation and the amount of attorney fees incurred by the Estate. (Dkt. 209).

[¶13] Glen then filed an appeal of the district court's order denying his claim on March 10, 2017. The Personal Representative filed a cross-appeal on March 24, 2017. This Court issued its opinion affirming the order of the district court on March 8, 2018.

[¶14] After the appeal, further litigation ensued on the remaining petitions. Alan dismissed his claims less than one week before trial was to begin. A bench trial on the other petitions occurred on December 13, 2018. The district court issued its Findings of Fact, Conclusions of Law, and Order for Judgment on April 10, 2019.

STATEMENT OF FACTS

[¶15] Glen and Sharleen operated a family farm together and acquired farmland, equipment, machinery, and vehicles. (Dkt. 374, pp. 46-49); (Dkt. 375, p. 15); (Trans. 13). Glen and Sharleen also owned a checking account that was used for the farm operation. (Dkt. 374, p. 48). Sharleen was authorized to write checks on the farm account. (Dkt. 375, p. 22).

[¶16] Glen and Sharleen separated in 2009. (Dkt. 362). Glen initiated a divorce in February 2010. The Summons in the divorce prevented the parties from disposing of, selling, encumbering, or otherwise dissipating assets. Albrecht, 2018 ND 67, ¶ 19. On July 13, 2010, the district court entered an interim order restraining the parties from

disposing of, or encumbering any of their property, real or personal, during the divorce, except as necessary in the usual and ordinary conduct of business. Id.

[¶17] During the 2012 crop season Glen grew corn, soybeans, and barley on farmland owned by him and Sharleen as joint tenants with survivorship rights. The expenses related to the 2012 crop were paid out of the farm account prior to Sharleen's death. (Trans. 166); (Dkt. 386).

[¶18] The district court entered an order divorcing Glen and Sharleen on October 19, 2012. (Dkt. 362). The district court reserved all issues related to their property.

[¶19] On January 7, 2013, Glen sold the 2012 corn crop for $120,421.66. (Dkt. 363). He did not get Sharleen's permission to sell the crop. He also did not give any of the proceeds to Sharleen or pay her any rent for her one-half interest in the farmland. (Trans. 145-46).

[¶20] On March 5, 2013, an evidentiary hearing was held in the divorce. The district court received evidence and heard testimony relative to the property owned by Glen and Sharleen. (Dkt. 362). Glen and Sharleen agreed upon the valuation of their assets, and the district court accepted their valuation. (Dkt. 362).

[¶21] On March 11, 13, 25, and 27 of 2013, Glen sold the 2012 barley crop. (Dkt. 364, 365, 366, 367). He sold the barley for a total of $95,254.20. Id. On April 29, 2013, Glen sold the soybean crop for $109,884.39. (Dkt. 368). He did not give any of the proceeds to Sharleen, and did not pay Sharleen any rent. (Trans. 143-48).

[¶22] Sharleen passed away on July 29, 2013. (Dkt. 353). The district court had not yet issued a final opinion on the division of assets. Four days after Sharleen passed away, the district court issued its memorandum opinion. (Dkt. 355).

[¶23] Sharleen left a Last Will and Testament dated November 2, 2011 ("Will"). (Dkt. 354). She appointed her son, Mark, as personal representative. She left all of her property to two of her three sons, Matthew and Mark. Mark was approved as the personal representative on August 15, 2013. (Dkt. 5). At that time, Mark resided in the state of Washington and continued to reside in Washington during these proceedings.

[¶24] The district court substituted Mark in as a party to the divorce case, and entered judgment in September 2013. (Dkt. 362). The district court ordered Glen to pay Sharleen $815,479 as part of the equitable division of their property. Id. Glen appealed the decision to this Court, which ultimately vacated the divorce judgment. Albrecht v. Albrecht, 2014 ND 221, 856 N.W.2d 755. The Law Office of Mackenzie & Reisnour represented the Estate on appeal.

[¶25] On November 27, 2013, Alan filed a petition to set aside Sharleen's Will alleging lack of testamentary capacity, undue influence, and fraud. (Dkt. 12). Mark employed the Serkland Law Firm to represent the Estate. While the appeal was pending in the divorce case, the Estate and Alan litigated the claims.

[¶26] After this Court vacated the divorce, Glen then filed a Notice of Claim as a creditor against the Estate on February 9, 2015. (Dkt. 41). The Estate disallowed the claim. On March 13, 2015, the Estate filed a motion seeking summary judgment dismissal of Alan's claims and dismissal of Glen's claim. Two months later, Glen filed a Petition for Allowance of Claim and Exempt Property. (Dkt. 68-83). Glen's claim against

the Estate alleged Sharleen took actions during the divorce in violation of the restraining orders. He also alleged he was Sharleen's surviving spouse. Glen asked to be allowed a claim against the Estate in the amount of $292,121.11. (Dkt. 68).

[¶27] The Estate opposed Glen's claim, and the matters were extensively litigated over the course of several months. (App. 32). On November 24, 2015, Glen moved for summary judgment. (Dkt. 104-120). Instead of seeking $292,121.11—the amount of his initial claim—he requested $509,242.22. (Dkt. 105). The district court issued an order denying summary judgment but granting Glen exempt property in the amount of $8,483.19 as the surviving spouse under N.D.C.C. § 30.1-07-01. A trial occurred on October 19, 2016. On January 9, 2017, the district court denied Glen's claim against the Estate. (Dkt. 198).

[¶28] One month later, the Personal Representative filed a petition seeking the return, partition, and sale of estate assets. (Dkt. 199). The Personal Representative alleged Sharleen owned a one-half interest in farm machinery, equipment, and vehicles, which were in Glen's possession or control. The Personal Representative also sought one-half the value of the farm account as of the date of Sharleen's death, and one-half of the proceeds from the sale of the 2012 crop. Glen responded and also filed a petition (joined by Alan) to review the compensation of the Personal Representative and employees of the Estate. (Dkt. 208, 209).

[¶29] A few weeks later, Glen appealed the district court's decision denying his claim against the Estate. The Personal Representative filed a cross-appeal of the determination that Glen is Sharleen's surviving spouse. (Dkt. 360). On March 8, 2018,

this Court issued an opinion affirming the district court's order denying Glen's claim against the Estate and declaring Glen the surviving spouse. Albrecht, 2018 ND 67.

[¶30] The district court then scheduled a jury trial on Alan's challenge to the Will for October 22-24, 2018. A bench trial on the other petitions was scheduled for December 13, 2018. Six days before the jury trial Alan dismissed his Petition challenging the Will. The bench trial on the remaining petitions occurred on December 13, 2018.

[¶31] On April 4, 2019, the district court issued its Findings of Fact, Conclusions of Law, and Order for Judgment. (App. 26-51). The district court ordered that the Estate is entitled to recover from Glen the amount of $167,780.13 for Sharleen's one-half interest in the 2012 crop; $142,108.50 for Sharleen's one-half interest in the farm equipment, machinery, and vehicles; and $20,538.54 for Sharleen's one-half interest in the farm checking account. (App. 52). The district court approved the total attorney fees and expenses incurred by the Estate for a total of $155,590.53, and remaining expenses of administration in the amount of $31,096.65. (App. 52-53). The district court also approved a total fee of $25,480 to the Personal Representative for his 392 hours of service as the Personal Representative over the course of more than five years. (App. 53). Judgment was entered on April 22, 2019. (Dkt. 406). Glen appealed on June 17, 2019. (App. 54-55); (Dkt. 409).

STANDARD OF REVIEW

[¶32] Glen challenges the district court's findings that Sharleen was an owner of farm equipment, machinery, vehicles, the farm checking account, and the 2012 crop. The standard of review for an appeal challenging a district court's findings of fact is the clearly erroneous standard. "A finding of fact is clearly erroneous if it is induced by an

erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, [this Court is] left with a definite and firm conviction a mistake has been made." Smith Enterprises, Inc. v. In-Touch Phone Cards, Inc., 2004 ND 169, ¶ 9, 685 N.W.2d 741. On appeal, this Court does not reweigh conflicts in the evidence and gives "due regard to the opportunity of the trial court to judge the credibility of the witnesses." Id. "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because [this Court] may have viewed the evidence differently does not entitle [this Court] to reverse the trial court." Id.

[¶33] Glen argues the district court erred by adopting the Personal Representative's proposed findings. Even though this Court prefers trial courts prepare their own findings of fact, when the court signs proposed findings submitted by a party that adequately explain the basis of the court's decision those findings will be upheld unless clearly erroneous. Id. This Court views "the trial court's findings as presumptively correct, placing the burden on the complaining party to demonstrate on appeal that a finding is clearly erroneous." Linrud v. Linrud, 1998 ND 55, ¶ 7, 574 N.W.2d 875.

[¶34] A trial court's determination on attorney fees is subject to the abuse of discretion standard. Matter of Estate of Peterson, 1997 ND 48, ¶ 24, 561 N.W.2d 618. A district court abuses its discretion "when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." J.B. v. R.B., 2018 ND 83, ¶ 5, 908 N.W.2d 687.

LEGAL ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FINDING GLEN AND SHARLEEN JOINTLY OWNED EQUIPMENT, MACHINERY, AND VEHICLES.

A. The evidence supports the district court's finding that Glen and Sharleen owned the farm equipment, machinery, and vehicles jointly.

[¶35] Glen argues on appeal that the district court erred in finding Glen and Sharleen owned the farm equipment, machinery, and vehicles jointly. Glen contends the district court's determination was based upon two factors: (1) Glen and Sharleen were still married when Sharleen passed away and (2) property between husband and wife must be owned as either joint tenants or tenants in common. Glen misinterprets the district court's findings.

[¶36] On appeal this Court does not reweigh conflicts in the evidence and gives "due regard to the opportunity of the trial court to judge the credibility of the witnesses." Smith Enterprises, 2004 ND 169, ¶ 9. "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous." Id. This Court also views "the trial court's findings as presumptively correct[.]" Linrud, 1998 ND 55, ¶ 7. The evidence supports the district court's findings that Glen and Sharleen owned the farm equipment, machinery, and vehicles jointly and this Court should affirm the findings.

[¶37] The district court relied upon Glen's testimony in finding that he and Sharleen both owned the farm equipment, machinery, and vehicles. (App. 34, 44). While Glen testified at trial that he owned several of the assets individually, this contradicted his earlier deposition testimony. He previously testified that he and Sharleen owned the assets jointly. Glen did not present any documentary evidence of during trial to demonstrate he owned the equipment, machinery, or vehicles individually. The district

court's finding that Glen and Sharleen jointly owned the farm equipment, machinery, and vehicles is therefore not clearly erroneous.[1]

[¶38] The district court specifically found that Glen's prior testimony established he and Sharleen acquired property, machinery, and real estate during their marriage, and the assets were owned by both Glen and Sharleen. The district court's findings are supported by the evidence. Glen testified as follows:

Q: Prior to the divorce case starting what kind of assets had you and Sharleen acquired?
A: Property - -
Q: Okay.
A: - - machinery and real estate.
Q: Did you have any debts at that time?
A: No.
Q: Were those assets accumulated with income from farming?
A: I don't understand that.
Q: Did you - - did you use your farming income to purchase farm machinery or did Sharleen's income contribute to that as well?
A: Her income didn't contribute to that. That was farm income.
Q: Okay. What did her income go towards?
A: I don't know. She - - she never told me.
Q: Okay. Was the farm machinery owned by you individually or both you and Sharleen?
A: I don't - - by me I guess.
Q: Okay. Did you have a farming entity that you farmed under, either a partnership or an LLC?
A: No.
Q: Okay. It was all in your name?
A: In both our names.
Q: Okay. Both you and Sharleen?
A: Yes.

[1] Glen argues the district court erred by adopting the proposed Findings of Fact, Conclusions of Law, and Order for Judgment filed by the Personal Representative. While this Court has expressed a preference that district courts prepare their own findings of fact, it has also held on numerous occasions that a district court's adoption of proposed findings of fact alone is no reason to reverse a decision. See In re M.B., 2006 ND 19, ¶ 11, 709 N.W.2d 11; Smith Enterprises, 2004 ND 169, ¶ 11, 685 N.W.2d 741; Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 858-59 (N.D. 1995).

(Dkt. 374, pp. 46-48). The vehicles were also owned by Glen and Sharleen because, as Glen testified, those were part of the farm operation. Id. at 49. Glen admitted he and Sharleen together acquired property, equipment, machinery, and real estate. (Trans. 123). Mark also testified that the farm equipment, machinery, and vehicles were typically purchased using funds from the farm account. (Trans. 70). At trial Glen admitted Sharleen was an owner of the farm account. (Trans. 156).

[¶39] Glen also testified the assets identified as item #19 through #52 on the Valuation and Equitable Division of Property (App. 23-25) were owned by him and Sharleen:

> Q: Okay. I'm going to have you turn the page now to - - we're going to talk about some of the items on page 2. Items 19 through 52, these are identified as Business Assets. Just generally would those - - would these all be equipment and tractors and things that you would have used in your farming operation?
> A: Yes.
> Q: Okay. Would those prior to the divorce have been owned by you and Sharleen?
> A: No.
> Q: Okay. Do you know how they were owned?
> A: Well, they were owned by the farm. I suppose they were owned by both of us.

(Dkt. 375, p. 15); (Trans. 132-33). The district court relied on Glen's testimony in finding the equipment, machinery, and vehicles were owned by both Glen and Sharleen. (App. 34, 44). The findings are not clearly erroneous.

[¶40] Glen's trial testimony at trial whereby he stated that he owned the farm equipment, machinery, and vehicles individually was given approximately three years after his deposition testimony. His trial testimony clearly contradicted his deposition testimony. For instance, Glen testified at his deposition that he did not know whether the 1972 Chevy grain truck, item #53, was titled in his name only. (Dkt. 375, p. 19). At trial

more than two years later, Glen claimed the title was in his name and that he signed it over upon selling the truck. (Trans. 179-80). At his deposition Glen testified that he and Sharleen owned the 2002 Chevy pickup, item #55. (Dkt. 375, pp. 19-20). At trial Glen testified he gave away the 2002 Chevy pickup, provided the title, and did not need the Estate to sign the title. (Trans. 181). Clearly, the district court found Glen's deposition testimony to be more credible and reliable.

[¶41] This Court does not reweigh conflicts in the evidence, relies upon the opportunity of the trial court to judge the credibility of the witnesses, and considers the district court's finding to be presumptively correct. Smith Enterprises, 2004 ND 169, ¶ 9; Linrud, 1998 ND 55, ¶ 7. The evidence presented to the district court supports that Glen and Sharleen owned the assets together. The district court's findings are not based upon an erroneous view of the law. The findings are based on Glen's testimony. On the entire record, this Court should not be left with a definite and firm conviction the district court made a mistake. The district court's findings are not clearly erroneous and should be affirmed.

B. The district court did not err by concluding that when a husband and wife own property together the ownership is either as joint tenants or tenants in common.

[¶42] Glen misstates the district court's conclusion about ownership of the farm equipment, machinery, and vehicles. Glen asserts the district court found that all property owned by married persons must be owned as either joint tenants or tenants in common and disregarded that married persons can own property individually. The district court actually concluded that **when** spouses **do** own property jointly, then it must be owned as either joint tenants or tenants in common. (App.44). The district court concluded that if

there is no evidence of joint tenancy, then the property is owned as tenants in common. The conclusion is an accurate interpretation of North Dakota law.

[¶43] Glen's testimony established that he and Sharleen both owned the farm equipment, machinery, and vehicles. (App. 44, ¶ 99). The district court then acknowledged there was no evidence of the existence of a farm entity, which further supported the finding that Glen and Sharleen owned the assets together. Id. Because there also was no evidence presented demonstrating Glen and Sharleen owned the assets as joint tenants with survivorship rights, the district court correctly concluded they owned the assets as tenants in common. Glen incorrectly argues the district court's conclusion was based entirely upon Glen and Sharleen being married. Nowhere in the district court's decision does it state that Glen and Sharleen owned the assets because of their marriage. The district court did not misinterpret or misapply the law.

C. Glen's reliance on partnership law is misplaced.

[¶44] Glen next argues the district court erred in relying upon the fact that there was no separate farm entity in concluding Glen and Sharleen owned the assets jointly. Glen cites two cases analyzing the existence of a partnership. The Estate did not allege a partnership between Glen and Sharleen, and the district court did not conclude a partnership existed. The cases do not apply to this matter.

[¶45] In Schlichenmayer v. Luithle, 221 N.W.2d 77 (N.D. 1974), a creditor who sold cattle to the defendant's husband attempted to hold the defendant liable for the obligation because the husband issued bad checks for the cattle. The creditor alleged the defendant benefitted from the transaction, that a partnership existed between the defendant and her late husband, and that the defendant was liable for her late husband's

tort. 221 N.W.2d at 81. This Court did not find credible evidence to support the allegation of a partnership. Id. at 82. In doing so this Court recognized joint tenants are not partners merely because of the joint tenancy and that spouses are not partners merely because of marriage. Id. This Court declared partnership arises by contract.

[¶46] Glen also cites In re Estate of Nuss, 646 N.E.2d 504 (Ohio App. 3d. 1994). The case also involved a determination of whether a farm partnership existed between a mother and her deceased son. The appellate court determined there was no partnership and that the mother owned certain assets individually.

[¶47] The facts of Schlichenmayer and Nuss differ greatly from this case. Here, the Estate sought Sharleen's one-half interest in assets or proceeds derived therefrom as a joint owner of the assets, not by alleging the existence of a farm partnership. The district court did not find that Glen and Sharleen owned the assets as partners. The finding was based upon evidence of joint ownership. Glen, the surviving spouse, is the one who testified that he and Sharleen owned the assets jointly.

[¶48] On appeal, Glen also now attempts to rely upon evidence that was not presented to the district court during trial. Appellant's Br., ¶ 59. Glen argues he was the sole owner of certain vehicles and cites to purchase documents which were not presented to the district court as evidence during trial. Glen did not present any purchase agreements or copies of titles during trial. Issues not presented to the trial court cannot be considered on appeal. Carlson v. Farmers Ins. Group of Cos.-Farmers Ins. Exchange, 492 N.W.2d 579, 581 (N.D. 1992). The district court's determination of ownership based upon the evidence presented during trial must be affirmed.

D. The district court relied upon the values Glen and Sharleen agreed to and sale prices obtained by Glen in valuing the assets.

[¶49] Glen argues the district court erred in "relying upon a judgment in the abated divorce action to establish the value of the assets on the date of Sharleen's death." Appellant's Br., ¶ 64. It is clear from the district court's findings and conclusions that it relied upon the values Glen and Sharleen stipulated to as of March 5, 2013—less than five months before Sharleen's death—and the sale values attained by Glen. The district court did not merely accept as conclusive the values placed on the assets by the district court in the divorce case. (Trans. 22-24). The district court also properly determined Glen was estopped from disputing the values because Glen agreed to the values as accurate as of March 5, 2013. (App. 46).

[¶50] It is true the judgment entered in the divorce case was vacated by this Court on appeal. But the evidence relied upon by the district court in the divorce supporting the values of the assets was not invalidated. This is an important distinction. The district court here arrived at the values based upon the evidence and the agreement of Glen and Sharleen. This Court's vacation of the divorce judgment did not degrade the evidence or the fact that Glen and Sharleen agreed upon the values as of March 5, 2013. At trial Glen conceded he agreed with the valuations used by the district court. (Trans. 134). The district court did not accept the vacated judgment as conclusive and therefore did not err in determining the values of the assets.

[¶51] Glen next argues the district court erred by essentially forcing Glen to purchase Sharleen's one-half interest in 11 items (#26, #29, #32, #34, #36, #37, #39, #43, #44, #47, and #52). Appellant's Br., ¶ 66. The district court valued only five of the 11 items. Item #29 was valued at $1,500. (App. 35). Item #34 was valued at $800. (App. 36).

Item #47 was valued at $350. (App. 37). Item #52 was valued at $450. (App. 38). The district court valued Item #26 (mistakenly referred to as #30) at $150. (App. 40). The total value given by the district court for the five assets is $3,250, so Sharleen's one-half interest is $1,625.

[¶52] Any error by the district court in ordering Glen to account to the Estate for Sharleen's one-half interest in those assets is harmless as the values are de minimis. If this Court determines the district court erred then the remedy is to remand with instructions to amend the judgment accordingly. Alternatively, the Court could remand with instructions that the items be sold and the Estate given one-half of the proceeds of the sales.

II. THE DISTRICT COURT DID NOT ERR IN DETERMINING THE ESTATE IS ENTITLED TO ONE-HALF OF THE CROP PROCEEDS.

[¶53] The district court awarded the Estate one-half of the proceeds from the sale of the 2012 crop, which included corn, soybeans, and barley. Glen argues the district court erred in awarding the Estate any of the proceeds. Glen's main contention is that he owned the crop and was not obligated to account to Sharleen for the sales.

[¶54] District courts are given discretion in partition actions to make a fair and just division of the property or proceeds and have "great flexibility in fashioning appropriate relief for the parties." In re Estate of Loomer, 2010 ND 93, ¶ 17, 782 N.W.2d 648. North Dakota law therefore allows a district court to make a fair and just division not only of property, but also the proceeds of a sale of property. The district court's findings that Sharleen had an ownership interest in the 2012 crop and that Glen failed to account to her for the crop sales are not clearly erroneous.

[¶55] Glen testified the farm operation included Sharleen. (Dkt. 374, pp. 47-48). He testified they acquired property, machinery, and real estate. Id. at 46-47. In 2012, Glen planted and harvested corn, soybeans, and barley. All of the crops were grown on agricultural real estate owned by Glen and Sharleen as joint tenants with survivorship rights. (App. 27); (Trans. 143-48). "Growing crops are part of the real estate." Schlichenmayer, 221 N.W.2d at 83. Sharleen therefore had an ownership interest in the crops through her ownership of the land, but also as being part of the farm operation. Prior to Sharleen's death, Glen sold the 2012 crop but did not account to Sharleen for any of the proceeds. He testified he did not get Sharleen's permission to sell the crop. He also did not pay Sharleen any rent for growing the crops on real estate that she jointly owned until the time of her death on July 29, 2013. (Trans. 143-48). It also appears Glen failed to account to the district court for the actual amounts of the crop sales as those were not reflected in the district court's judgment in the divorce case. (App. 25).

[¶56] On January 7, 2013, Glen sold the 2012 corn crop for $120,421.66. (Dkt. 363); (Trans. 145). He did not get Sharleen's permission to sell the corn. (Trans. 145-46). Glen did not give any of the proceeds from the sale to Sharleen. (Trans. 146). Glen sold the barley on March 11, 13, 25, and 27 of 2013 under the same circumstances as the sale of the corn crop. (Trans. 143-45); (Dkt. 364, 365, 366, 367). The barley sold for $95,254.20—more than the parties estimated in the divorce. (App. 25). On April 29, 2013, Glen sold the soybean crop for $109,884.39 under the same circumstances. He did not give any proceeds to Sharleen and did not pay Sharleen for use of the farmland. (Trans. 147-48).

[¶57] Glen's position is that the Estate is not entitled to the proceeds for crops sold prior to Sharleen's death. Glen's position, however, ignores that Sharleen retained an interest in the proceeds from any sales of assets owned by her and Glen. Simply disposing of the assets and not accounting to Sharleen for the proceeds did not absolve Glen of liability. Glen's testimony was clear: he never paid any proceeds to Sharleen or her Estate. (Trans. 143-48). Simply because Glen sold assets prior to Sharleen's death did not defeat Sharleen's interest in the proceeds of the sales. She retained either a one-half interest in the property or a one-half interest in the proceeds.

[¶58] Glen also argues any interest Sharleen had in the proceeds terminated upon Sharleen's death, when her joint tenancy in the real estate terminated. Appellant's Br., ¶ 69. Glen's argument makes no sense because the crops were grown, harvested, and sold before Sharleen's death and Sharleen therefore retained an interest in the proceeds. Sharleen's interest in the proceeds of the crop sales did not terminate upon her death, and Glen failed to pay any portion of the proceeds to Sharleen.

[¶59] Glen next argues the district court erred by not reducing Sharleen's share of the 2012 crop proceeds by the amount of expenses incurred in 2012. Glen presented his 2012 tax return during trial, which shows he paid the expenses in 2012. (Dkt. 386). The expenses related to the 2012 crop were paid out of the farm account, which Sharleen also had an interest in, prior to Sharleen's death. (App. 27). Glen failed to present any evidence of expenses related to the 2012 crop that were incurred in 2013. Id. The district court did not err by awarding the Estate one-half of the proceeds without a further deduction for expenses because the expenses had already been paid out of the farm account.

[¶60] The district court did not clearly err or abuse its discretion in exercising its broad equitable powers to determine Sharleen had a one-half interest in the proceeds of the 2012 crop. Sharleen was an owner of the land on which the crops were grown, and Glen sold the crops prior to Sharleen's death. By doing so, Sharleen retained an interest in the proceeds from the sales. Glen failed to account to Sharleen for the sales before her death and it was proper for the district court to exercise its equitable powers and order Glen to pay Sharleen's Estate the value of her one-half interest.

III. THE DISTRICT COURT DID NOT ERR IN FINDING SHARLEEN AND GLEN JOINTLY OWNED THE FARM ACCOUNT.

[¶61] Glen asserts the district court erred in awarding the Estate one-half the value of the farm account as of the date of Sharleen's death. He argues that because he was the sole party to the farm account when Sharleen passed away the district court improperly concluded Sharleen had an interest in the account. The district court, relying on Glen's testimony, found Glen and Sharleen owned the farm account jointly and awarded the Estate one-half the account balance as of the date of Sharleen's death. The district court did not err in finding Sharleen had an ownership interest in the account or the funds on deposit in the account.

[¶62] This Court does not reweigh conflicts in the evidence on appeal. Smith Enterprises, 2004 ND 169, ¶ 9. Due regard is also given to the opportunity of the trial court to judge the credibility of a witness. Id. A trial court's choice between two permissible views of the evidence is not clearly erroneous. Id. Glen testified very clearly that he and Sharleen owned the farm checking account:

Q: How did you keep the farm income separate from Sharleen's income?
A: We had a farm account.
Q: Was this a checking account?

A: Yes.
Q: Where was that at, which bank?
A: In Stutsman County Bank.
Q: Was that account in your name or both of your names?
A: Both of our names.

(Dkt. 374, p. 48). At trial Glen initially testified consistently with his deposition testimony. He testified Sharleen was an owner of the farm checking account. (Trans. 126). He then changed his testimony and said he did not believe Sharleen was an owner on the farm account. Id. After being confronted with his earlier deposition testimony, Glen claimed he "may have misunderstood" the question at his deposition. (Trans. 126-28). Here, the district court clearly accepted Glen's earlier deposition testimony as being more credible.

[¶63] Glen's earlier testimony that he and Sharleen owned the farm checking account is sufficient proof of the fact. This Court should accept the district court's findings as presumptively correct, and conclude the district court did not error in determining Sharleen and Glen both owned the farm checking account. Linrud, 1998 ND 55, ¶ 7 ("[T]he trial court's findings as presumptively correct, placing the burden on the complaining party to demonstrate on appeal that a finding is clearly erroneous.").

[¶64] Glen testified at trial that Sharleen maintained an interest in the farm account. (Trans. 184). When questioned by his counsel, Glen testified Sharleen was a party to the farm checking account. (Trans. 194). He testified she was an owner of the account when it was maintained at Unison Bank, but that Glen closed the account and opened a new account at First Community Credit Union in his name only. (Trans. 194-95). Glen's testimony demonstrates he unilaterally converted the funds in the farm account into an account that only he owned. He cannot avoid accounting to the Estate for

Sharleen's one-half interest in the farm account, which Glen admitted Sharleen owned, by simply converting the funds and depositing the funds into a different account. Because the district court found that Glen and Sharleen operated the farm together, Sharleen still had ownership rights in the farm account especially after Glen converted the funds.

[¶65] District courts are given "discretion in partition actions to 'do equity' and to make a fair and just division of the property or proceeds between the parties" and have "great flexibility in fashioning appropriate relief for the parties." Loomer, 2010 ND 93, ¶17. The Court should affirm the district court's finding that Sharleen had a one-half interest in the farm account.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING ATTORNEY'S FEES AND EXPENSES

[¶66] Glen argues the district court abused its discretion by allowing a portion of attorney fees and expenses that "relate to the claim Glen brought in February of 2015." Appellant's Br., ¶ 78. Glen does not challenge the reasonableness of the hours or rates; his only complaint is the fees incurred defending against his claim against the Estate should be disallowed. Glen also contends the district court abused its discretion in allowing $1,026.20 of expenses "related to property owned by Mark."

[¶67] "An abuse of discretion by the trial court is never assumed and must be affirmatively established." Oliver v. City of Larimore, 540 N.W.2d 630, 634-35 (N.D. 1995). The district court did not abuse its discretion in awarding the attorney fees and expenses because if the Estate did not defend against Glen's claim as a creditor it would

have been required to pay Glen more than $160,000[2]. Glen made the decision to assert the claim as a creditor of the Estate rather than making an elective share claim or bringing a separate action to recover non-probate assets. The district court also did not abuse its discretion in allowing the expenses as the bills were incurred by Sharleen prior to her death.

A. The district court correctly determined the attorney fees incurred by defending against Glen's claim benefitted the Estate.

[¶68] If a personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative is entitled to receive necessary expenses, including attorney's fees incurred, from the estate. N.D.C.C. § 30.1-18-20. "For payment of attorney fees from the estate under N.D.C.C. § 30.1-18-20, the personal representative's conduct must have been in good faith, free from fraudulent intent, and for the benefit of the estate." Peterson, 1997 ND 48, ¶ 25. "A benefit to the estate includes a personal representative's good faith attempts to effectuate the testamentary intent set forth in a facially valid will." Id. at ¶ 26. "A trial court is considered an expert in assessing the value of attorney fees." Oliver, 540 N.W.2d at 634-35.

[¶69] Mark testified if he had not retained counsel to disallow Glen's claim and defend the Estate, then Glen's claim would have been effective against the Estate. (Trans. 113). Mark's decision to defend against Glen's claim benefited the Estate because the Estate avoided owing a debt to Glen in excess of $160,000. If the judgment in favor of the Estate against Glen is upheld and paid, then the Estate will likely have sufficient

[2] When Glen initially filed his Petition, he was seeking an award against the Estate for $292,121.11 plus exempt property in the amount of $14,483.19. (Dkt. 68, ¶ 14). Before trial he reduced the amount to just over $160,000.

funds to pay its expenses of administration and make a final distribution of the remaining sums to the two beneficiaries, Matthew and Mark. This outcome could not happen if Glen's claim against the Estate had not been disallowed and litigated. The Personal Representative's determination to defend against Glen's claim benefitted the Estate and the allowance of attorney fees is proper.

[¶70] The district court also found the attorney fees incurred by the Estate were as a result of Mark trying to give effect to and honor Sharleen's testamentary wishes. (App. 40). Sharleen wanted her assets to go to Mark and Matthew. She left Alan and Glen out of her will and, likely because of the pending divorce, did not want to leave any assets to Glen. Mark testified the fees incurred were a result of trying to give effect to and honor his mother's testamentary intent. (Trans. 66-67). The district court found Mark's actions in defending against Glen's claim benefited the Estate because if Glen had prevailed the Estate would have been indebted to Glen. Id. If Glen had prevailed on his claim there would not be any assets for distribution to Sharleen's beneficiaries. The attorney fees and expenses incurred in defending against Glen's claim were incurred in good faith, without fraud, and for the benefit of the Estate. The district court did not abuse its discretion by allowing the attorney fees and expenses.

B. The district court did not abuse its discretion in allowing expenses.

[¶71] Glen contends the district court abused its discretion in allowing $1,026.20 in expenses. Appellant's Br., ¶ 81. A portion of the expenses were for cable service, water, power, and plumbing and heating for the home Sharleen lived in at the time of her death. Mark did not live with Sharleen so he received no benefit from these services. It

was proper for Mark to pay these debts incurred by Sharleen and the district court properly allowed the expenses.

[¶72] Glen argues the remaining expenses were related to a checking account that became Mark's upon Sharleen's death and that those expenses should not be allowed. Glen did not present any evidence at trial demonstrating what those expenses were for and no explanation has been provided on appeal either. The district court found that the expenses included on Exhibit 20 were incurred and paid by the Estate. (App. 49). Glen has failed to demonstrate how the district court abused its discretion and this Court should uphold the allowance of expenses.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE PERSONAL REPRESENTATIVE A FEE OF $25,480 FOR MORE THAN FIVE YEARS OF SERVICE.

[¶73] The district court allowed Mark a fee of $25,480 for serving as the Personal Representative for more than five years. (App. 53). The district court approved a rate of $65 per hour and a total of 392 hours of service by Mark. (App. 49). Glen contends the district court abused its discretion by allowing the fee.

[¶74] A personal representative is entitled to reasonable compensation for services rendered. In re Estate of Fisk, 2010 ND 186, ¶ 6, 788 N.W.2d 611; Peterson, 1997 ND 48, ¶ 18; N.D.C.C. § 30.1-18-19. The review of fees paid or to be take by the personal representative is left to the sound discretion of the trial court. Matter of Estate of Flaherty, 484 N.W.2d 515, 520-21 (N.D. 1992). Where a petitioner has made no effort to introduce actual evidence to dispute the value of the work performed for the estate, there is no basis for a court to determine the fees have in any way been unreasonable. See Matter of Estate of Hansen, 507 N.W.2d 903, 904 (N.D. 1993) (affirming the trial court's

computation of reasonable fees when claimant made no effort to introduce evidence to refute the value of the work performed).

[¶75] The district court concluded a reasonable hourly rate for Mark's service was $65. (App. 49). The customary rate of commission for serving as personal representative is not uniform; ranges for North Dakota can be anywhere from $60-80 per hour. See The American College of Trust and Estate Counsel, Study 5: A Survey of State Statutes and Practices Regarding Fees of Executors, Administrators and Testamentary Trustees, available at: https://www.actec.org/assets/1/6/Study5.pdf (last accessed on October 3, 2019). Glen has not challenged the hourly rate. The hourly rate awarded by the district court must therefore be affirmed.

[¶76] Glen failed to present any evidence at trial to dispute the services rendered by the Personal Representative. Mark was appointed in August 2013. He lived in Washington at the time and throughout the entirety of the probate proceedings. (Trans. 10). After his appointment, Mark was made a party to the divorce proceeding between Glen and Sharleen. (Trans. 21). After he was made a party to the divorce, a judgment was entered requiring Glen to pay over $815,000 to Sharleen's Estate. (Trans. 25-26). Glen appeal the decision and Mark, as Personal Representative, was a party to the appeal.

[¶77] At the same time, Mark's brother, Alan, filed a petition challenging Sharleen's Will alleging lack of capacity, undue influence, and fraud. (Dkt. 12). There was extensive litigation regarding the petition. Alan did not dismiss his claims until October 16, 2018. (Dkt. 345).

[¶78] After the appeal in the divorce case, Glen made a claim against the Estate. Glen later filed a petition against the Estate asserting Sharleen violated restraining

provisions in the divorce case. See Albrecht, 2018 ND 67. The petition resulted in extensive litigation, trial, and an appeal. Id.

[¶79] At trial, the Personal Representative presented Exhibit 21, which was a spreadsheet created and maintained to track the hours associated with performing work for the Estate. (Trans. 50-51); (Dkt. 372). Column C of Exhibit 21 shows the hours spent, and the remaining columns provide descriptions of the services.

[¶80] Exhibit 21 depicts Mark spent 30 total hours for his deposition related to Alan's challenge of Sharleen's Will. Mark lived in Washington so it was a full day of travel to come to North Dakota for his deposition, and then a full day of travel back to Washington. (Trans. 52). The entry also includes time for appearing at his deposition and preparation time in getting ready for his deposition. (Trans. 52). The same amount of time was spent coming to North Dakota for Glen's deposition, and additional time for appearing at Glen's second deposition by phone. (Dkt. 372); (Trans. 52-53). Mark testified his time for line 5 in Exhibit 21 was for reviewing deposition transcripts and exhibits entered during those deposition, as well as documents and materials related to the case. (Trans. 53).

[¶81] Glen contends some of Mark's time was for paying bills for property he owned as a joint tenant with Sharleen. Glen's argument ignores the fact that those bills were incurred by Sharleen directly, not Mark. Mark did not benefit from Sharleen's possession and use of the home. Mark did not live in the home with Sharleen; he lived in Washington. As the personal representative Mark was obligated to pay Sharleen's outstanding debts.

[¶82] The district court found, relying upon Exhibit 21 and Mark's testimony, that Mark provided approximately 392 hours of service as the personal representative. (App. 42-43). The district court correctly found the hours reported in Exhibit 21 include time spent by Mark because of the litigation involving Alan's petition and Glen's petition. The district court found the time included five trips from Washington to North Dakota, time spent reviewing documents and filings in the probate proceedings, reviewing depositions, reviewing exhibits, spending time copying documents for production, obtaining bank records and statements pertaining to Sharleen's assets, reviewing Sharleen's financial records and having a tax return prepared, paying Sharleen's final bills, preparing and attending an estate sale in Jamestown, and time spent reviewing documents for the divorce case and appeals by Glen. Id. The district court also correctly found that Glen failed to present any evidence to refute the time spent by Mark as the personal representative. (App. 43). The district court found the 392 hours of service over a five-year period to be reasonable.

[¶83] The district court's findings of fact on the Personal Representative's fee are not clearly erroneous. The district court also did not abuse its discretion in allowing a fee of $25,480 for 392 hours of service at a rate of $65 per hour over a period of five years. This Court should therefore affirm the fee to the Personal Representative.

CONCLUSION

[¶84] The Personal Representative hereby respectfully asks this Court to affirm the Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment entered by the district court.

REQUEST FOR ORAL ARGUMENT

[¶85] Oral argument is hereby requested. This case presents a lengthy and complex procedural history, and this is the second appeal in this probate action. The opportunity to present oral argument will allow the parties to address particular questions or concerns of the Court.

Dated this 3rd day of October, 2019.

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CERTIFICATE OF COMPLIANCE

[¶86] The undersigned, as attorney for the Personal Representative, Petitioner, and Appellee Mark Albrecht, in the above-captioned matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that the total number of pages of the above brief does not exceed 38.

Dated this 3rd day of October, 2019.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

In the Matter of the Estate of Sharleen Albrecht, Deceased	Supreme Court No. 20190180 Stutsman County District Court Civil No. 47-2013-PR-00075 **AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA
COUNTY OF CASS

[¶1] I hereby certify that on October 3, 2019, the following document:

BRIEF OF APPELLEE MARK ALBRECHT AS PERSONAL REPRESENTATIVE

was filed electronically with the Clerk of the Supreme Court through the Supreme Court E-Filing Portal system for electronic service through the E-Filing Portal system on the following:

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