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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

ON APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT ENTERED ON APRIL 10, 2019, AND JUDGMENT ENTERED ON APRIL 22, 2019

REPLY BRIEF OF APPELLANT GLENVIN ALBRECHT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

LAW & ARGUMENT ..... ¶ 1

A. The district court erred in disregarding Glen's trial testimony on ownership of the equipment, machinery, and vehicles in favor of his deposition testimony. ..... ¶ 2

B. The district court erred in relying on family law principles to award half of Glen's property to the Estate. ..... ¶ 6

C. The district court erred in ordering Glen to sell property in his possession. ..... ¶ 8

D. The district court erred as a matter of law in concluding the Estate was entitled to half the proceeds from the 2012 crops harvested and sold prior to Sharleen's death. ..... ¶ 10

E. The district court award of fees and expenses to the Estate was arbitrary and unreasonable. ..... ¶ 16

CONCLUSION ..... ¶ 20

TABLE OF AUTHORITIES

Cases

Advanced Irr., Inc. v.First Nat. Bank of Fargo,
366 N.W.2d 783 (N.D. 1985) ..... ¶ 15
Bruce J. Wenzel Estate v. Wenzel,
2008 ND 68, 747 N.W.2d 103 ..... ¶ 8
Delzer v. United Bank of Bismarck,
484 N.W.2d 502 (N.D. 1992) ..... ¶ 2
Estate of Albrecht,
2018 ND 67, 908 N.W.2d 135 ..... ¶ 13
Farmers Union Oil Co. of Williston v. Harp,
462 N.W.2d 152 (N.D. 1990) ..... ¶ 2
Hoverson v. Hoverson,
2001 ND 124, 629 N.W.2d 573 ..... ¶ 15
Hoverson v. Hoverson,
2013 ND 48, 828 N.W.2d 510 ..... ¶ 7
Hysjulien v. Hill Top Home of Comfort, Inc.,
2013 ND 38, , 827 N.W.2d 533 ..... ¶ 2, 5
In re Estate of Nuss,
646 N.W.2d 504 (Ohio App.3d 1994) ..... ¶ 6
In re Estate of Sorenson,
2006 ND 145, 717 N.W.2d 535 ..... ¶ 7
Industry Fin. Corp. v. Redman,
383 N.W.2d 847 (N.D. 1986) ..... ¶ 15
Kennett–Murray Corp. v. Bone,
622 F.2d 887 (5th Cir. 1980) ..... ¶ 2, 3
Lyngstad v. Roy,
111 N.W.2d 699 (N.D. 1961) ..... ¶ 12
Matter of Conservatorship of Kinney,
495 N.W.2d 69 (N.D. 1993) ..... ¶ 16
Oliver v. City of Larimore,
540 N.W.2d 630 (N.D. 1995) ..... ¶ 16
Schlichenmayer v. Luithie,
221 N.W.2d 77 (N.D. 1974) ..... ¶ 6
Ulsaker v. White,
2006 ND 133, 717 N.W.2d 567 ..... ¶ 7

Statutes

N.D.C.C. § 14-07-08(b) ..... ¶ 13
N.D.C.C. § 30.1-18-21 ..... ¶ 16
N.D.C.C. § 30.1-31-08(2) ..... ¶ 14
N.D.C.C. § 30.1-31-02(06) ..... ¶ 14
N.D.C.C. § 47-02-06 ..... ¶ 7
Sec. 47-02-05, N.D.C.C ..... ¶ 6
Sec. 47-05-06(2), N.D.C.C ..... ¶ 6

LAW & ARGUMENT

[¶1] The Personal Representative, ("PR"), asserts the district court's Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment should be affirmed by this Court because the evidence supports the district court's finding that Glen and Sharleen jointly owned the equipment, machinery, and vehicles. The PR additionally argues the district court did not err in finding that the Estate is entitled to half of the 2012 crop proceeds and that Glen and Sharleen jointly owned the checking account at First Community Credit Union. Further, the PR asserts the district court did not abuse its discretion in allowing the Estate's claimed attorney fees and expenses and PR fees.

A. The district court erred in disregarding Glen's trial testimony on ownership of the equipment, machinery, and vehicles in favor of his deposition testimony.

[¶2] The PR asserts the district court properly disregarded Glen's trial testimony and relied upon his deposition testimony to establish that Glen and Sharleen jointly owned the equipment, machinery, and vehicles. The PR alleges Glen's trial testimony was "contradictory" to his previous deposition testimony. However, Glen's trial testimony actually clarified his deposition testimony. This Court has noted that testimony should not be disregarded just because there may be some confusion. See Delzer v. United Bank of Bismarck, 484 N.W.2d 502, 508 (N.D. 1992) (citing Kennett–Murray Corp. v. Bone, 622 F.2d 887, 893 (5th Cir. 1980)). This Court has noted that a district court should not ignore trial testimony that attempts to explain further some of the same or similar questions asked at the deposition. See Hysjulien v. Hill Top Home of Comfort, Inc., 2013 ND 38, ¶¶ 23, 27, 827 N.W.2d 533. As this Court has also noted, a district court must still consider all admissible evidence (including trial testimony) even if there is some contradictory evidence in prior deposition testimony. Farmers Union Oil Co. of Williston v. Harp, 462

N.W.2d 152, 156 (N.D. 1990). This Court has rejected the contention that trial testimony is fully negated by possibly contradictory deposition testimony. Id.

[¶3] In Kennett-Murray, the Fifth Circuit noted a trial court should consider all evidence before it and not disregard testimony simply because it conflicts to some degree with previous testimony. 622 F.2d at 893. Although the district court may weigh the credibility of witnesses and testimony, it should not have wholly disregarded Glen's trial testimony in favor of the deposition testimony. See id.

[¶4] Accordingly, Glen's "contradictory" testimony should not have been disregarded in light of Glen's clarifying statements and his understanding of the ownership of the farm. A reasonable person should understand Glen's testimony to be a clarification of his understanding of ownership based on his recollection. For example, when asked about his prior deposition testimony as to ownership of farm equipment, Glen responded: "I must have forgot about that. I didn't understand and I forgot about them – the items." Transcript of Proceeding, Dec. 13, 2018 ("Trans."), p. 133: 9-10. As a layperson being asked about approximately 30 items of personal property years after the initial purchase of farm equipment and machinery, Glen could not reasonably be expected to explain the legal intricacies of ownership between spouses and reiterate those terms exactly both at trial and a deposition several years prior.

[¶5] In another example, Glen again clarified some of the "contradictory" testimony when asked whether the farm operation was in both his and Sharleen's name, Glen responded "Partly, yes." Trans. p. 125. Glen clarified his testimony explaining, "some of the things were in both our names, and the land was in both our names, and then, but, the machinery was in my name." Trans. p. 126. Glen further clarified and said:

> Q. Glen, Kasey asked you some questions regarding the farm operation and it being in both you and Sharleen's name; is that correct? Do you remember that line of testimony?
> A. Well, I don't know when you refer to farm operation.
> Q. Okay. Is it correct that you were talking in a general sense as being married?
> A. Yes.

Trans. p. 181. Notably, the deposition testimony which the Estate has deemed contradictory, uses the terms ownership as opposed to who purchased the property or held the title. As such, like in Hysjulien, this Court should consider Glen's testimony as clarifying, not contradictory. Accordingly, the district court erred in disregarding Glen's "contradictory" trial testimony in favor of his deposition testimony as to ownership.

B. The district court erred in relying on family law principles to award half of Glen's property to the Estate.

[¶6] Ownership is not established by marriage. Schlichenmayer v. Luithie, 221 N.W.2d 77, 80 (1974). "Joint tenants are not, merely because of the joint ownership, partners (Sec. 47-05-06(2), N.D.C.C), nor are husband and wife, merely because of the marriage, partners (Sec. 47-02-05, N.D.C.C.)." Id. at 82. A shared interest in a farming operation also does not establish a partnership or joint ownership of the farm assets. See In re Estate of Nuss, 646 N.W.2d 504, 505 (Ohio App.3d 1994). Sharleen was not involved in the farm after her and Glen's separation in 2009. Trans. p. 161. Prior to their separation, Sharleen had limited involvement in the farm operation. Transcript of Divorce Proceeding, Dkt. #280 ("Divorce Trans."), p. 28.

[¶7] The district court effectively awarded the Estate money and property based on divorce law. Family law principle of a marital estate is irrelevant in this probate action. See Hoverson v. Hoverson, 2013 ND 48, ¶ 9, 828 N.W.2d 510 (citing Ulsaker v. White, 2006 ND 133, ¶¶ 12-13, 717 N.W.2d 567); In re Estate of Sorenson, 2006 ND 145, ¶ 18,

717 N.W.2d 535. Notably, the district's court's reliance on N.D.C.C. § 47-02-06 regarding joint tenancy contemplates a transfer of property to multiple parties. Here, as evidenced by Glen's testimony and certain purchase agreements, items including the 2005 IH Diesel truck (#57), the 2012 Nevel Trailer (#58), and the 1890 No Till Drill were all transferred to Glen alone. There should be no presumption of joint ownership, whether as joint tenants or tenants in common, simply because Glen and Sharleen were married. The evidence does not support the district court's conclusion and Estate's assertion that all property was jointly owned despite no evidence of property being transferred jointly to both Glen and Sharleen.

C. The district court erred in ordering Glen to sell property in his possession.

[¶8] Glen cannot be forced to buy out Sharleen's alleged share of jointly-owned property. Bruce J. Wenzel Estate v. Wenzel, 2008 ND 68, ¶ 10, 747 N.W.2d 103. The Estate correctly notes that this Court should reverse and remand this matter because the district court erred in calculating the one-half interest. See Appellee's Br. at ¶52.

[¶9] If this Court determines Sharleen had an interest in 11 items (26, 29, 32, 34, 36, 37, 39, 43, 44, 47, and 52), it is clear error to force Glen to buy out Sharleen's interest. This is not a de minimus error, but rather requires reversal of the district court's decision. Additionally, this clear error provides additional support to Glen's argument that the district court erred by wholly adopting the proposed findings of the Estate. The district court clearly erred in failing to consider the evidence and law presented, resulting in this error and adoption of the entirety of the Estate's findings.

D. The district court erred as a matter of law in concluding the Estate was entitled to half the proceeds from the 2012 crops harvested and sold prior to Sharleen's death.

[¶10] The district court erroneously concluded that the Estate is entitled to half the value of the proceeds from Glen's sale of corn, barley, and soybeans harvested in 2012. The Estate and the district court cite no legal authority to support its legal conclusion that Sharleen owned one-half the proceeds of harvested crops in a farm operation with which she was uninvolved.

[¶11] Glen planted and harvested corn, soybeans, and barley in 2012, while separated from Sharleen. Trans. p. 143-45, 161. Glen's expenses incurred in 2012 relating to the crops totaled $177,268.00. Dkt. #386. The 2012 expenses were paid from Glen's individual account at First Community Credit Union ("FCCU"). Trans. p. 166. Glen deposited the $325,560.25 of proceeds into his solely owned checking account at FCCU. Trans. p. 147-47, 159; Dkt. #363-68. Glen planted crops in the spring of 2013 and testified he would have incurred similar expenses as in 2012. Trans. p. 166. The district court clearly erred in finding "Glen also did not present any evidence of specific expenses related to the 2012 crop," because Glen testified about the expenses. App. 27, ¶ 10. Those expenses would have also been paid from his checking account at FCCU. Trans. p. 166.

[¶12] When crops are harvested, they become personalty. Lyngstad v. Roy, 111 N.W.2d 699, 701 (N.D. 1961). Any interest Sharleen's estate may have had in Glen's crops ceased upon her death and upon the harvest of those crops, the district court erred as a matter of law in concluding the Estate had a half ownership interest in the proceeds.

[¶13] In addition, the district court found that Glen sold the crops without Sharleen's permission and did not give her any of the proceeds during her lifetime. App. 28-29 at ¶ 16. There is no evidence in this record indicating Glen and Sharleen agreed to, or were ordered to, share the profits from the already-harvested crops, much less an

agreement to share equally in all the proceeds without accounting for expenses or Sharleen's lack of any involvement with the farm in 2012. Further, Glen and Sharleen were not business partners, nor could their earnings be considered joint property as they were separated. See N.D.C.C. § 14-07-08(b). To be clear, there was no allegation of conversion or contempt in the divorce proceedings regarding Glen's continued operation of the farm during the pendency of the abated divorce action. As noted by this Court, there should be no remedial sanction or contempt motion in this action based on the divorce proceeding. Estate of Albrecht, 2018 ND 67, ¶ 21, 908 N.W.2d 135. Here, it appears the district court and the Estate have effectively sanctioned Glen for his sale of the crops in his ordinary course of business which was unobjected to by either Sharleen or the Estate until the present partition motion.

[¶14] As an extension of this argument, the Estate argues it was properly entitled to half of the checking account despite it being solely owned by Glen at the time of Sharleen's death. To clarify this issue, as to both the district court and the Estate's reference to the "farm account," Glen and Sharleen shared a farm checking account at one point during their marriage. Trans. p. 194; Divorce Trans. p. 108. Glen closed the initial farm account and opened a new account at FCCU. Trans. p. 194. Pursuant to N.D.C.C. § 30.1-31-08(2), Glen was the sole owner. See N.D.C.C. § 30.1-31-02(06); Dkt. 385; Trans. p. 194-95. The district court erred as a matter of law in concluding that that the Estate was entitled to half the money in Glen's FCCU account as of the date of her death.

[¶15] In ignoring the issue of double recovery here, the Estate continues to argue it is entitled to fifty percent of the crop proceeds. North Dakota law, as this Court has repeatedly recognized, does not allow for a double recovery. Hoverson v. Hoverson, 2001

ND 124, ¶ 28, 629 N.W.2d 573; Industry Fin. Corp. v. Redman, 383 N.W.2d 847, 848 (N.D. 1986); Advanced Irr., Inc. v.First Nat. Bank of Fargo, 366 N.W.2d 783, 785 (N.D. 1985). The district court concluded the Estate was entitled to a one-half interest in the proceeds of the crops in the amount of $167,780.13 and concluded the Estate was entitled to half the balance in the FCCU checking account in the amount of $20,538.54. This results in a double recovery for the Estate, which is not allowed under North Dakota law. This Court should conclude the district court erred as a matter of law and clearly erred in its findings. Again, this also supports Glen's argument that the district court erred in adopting the Estate's proposed order without reviewing the law and facts.

E. The district court award of fees and expenses to the Estate was arbitrary and unreasonable.

[¶16] The district court abused its discretion in its award of fees and failed to review the reasonableness of compensation to the personal representative. "[A] trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably." Matter of Conservatorship of Kinney, 495 N.W.2d 69, 71 (N.D. 1993). The reimbursement of attorney fees "is frequently disallowed if the legal services are performed primarily for the personal interest of the personal representative and not for the benefit of the estate as a whole." Oliver v. City of Larimore, 540 N.W.2d 630, 633 (N.D. 1995). Additionally, a district court must review the reasonableness of the compensation of the personal representative and employees of the estate. See N.D.C.C. § 30.1-18-21.

[¶17] Mark Albrecht, as personal representative, testified he had spent 397 hour acting as personal representative, 86 hours reviewing and traveling for depositions, 30 hours photocopying documents, 20 hours on tax preparation, and 10 hours for paying bills. Dkt. #21. Mark admitted the hours listed on the spreadsheet were estimates. Trans. p. 108.

He spent 30 hours copying "hundreds" of documents while at work. Trans. p. 110; Dkt. #372.

[¶18] As an example of the district court's abuse of discretion in awarding the personal representative's compensation, it is entirely unreasonable that a personal representative would be compensated for 30 hours to photocopy only a few hundred documents while apparently at work. Mark claims he spent thirty hours (nearly an entire standard work week) photocopying documents, and is entitled to reimbursement in the amount of $1,950 for his time allegedly spent copying documents in response to Alan Albrecht's discovery requests. Again, this unreasonable finding by the district court provides additional support for the conclusion that the district court failed to consider the evidence presented to it and instead adopted the Estate's verbatim proposed order.

[¶19] A portion of the attorney fees and expenses the district court allowed relate to Glen's claim from February 2015. Trans. p. 64; Dkt. #41. Glen's claim related to the non-probate transfers that Mark personally received. Trans. p. 102. Mark knew that incurring the attorney fees in defending the action that protected only his own transfers left the Estate in the same insolvent position. Trans. p. 97. Glen's claim presented no risk to the insolvent Estate. Rather, the claim presented substantial risk to Mark personally as it sought return of non-probate assets he received. Accordingly, Mark is the only party here who benefits from the reimbursement of attorney fees he personally incurred attempting to protect his non-probate assets received from Sharleen. The district court abused its discretion in allowing the Estate to claim attorney fees and expenses related to defending against Glen's claim. The district court also failed to adequately review the attorney fees and compensation awarded to Mark.

CONCLUSION

[¶20] This Court should reverse the district court's judgment and direct the district court to enter an order dismissing the Personal Representative's Petition because Glenvin Albrecht is the sole owner of the machinery, vehicles, equipment, crop proceeds and checking account at issue. Sharleen's Estate has no co-tenancy interest and no right to a partition. This Court should further reverse the district court's decision as to the estate expenses and fees and direct the district court to enter an order disallowing the attorney fees, expenses, and personal representative fees associated with Glen's claim and directing the district court to order the personal representative be compensated in a reasonable amount.

Dated this 17th day of October, 2019.

/s/ Sara M.Monson

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[¶21] The undersigned, hereby certifies, in compliance with N.D.R. App. P. 32(e) and 32(a)(8), that the total number of pages of the above brief does not exceed 12 pages.

Dated this 17th day of October, 2019.

/s/ Sara M.Monson

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IN THE SUPREME COURT OF THE STATE OF NORT 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)
)ss.
COUNTY OF CASS)

[¶1] MANDY SEIGEL, being first duly sworn, deposes and says that on October 17, 2019 she served the following documents:

REPLY BRIEF OF APPELLANT

electronically via email to:

Kasey McNary kmcnary@serklandlaw.com

and mailed via First Class United States Mail to:

Matt Albrecht
8245 18 ½ Street SE, #18
Buchanan, ND 58420-9601

MANDY SEIGEL

Subscribed and sworn to before me this 17 of October, 2019.

WINTER BREKHUS
Notary Public
State of North Dakota
My Commission Expires May 7, 2020

(SEAL)

Notary Public
Cass County, North Dakota

IN THE SUPREME COURT OF THE STATE OF NORT 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)
)ss.
COUNTY OF CASS)

[¶1] MANDY SEIGEL, being first duly sworn, deposes and says that on October 17, 2019 she served the following documents:

REPLY BRIEF OF APPELLANT

electronically via email to:

Alan Albrecht ajaatty@gmail.com

MANDY SEIGEL

Subscribed and sworn to before me this 17 of October, 2019.

MACKENZIE NOER
Notary Public
State of North Dakota
My Commission Expires Jan. 3, 2022

(SEAL)

Notary Public
Cass County, North Dakota