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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Stephanie Grasser,	)	
	)	
Plaintiff, Appellee,	)	Supreme Court No. 20170188
	)	
vs.	)	Williams County Civil No.
	)	53-2014-DM-00262
Gene Grasser,	)	
	)	
Defendant, Appellant.	)	

BRIEF OF PLAINTIFF/APPELLEE, STEPHANIE GRASSER

Appeal from the Amended Judgment dated March 17, 2017,
District Court of Williams County
Northwest Judicial District
The Honorable Josh B. Rustad

H. Malcolm Pippin
I.D. #04682
P.O. Box 1487
Williston, ND 58802-1487
(701) 577-5544
Attorney for the Plaintiff/Appellee

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[¶3] Whether the District Court properly denied the Appellant's request for reimbursement of sanctions, costs, and attorney's fees.

[¶4] Whether the District Court properly awarded primary residential responsibility of the child to Ms. Reiger.

[¶5] Whether the District Court properly determined the property and debt division.

[¶6] II. STATEMENT OF THE CASE

[¶7] On July 22, 2014, Stephanie Reiger (Grasser) initiated an action for divorce. See Appellant's App. at 15–18, Doc. ID # 1–2.

[¶8] On September 17, 2014, Ms. Reiger made a motion for an interim order regarding parenting time. See id. at 26–31, Doc. ID # 15–16.

[¶9] On October 3, 2014, Gene Grasser made a Motion to Continue the Interim Order Hearing, which was scheduled for October 10, 2014. See id. at 32, Doc. ID # 19.

[¶10] On October 8, 2014, Mr. Grasser made a Motion for Demand for Change of Judge. See id. at 40–45, Doc. ID # 31–32.

[¶11] On October 8, 2014, a hearing was held on Mr. Grasser's Motions to Continue and for Demand for Change of Judge.

[¶12] On October 10, a hearing was held on the Motion for Interim Order. The Interim Order was entered on October 13, 2014. See id. at 47, Doc. ID # 40.

[¶13] On October 14, 2014, the District Court issued an Order Denying Defendant's Motion for Change of Judge. See id. at 54, Doc. ID # 41.

[¶14] On March 23, 2015, Ms. Reiger made a Motion for Partial Summary Judgment. See Doc. ID # 99–101.

[¶15] On May 11, 2015, the District Court entered an Order for Partial Summary Judgment and Partial Summary Judgment granting the divorce, but leaving the issues of parenting time and property division for trial. See Doc. ID # 129–130.

[¶16] Between November 10, 2014 and the first day of trial, which was September 21, 2016, Ms. Reiger brought several motions for contempt and to compel for the Defendant's failure to comply with orders of the court and cooperate with providing discovery. See

Appellant's App. at 55–62, 65, 88–89, 92, 108. Each of these was granted and imposed reasonable sanctions, costs, and fees. See id. at 81–82 (Doc. ID # 74), 83–84 (Doc. ID # 75), 90–91 (Doc. ID # 133), 94–95 (Doc. ID #152).

[¶17] On September 21 and 23, 2016, the trial was held before Northwest Judicial District Judge Josh B. Rustad.

[¶18] On March 9, 2017, Judge Rustad issued his Memorandum Opinion, Findings of Fact, Conclusions of Law, and Order for Judgment. See id. at 119–151 (Doc. ID # 288).

[¶19] On March 17, 2017, an Amended Judgment for divorce was entered. See id. at 152–186 (Doc. ID # 292).

[¶20] On May 19, 2017, Mr. Grasser filed his Notice of Appeal. See id. at 189–191 (Doc. ID # 297).

[¶21] III. STATEMENT OF THE FACTS

[¶22] The parties were married on October 21, 2000. One child was born of the marriage, S.G. (DOB: 2004). The parties were divorced via Order dated May 11, 2015. See Doc. ID # 130.

[¶23] During the marriage, the Appellant worked as a farmer/rancher and the Appellee worked as a nurse. During the marriage, the Appellee was subject to constant abuse from the Appellant. See Tr. 09-21-16, page 139, lines 3–14; page 141, lines 6–15. Furthermore, the evidence reflects that the Appellant then continued on with his style of abuse with other women, including his own Mother, just a few months prior to trial. See id. at page 18, lines 21–25; page 19, lines 1–8; pages 21–23.

[¶24] At the time of the divorce, the marital assets had been accumulated primarily, if not exclusively, during the period of the marriage. At the Divorce trial, the Appellant offered no expert testimony regarding the valuation of land, minerals, or personal property.

[¶25] In discovery responses filed shortly before Trial, the Appellant referenced a May 11, 2015, Financial Statement that he signed as being truthful in all respects. See Appellee's App. at 1–12. Absolutely no debts to the Appellant's parents, or to the Estate of Selmer Grasser were listed in the Financial Statement. It should be noted that the date of the Financial Statement, May 11, 2015, is important given that was the date of the divorce which was used by the District Court, per agreement of the parties, as the date to use for purposes of dividing the property of the parties.

[¶26] IV. ARGUMENT

[¶27] 1. The District Court did not abuse its discretion in determining the issue of recusal.

[¶28] The Appellant argues that the District Court erred by failing to recuse itself or,

alternatively, by failing to allow a full presentation of the Appellant's concerns on the issue of recusal. See Appellant's Br. at ¶ 8. The Appellant alleges that, once his concerns were raised, the District Court was required to allow him to "make a proper motion, present affidavits in support of the motion, and hold an evidentiary hearing." See id. However, he cites no rule, statute, or case law in support of his assertion.

[¶29] The standard of review of the District Court's decision regarding recusal is abuse of discretion. See Schweitzer v. Mattingley, 2016 ND 231, ¶ 12, 887 N.W.2d 541. "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or 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." Rath v. Rath, 2016 ND 105, ¶ 5, 879 N.W.2d 735 (citing Riak v. State, 2015 ND 120, ¶ 14, 863 N.W.2d 894).

[¶30] In his Brief in Support of Motion for Demand for Change of Judge, the Appellant reproduced N.D.C.C. § 29-15-21, which governs a statutory demand for change of judge. See Appellant's App. at 42–43 (Doc. ID # 32). When properly presented, a demand for change of judge divests the judge whose disqualification is sought of discretion to take further action in the case. See N.D.C.C. § 29-15-21(6). Subsection 2 of N.D.C.C. § 29-15-21 sets forth the proper timing to bring a demand for change of judge, stating:

> The demand is invalid unless it is filed with the clerk of court not later than ten days after the occurrence of the earliest of any one of the following events:
> a. The date of the notice of assignment or reassignment of a judge for trial of the case;
> b. The date of notice that a trial has been scheduled; or
> c. The date of service of any ex parte order in the case signed by the judge against whom the demand is filed.

[¶31] The case was assigned to Judge Rustad on July 23, 2014. See Appellant's App. at 19. The Appellant's Motion for Demand for Change of Judge was filed on October 8, 2014,

well outside the ten-day deadline. See id. at 40–41. Therefore, the demand itself was invalid. Any attempt of the Appellant to characterize the Motion as a statutory demand for change of judge under N.D.C.C. § 29-15-21 is without merit.

[¶32] We must therefore treat the Appellant's motion as a request for recusal. Unlike a statutory demand for a change of judge, a request for recusal does not disqualify the judge from acting further in the case. See Schweitzer v. Mattingley, 2016 ND 231, ¶¶ 13–14, 887 N.W.2d 541. A judge is required to recuse himself when circumstances require under the North Dakota Code of Judicial Conduct. See id. at ¶ 12. The Code of Judicial Conduct imposes a duty to avoid the appearance of impropriety. See id. When determining whether to recuse himself, "a judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality." Id. (citing Rath, 2016 ND 46, ¶ 31, 876 N.W.2d 474).

[¶33] Although a judge is required to recuse himself when required under the Code of Judicial Conduct, there is an equally strong duty for a judge not to recuse himself when the facts do not require recusal. See id. at ¶ 13. "[R]ecusal is not required in response to spurious or vague charges of partiality." Farm Credit Bank v. Brakke, 512 N.W.2d 718, 721 (N.D. 1994). In this situation, the District Court clearly did not abuse its discretion in its determination regarding recusal.

[¶34] The facts in this situation do not require recusal. The Appellant has presented no facts to establish that the District Court acted arbitrarily, unreasonably, unconscionably, or in any way misinterpreted or misapplied the law. Judge Rustad admitted he knew who Ms. Reiger was and who some of the proposed affiants were. See Tr. 10-8-14, page 19, lines 9–13. However, that alone does not establish impartiality. In fact, judges are required under

the Code of Judicial Conduct to decide cases independently, without regard to the judge's friends or family. See Canon 2, Rule 2.4, Comment 1, N.D. Code of Jud. Conduct. Judge Rustad denied having any type of relationship with Ms. Reiger or any other party. See Tr. 10-8-14, page 19, lines 18-19. No evidence of any relationship was presented. Therefore, recusal would not have been appropriate in this situation, and the District Court did not abuse its discretion by denying the Appellant's request for recusal.

[¶35] **2. The District Court's denial of the Appellant's request for reimbursement of sanctions was not an abuse of discretion.**

[¶36] The Appellant alleges that the District Court should have required Ms. Grasser and Attorney Pippin to return sanctions imposed against the Appellant because the sanctions were "unjustified and due to his former lawyer's actions and inactions." See Appellant's Br. at ¶ 23.

[¶37] Appellate review of a trial court determination on contempt is "extremely limited." Montgomery v. Montgomery, 2003 ND 135, ¶ 18, 667 N.W.2d 611. The District Court has broad discretion to determine whether to hold an individual in contempt. See id. "The determination whether a contempt has been committed and remedial sanctions are warranted lies within the sound discretion of the trial court, and its decision will not be overturned on appeal unless there was a clear abuse of discretion." Kautzman v. Kautzman, 2002 ND 118, ¶ 8, 647 N.W.2d 684. Here, the District Court did not abuse its discretion in imposing sanctions for the Appellant's persistent and willful contemptuous behavior and lack of cooperation with the discovery process. Simply put, it was necessary for Attorney Pippin to repeatedly file Motions to Compel because Gene Grasser repeatedly failed to respond to discovery that had been served on him.

[¶38] **3. The District Court's decision to award primary residential responsibility**

of the child to Ms. Reiger was not clearly erroneous.

[¶39] The Appellant alleges that the District Court's determination of primary residential responsibility of the child was based on outdated information, a misapplication of the statutory best interest factors, and a twisting of the facts. See Appellant's Br. at ¶ 25. In his argument, the Appellant attempts to present facts and evidence as to each statutory factor in an apparent attempt to persuade this Court that the District Court made a mistake. See id. at ¶¶ 29–54. However, nothing the Appellant presents establishes that the District Court's determination of these factors was clearly erroneous.

[¶40] The District Court is required to consider the statutory factors for the best interests of the child when determining primary residential responsibility. See Schweitzer, 2016 ND 231, ¶ 22, 887 N.W.2d 541. An award of primary residential responsibility is a finding of fact and, therefore, is subject to the clearly erroneous standard of review. See id.

[¶41] "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if on the entire record this Court is left with a definite and firm conviction a mistake has been made." See id. (citing Sweeney v. Kirby, 2015 ND 148, ¶ 7, 864 N.W.2d 464). On the issue of reviewing an award of primary residential responsibility, this Court has previously stated it will not "reweigh the evidence or reassess the credibility of witnesses" and will not substitute its judgment for a District Court's decision merely because it may have reached a different result. Id. In this case, the District Court addressed each of the best interest factors and made clear findings as to each of them, none of which were clearly erroneous.

[¶42] There is abundant evidence to support the District Court's Findings – far beyond the level to affirm under a clearly erroneous standard of review.

[¶43] Initially, the investigator appointed by the Court was unequivocal in not only her recommendations regarding primary care of the child, but also in her testimony and report to the effect that Gene Grasser was engaging in parental alienation of the child against the child's Mother. See Appellee's App. at 13–40. Specifically, the Parenting Investigator found several instances of S.G.'s preferences and behavior being directly influenced by her father. See id. For example, based on her visits with S.G. and both parties, the Parenting Investigator found that, although S.G. has more behavioral issues when she is with her mother, "[t]his is directly influenced by her father." Id. at 32. Further, the Parenting Investigator believes S.G.'s stated preference that she would like parenting time to be equal was "strongly influenced by her father." Id. at 33.

[¶44] The Parenting Investigator's report further states that S.G. demonstrates symptoms of parental alienation toward Ms. Reiger and at the influence of the Appellant. See id. at 37–39. The Parenting Investigator opined that S.G. is "in the moderate category" of parental alienation. Id. at 38. Based on the Parenting Investigator's thorough analysis of the parties and their relationship with S.G., she found it was in S.G.'s best interest for Ms. Reiger to have primary residential responsibility and that parenting time with the Appellant be "structured and limited." Id. at 39.

[¶45] The Trial Court also carefully analyzed all of the best interest factors and as a part of the process, took into account the fact that Gene Grasser, only months before trial, on March 4, 2016, took his own Mother down (DOB 4/8/46) and physically and verbally abused her. See Appellant's App. at 119–124; Appellee's App. at 41–46. In fact, at trial, Arla Grasser testified that all of the allegations contained with the Police report were true and accurate. See Tr. 09-21-16, page 21. This most recent episode involving his own

Mother was consistent with his long-standing pattern of abuse that he exhibited towards Ms. Reiger and several other women over the years. See also Trial Ex. 20 (Doc. ID # 263), 26 (Doc. ID # 269), and 14 (Doc. ID # 257).

[¶46] The Counseling records of Gene Grasser reveal many of the concerns that the Trial Court noted. For example, the counseling records set forth his anger problems, substance abuse problems, and his continued issues with drinking and violence. See Trial Ex. 43 (Doc. ID # 283).

[¶47] In parenting time cases, its relatively easy, on appeal, to sideline quarterback this fact or that fact and to conveniently (when it behooves you to do so) ignore the witnesses' credibility, the witnesses' demeanor, and the totality of the circumstances. That is exactly what the Appellant in this case is attempting to do.

[¶48] The minor child in this case had always been in the primary care of her Mother, who had been subjected to horrible emotional and verbal abuse by the Appellant. The Appellant's rage, drinking, and violence continued on whereby he subjected other women in his life to his conduct. In a nutshell, the District Court took into account all evidence, applied all of the factors, and made a lengthy determination analyzing all of the factors in reaching its decision. As demonstrated above, there exists abundant evidence to support the District Court's decision – again, far beyond the level of evidence necessary to support the decision under the clearly erroneous standard of review.

[¶49] **4. The District Court's determination of the division of the marital estate was not clearly erroneous.**

[¶50] The Appellant argues that the District Court erred by failing to include loans from his family when considering how to divide the marital estate. See Appellant's Br. at ¶ 57. However, no documentation of these substantial purported loans was presented at trial

because, as Arla Grasser testified, none existed. See Tr. 09-21-16, page 14, lines 6–25; page 15; page 16, line 1; page 40, lines 5–18.

[¶51] Initially, in his brief to this Court, the Appellant devotes considerable time to an alleged $500,000 debt to the Estate of Selmer Grasser. The puzzling part of that argument is that, during the middle of the trial, Gene Grasser and his Attorney introduced Defendant's Exhibit A (Appellee's App. at 1–12), representing the values that Gene Grasser placed on various assets and debts for the Court's consideration. In that Exhibit, Gene Grasser eliminates the alleged debt to the Estate of Selmer Grasser and places a value of $0 on that alleged item. See id. at 11.

[¶52] Of course, the reason for the change of that claim from $500,000 to $0 by Gene Grasser was, presumably, a product of the reality from the testimony from the day before where both he and his Mother, Arla Grasser, repeatedly testified that there was absolutely no documentation, of any kind, with respect to any debt owed by Gene Grasser to the Estate of Selmer Grasser. See supra ¶ 45; See also Tr. 09-21-16, page 44, lines 9–25; page 45, lines 6–25.

[¶53] Arla Grasser testified that there were no legal contracts (Tr. 09-21-16, page 14), no agreements (Id.), and she had no idea on how much, on terms, interest rate, collateral or when the alleged loans were made. Id. at pages 15-16.

[¶54] Gene Grasser likewise testified that there were no legal documents (Tr. 09-21-16, page 35, lines 7–13), no loan agreements with his parents (Id. at page 41, lines 17–21), and no legal documents of any kind regarding any alleged loan from his Father that Gene Grasser then owed to his estate upon his death (Id.). At page 45 of his testimony Gene Grasser is unable to recite any terms, etc., regarding any alleged indebtedness. See Tr. 09-

21-16, page 45, lines 6–25.

[¶55] Likewise, it should be noted that while the Appellant repeatedly alleges in his brief before this Court that the Trial Court failed to recognize millions of dollars of "debt" he owed to his parents, he fails to point out the numerous instances within the transcript where both he and his Mother both readily acknowledge that there exist no terms for the alleged debt, no writings, and neither of them had any specifics at all with respect to the alleged debt.

[¶56] Furthermore, in sworn discovery responses submitted by the Appellant dated September 1, 2016 (only a few weeks prior to the trial), he specifically referenced a May 11, 2015, Financial Statement as evidencing all of this assets and debts. A close review of the May 11, 2015 Financial Statement (Appellee's App. at 1–12) reveals absolutely no reference by Gene Grasser as to any alleged debts of any kind to his parents, to his Father's Estate, or to the others that he all of sudden magically claimed to have owed money to at the time of the trial.

[¶57] Furthermore, as aptly set forth by the District Court, N.D.C.C. § 9-06-04(4) specifically sets forth that any alleged debt that exceeds the amount of $25,000 must be in writing to constitute an enforceable debt. See Appellant's App. at 126. Here, there were no writings, of any kind, as acknowledged by all concerned.

[¶58] Finally, most, if not all, of the alleged indebtedness falls outside of the applicable statute of limitations for the enforcement of any such alleged debt.

[¶59] In summary, the Trial Court properly dismissed the alleged "indebtedness" as being exactly what it was – a fiction. It is abundantly obvious that Gene Grasser simply came up with the alleged "indebtedness" on the eve of trial in a misguided attempt to skew the

property division in this case with the District Court "awarding" him phantom indebtedness that he would never have to repay to anyone.

[¶60] Section 14-05-24 of the North Dakota Century Code requires the trial court to distribute the parties' property as it may deem just and proper. Jondahl v. Jondahl, 344 N.W.2d 63, 67 (N.D. 1984). "A trial court must start with the presumption that all property held by either party whether held jointly or individually is to be considered marital property." Hitz v. Hitz, 2008 ND 58, ¶ 11, 746 N.W.2d 732, 736. "The trial court must then determine the total value of the marital estate in order to make an equitable distribution of the property." Id. "After a fair evaluation of the property is made, the entire marital estate must then be equitably divided between the parties under the Ruff-Fischer guidelines." Id. (quoting Ruff v. Ruff, 78 ND 775, 52 N.W.2d 107 (ND 1952); Fischer v. Fischer, 139 N.W.2d 845 (ND 1996).

[¶61] "The trial court's valuation and division of property is treated as a finding of fact and is thus fortified by Rule 52(a), N.D.R.Civ.P." Gooselaw v. Gooselaw, 320 N.W.2d 490, 491. "Therefore, we will set aside these findings only if we determine they are clearly erroneous." Id. "A finding of fact is clearly erroneous if induced by an erroneous view of the law, no evidence exists to support it, or we are left with a definite and firm conviction the district court made a mistake." Home of Economy v. Burlington Northern Santa Fe R.R., 2010 ND 49, ¶ 16, 780 N.W.2d 429; Hoverson v. Hoverson, 2001 ND 124, ¶ 4, 629 N.W.2d 573 (applying the clearly erroneous standard to property valuations). In this case, the Trial Court's ruling was not clearly erroneous.

[¶62] At trial, Stephanie submitted valuation experts for the land, minerals, and farm equipment. Gene Grasser presented no such experts, choosing instead to rely upon his own

word as somehow being more persuasive than the unbiased and objective appraisals provided by the valuation trial experts that testified before the District Court. The Gene Grasser testimony as to "valuation" was ladled with confusion, inconsistency, and flat out nonsense. The District Court did not err in its valuations, all of which were supported by expert testimony, nor did it err in its ultimate distributions.

[¶63] While the Appellant has devoted considerable time to claiming that the marriage was short term, the reality is that the marriage was in excess of 15 years and the property accumulated by the parties was primarily, if not exclusively, obtained during the marriage. The Trial Court did not err in its valuations or the distribution of the marital estate.

[¶64] V. CONCLUSION

[¶65] For the foregoing reasons, and for those reasons to be submitted during oral argument in this matter, the Appellee herein respectfully submits that the Trial Court decisions in this matter should be affirmed in all respects.

[¶66] RESPECTFULLY SUBMITTED this 18th day of January, 2018.

PIPPIN LAW FIRM
111 East Broadway
P. O. Box 1487
Williston, ND 58802-1487
Telephone: (701) 572-5544
malcolm@pippinlawfirm.com
Attorneys for Plaintiff / Appellee
/s/ H. Malcolm Pippin
BY: H. Malcolm Pippin
N.D. Id # 04682

[¶67] **CERTIFICATE OF SERVICE**

[¶68] I hereby certify that a true and correct copy of the foregoing Brief of Plaintiff and Appellee, Stephanie Grasser, a/k/a Stephanie Reiger, was served electronically on this 18th day of January, 2018, addressed to:

☐ U.S. Mail ☐ FedEx/UPS ☐ Hand-Delivery ☐ Facsimile ☒ E-mail ☐ Odyssey	Lynn M. Boughey PO Box 836 Bismarck, ND 58502-0836 lynnboughey@midconetwork.com

PIPPIN LAW FIRM
111 East Broadway
P. O. Box 1487
Williston, ND 58802-1487
Telephone: (701) 572-5544
malcolm@pippinlawfirm.com
Attorneys for the Plaintiff / Appellee

/s/ H. Malcolm Pippin
BY: H. Malcolm Pippin
N.D. Id # 04682

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	)	
Defendant, Appellant.	)	

CERTIFICATE OF SERVICE

[¶1] I hereby certify that a true and correct copy of the Appellee's Appendix was served electronically on this 19th day of January, 2018, addressed to:

☐ U.S. Mail ☐ FedEx/UPS ☐ Hand-Delivery ☐ Facsimile ☒ E-mail ☐ Odyssey	Lynn M. Boughey PO Box 836 Bismarck, ND 58502-0836 lynnboughey@midconetwork.com

PIPPIN LAW FIRM
111 East Broadway
P. O. Box 1487
Williston, ND 58802-1487
Telephone: (701) 572-5544
malcolm@pippinlawfirm.com
Attorneys for the Plaintiff / Appellee

/s/ H. Malcolm Pippin
BY: H. Malcolm Pippin
N.D. Id # 04682