IN THE SUPREME COURT
STATE OF NORTH DAKOTA

John Eberle,	)	Supreme Court No. 20090332
Plaintiff and Appellee,	)	
v.	)	
	)	District Court
Heidi Eberle,	)	Emmons County Civil No. 07-C-0016
Defendant and Appellant.	)	

APPEAL FROM THE DISTRICT COURT
EMMONS COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE A. ROMANICK

BRIEF FOR APPELLEE

Paul H. Myerchin (State Bar ID No. 05412)
BORMANN, MYERCHIN,
MONASKY & ESPESETH, LLP
418 East Broadway Avenue, Suite 240
P.O. Box 995
Bismarck, ND 58502-0995
Telephone (701) 250-8968
Facsimile (701) 250-8982

Attorneys for Plaintiff and Appellee

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Attorneys for Plaintiff and Appellee

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STATEMENT OF ISSUES

I. Whether Judge Romanick abused his discretion for joining Bankruptcy Trustee Wagner to this action when Heidi was dishonest in her voluntary Chapter 7 Bankruptcy Petition by concealing this divorce action as an asset.

II. Whether Judge Romanick's equitable distribution of the Eberle marital estate was clearly erroneous when the evidence and law support Judge Romanick's findings regarding the parties' conduct, the preservation of the third-generation Eberle family farm, and Heidi's "unclean" hands.

III. Whether Judge Romanick's parenting time award to the parties was clearly erroneous when the evidence supported Judge Romanick's findings that John's parenting time decreased dramatically over the summer of 2009, that John had difficulty arranging parenting time and an extremely difficult time reaching his children by telephone, that Heidi had testified she left it up to the minor children if they wanted to talk or spend time with John, and that Heidi cannot speak or work with John regarding parenting time.

IV. Whether Judge Romanick abused his discretion by failing to tax transcript costs following the appeal in ***Eberle I***.

STATEMENT OF THE CASE

I. Nature of the Case.

Appellant Heidi Eberle (Heidi) appeals a number of Judge Romanick's rulings after this matter had been sent back on remand, pursuant to the North Dakota Supreme Court's Judgment dated June 17, 2009, in ***Eberle v. Eberle***, 2009 ND 107, 766 N.W.2d 477, Supreme Court No. 20080317. (App. 7.) Heidi disagrees with Judge Romanick's ruling to add the bankruptcy trustee to this divorce case, despite Heidi having lied in her bankruptcy petition and at the First Meeting of Creditors. (John Eberle Appendix (JEA) 31, Items 17, 21 & 67-74.) Heidi disagrees with Judge Romanick's ruling that she receive less property, despite Judge Romanick's ruling being well-supported by facts and the law. (App. 16-25.) Heidi disagrees with Judge Romanick's ruling concerning parenting time for the parties, despite Heidi having dramatically reduced Appellee John Eberle's (John) parenting time with the minor children over the summer of 2009. (App. 55-61.) Finally, Heidi disagrees with Judge Romanick's ruling denying her reimbursement of her costs to secure the transcript for the first appeal, despite her not having utilized that transcript in the Brief for Appellant on the first appeal. (App. 14-15.)

II. Course of Proceedings and Disposition.

On April 6, 2009, oral argument was held on Heidi's first appeal. (App. 7.) Less than one month later, on May 1, 2009, Heidi filed a voluntary Chapter 7 Bankruptcy Petition with the United States Bankruptcy Court, District of North Dakota, Case No. 09-30487. (JEA 11-58.) Heidi's "First Meeting of Creditors" in that bankruptcy case was

held before Bankruptcy Trustee Michael L. Wagner in Bismarck, North Dakota, on June 5, 2009. (JEA 67.)

On June 17, 2009, the North Dakota Supreme Court issued its Judgment, affirming in part, reversing in part, and remanding the matter for further proceedings on the division of the marital estate. (App. 7.) On June 25, 2009, Heidi filed her Amended Costs on Appeal from District Court of Emmons County and Motion for Payment. John then filed his Objection to Defendant's Amended Costs on Appeal on June 26, 2009. To deal with this issue and other matters in the case, a status conference before Judge Romanick was set for Thursday, August 20, 2009. (App. 4, Docket 140, 142, 143 & 146.)

On July 30, 2009, John filed a Motion to Join Party, the Bankruptcy Trustee, to this matter. (App. 5, Docket 155.) In John's motion, he also requested that Heidi's attorney withdraw from these proceedings due to an apparent conflict of interest since counsel was also listed as a creditor in Heidi's bankruptcy petition. (JEA 37.) On August 3, 2009, Heidi filed an objection to John's motion concerning the Bankruptcy Trustee's addition. John then filed a reply brief on August 7, 2009, and the Bankruptcy Trustee also filed a response for Judge Romanick's consideration on August 12, 2009. (App. 5, Docket 158, 161 & 162; JEA 75-78.)

On August 20, 2009, John filed a Motion to Enforce Reasonable and Liberal Visitation/Parenting Time with the Court because John was experiencing a drastic reduction in the visitation with his children since approximately the end of May, 2009. (App. 5, Docket 165.)

The Court then held the status conference hearing on August 20, 2009, on the issues surrounding the addition of the Bankruptcy Trustee, the inherent conflict of interest between Heidi and her attorney, due to Heidi's bankruptcy filing, and when the parties could submit post-hearing briefs discussing the issue of dividing the marital estate. (8/20/09 Hr'g Tr., 3-5, 6:1-9, 13:21-25, 14:1-19 & 18:1-22.)

On September 10, 2009, Judge Romanick entered an order joining the Bankruptcy Trustee as a real party in interest to the matter and, in the same order, denied the request to remove Heidi's attorney. (App. 11.)

On September 9, 2009, John served his post-hearing brief and proposed Findings of Fact, Conclusions of Law and Order for Judgment. (App. 5, Docket 170.)

Heidi, although being invited by Judge Romanick to submit a filing, chose to file nothing. (8/20/09 Hr'g Tr., 13:21-25, 14:1-19 & 18:1-22.)

On September 10, 2009, Judge Romanick then entered Findings of Fact, Conclusions of Law and Order for Judgment regarding the distribution of the Eberle marital estate and an Order on Costs on Appeal in this matter. (App. 16-25, 14-15.)

On September 15, 2009, Heidi filed her response to Plaintiff's Motion to Enforce Reasonable Visitation/Parenting Time, and on Monday, September 21, 2009, the Court held a hearing on the issue. (App. 5, Docket 176.) On September 23, 2009, Judge Romanick issued his Findings of Fact, Conclusions of Law and Order for Amended Judgment on the issue of parenting time, setting forth a specific schedule for the parties. (App. 55-61.) On September 25, 2009, the Amended Judgment for the division of

property was entered and on September 30, 2009, the Court filed the Second Amended Judgment regarding the parenting time schedule. (App. 62-69.)

On November 2. 2009, Heidi filed her Notice of Appeal, along with a Motion for Waiver of the Appeal Bond. (App. 75-76.) Along with this motion, Heidi filed an affidavit of her bankruptcy attorney, Edwin W.F. Dyer, III, commenting on the reasons why this divorce action was not listed as an asset in Heidi's bankruptcy petition. This was the first and only time (the day of her filing the notice of appeal), that the affidavit of Heidi's bankruptcy attorney was filed with the court. (App. 6, Docket 202 & App. 29-31.)

STATEMENT OF THE FACTS

John disputes a number of Heidi's assertions in her Statement of Facts. First, Exhibit 34 unequivocally shows that in 1992, prior to this marriage, John purchased 480 acres, less rights-of-way, from his parents. Second, Heidi moved out of the marital home in February, 2007, after disclosing to John that she had engaged in extramarital affairs. (TT, 37:11-25; 38-39; 40:1-3.) Third, John hired an attorney, LaRoy Baird, after Heidi insisted that John hire an attorney to finalize the divorce because John and Heidi had reached an agreement. (TT, 49:3-4, 18-19; 50:8-22; 52:1-9.)

On May 1, 2009, less than one month after ***Eberle v. Eberle***, 2009 ND 107, 766 N.W.2d 477 (***Eberle I***), was argued before the North Dakota Supreme Court, Heidi filed a voluntary Chapter 7 Bankruptcy Petition with the United States Bankruptcy Court, District of North Dakota. Heidi sought bankruptcy protection and discharge of approximately $175,000 worth of debt that had been accumulated since the parties' divorce in March, 2007. (JEA 11 & 27.) Schedule B (the listing of assets) of Heidi's Bankruptcy Petition failed to list this divorce action as an asset or as a potential property distribution. (JEA 31, Items 17 & 21.) On June 5, 2009, at Heidi's First Meeting of Creditors, in the Bankruptcy Court, before Bankruptcy Trustee Michael L. Wagner, Heidi, under oath, evasively avoided disclosing her position in this lawsuit that this she was entitled to approximately $500,000 of marital assets. (JEA 70-71.) While at the First Meeting of Creditors, her bankruptcy attorney, Edwin W.F. Dyer, III, indicated they would file an Amended Schedule B with the Bankruptcy Court listing the divorce action as an asset. (JEA 71.) Interestingly, Heidi, in this amended filing, simply listed the value

of this potential division as having "zero" value! (JEA 65, Item 21.) It should also be noted that in Heidi's bankruptcy petition she listed her legal counsel in this divorce, Attorney Donavin Grenz, as an unsecured creditor. (JEA 37.)

On June 17, 2009, the North Dakota Supreme Court issued its Judgment in ***Eberle I***. affirming in part, reversing in part and remanding for a division of the marital estate. (App. 7.) John then filed a Petition for Rehearing which was denied and, after the supreme court Judgment became final, John filed a motion with Judge Romanick to add the bankruptcy trustee as a party to this matter. (App. 5, Docket 156.)

Concurrently with the above-mentioned facts. important facts were developing concerning John's parenting time with his children. Since March, 2007. the parties agreed upon the following parenting time schedule: John would have the children from Thursday afternoon until Sunday evening or Monday morning and Heidi would then have the children from either Sunday evening or Monday morning through Thursday afternoon. This schedule was in place because Heidi had indicated to John from the beginning of their divorce that she needed her weekends free. (9/21/09 Hr'g Tr.. 10:9-25; 11:1-13.) In reality, this meant that John had the children for more than fifty percent (50%) of the time over many months. (JEA 79-81.) This schedule was in place for over two years until late May-early June, 2009.

It was approximately at this time that John approached Heidi to discuss the issue of their middle son, J.J.D.E., being allowed to run unsupervised within the City of Strasburg. Shortly after this conversation, the parties' agreed-upon visitation schedule ended and Heidi indicated that she was going to decide . . . and she was in control . . . and

she was going to teach John a lesson. (Docket 166, 8/19/09 Aff. of John Eberle, ¶ 7 & JEA 79-81.) It was after this point in time when Heidi "was in charge" and the parenting time schedule was no longer in place. (9/21/09 Hr'g Tr., 20:6-23 & JEA 79-81.) John would go without seeing any of the children for 10 to 11 days at a time. (JEA 81.)

What is more, specifically with J.J.D.E., the relationship, which was a happy and healthy one and one where J.J.D.E. wanted to spend most of his time at the farm, abruptly ended and began to severely deteriorate. (9/21/09 Hr'g Tr.,17:10-25, 18:1-18, 19:16-23, 20:6-23 & JEA 81.) Not only did J.J.D.E. stop seeing his dad for weeks at a time, J.J.D.E. also demanded money from John for a laptop computer and told John he was a liar. (9/21/09 Hr'g Tr., 21:4-25, 22:1-24.) As for John's daughter, H.M.E., the change in the parenting time schedule was severe. In the month of August, 2009, H.M.E. was so fearful of Heidi's manipulation of the parenting time schedule that she didn't want to return to Heidi's home in Strasburg, because she feared Heidi would not allow her to see her dad, John. (9/21/09 Hr'g Tr., 25:10-18 & JEA 81.)

The trial court, having the opportunity to weigh and assess the credibility of the witnesses at the Monday, September 21, 2009, hearing on the issue of parenting time, then entered its Findings of Facts, Conclusions of Law and Order for Judgment on Wednesday, September 23, 2009, restoring John to frequent parenting time with his children. (App. 55-61.)

Additional facts will be discussed below, as necessary.

LAW AND ARGUMENT

I. Judge Romanick Correctly Joined Bankruptcy Trustee Wagner to this Action.[1]

This court analyzes a trial court's joining of a party to an action under an abuse of discretion standard. ***Matter of Estate of Murphy***, 554 N.W.2d 432, 438 (N.D. 1996).

Judge Romanick concluded that the bankruptcy trustee was a material party and had a material interest in the possible distribution of the marital assets and ought to be made a party. (App. 11.) Judge Romanick's conclusion was exactly correct, based upon the startling developments that occurred after oral argument in ***Eberle I***, which no one would have–or could have–predicted. These startling developments were Heidi's own doing.

On May 1, 2009, Heidi filed a voluntary Chapter 7 Bankruptcy Petition, No. 09-30487, in U.S. Bankruptcy Court, District of North Dakota, seeking discharge of approximately $175,000 worth of debt. (JEA 11-58.) Interestingly, at Schedule B of this initial petition where a debtor is to list any and all interest they may have in personal property, Heidi failed to list this lawsuit as an asset. (JEA 31, Items 17 & 21.) Heidi also failed to list her interest in this lawsuit at Schedule C, property claimed as exempt. (JEA 33.) The only listing of this matter in the initial petition is in the Statement of Financial Affairs. (JEA 47.) As Bankruptcy Trustee Wagner explained to Judge Romanick in the

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[1] Late afternoon, February 25, 2010, Appellant filed a notice withdrawing this issue from the appeal. John's Brief and Appendix were substantially complete at that time and this section remains in the brief in the event the Appellant re-raises the issue or addresses it at the time of oral argument.

Trustee's response brief, Heidi's actions made any distribution of property to Heidi in this divorce action property of the bankruptcy estate. (JEA 75-76.)

Even more startling were the developments that occurred at Heidi's First Meeting of Creditors held on June 5, 2009, before Bankruptcy Trustee Wagner. It was during this meeting of creditors that Heidi, having sworn to tell the truth, was asked, on four separate occasions, either what the issue of the appeal was or what kind of assets she would receive from the divorce action. (JEA 70-71.)

Heidi continually gave Bankruptcy Trustee Wagner evasive answers. *Id.* Heidi never disclosed to Bankruptcy Trustee Wagner that it was her position throughout this divorce action that she is supposedly entitled to over a half million dollars. *Id.* Trustee Wagner's questions were directed at Heidi and were in no way, shape or form, exceptionally difficult questions requiring anything but a truthful answer. *Id.* An equally important fact occurred at the First Meeting of Creditors where Heidi's attorney indicated they would make an amended filing of Schedule B, listing this divorce action. (JEA 71.) Nevertheless, when the amended Schedule B was filed, Heidi listed the value of her interest in the divorce action as "zero"! (JEA 65.) Heidi listed a "zero" value despite the bankruptcy form requesting the debtor give an estimated value. *Id.*

These starling developments came about despite Judge Romanick and this Court being well aware that Heidi and her counsel have argued, since the reopening of this divorce, that Heidi was entitled to an equal (50-50) division of the marital estate, and, accordingly, under their calculations, Heidi was entitled to over a half million dollars from the marital estate. Yet, Heidi's underhandedness becomes grossly apparent with the

filing of her bankruptcy petition, when she concealed assets in an effort to discharge approximately $175,000 worth of debt which she incurred solely on her own since after the divorce in March, 2007, all in an attempt to "pocket", solely for herself, over a half million dollars.

It must be noted that Heidi did not file the affidavit of her bankruptcy attorney until the day she filed her appeal in an attempt to claim her actions were legitimate in the bankruptcy case. (App. 6. Docket No. 202.) Accordingly, any reliance by Heidi on Attorney Dyer's affidavit must be rejected since it is analogous to raising an issue for the first time on appeal. *See, Messer v. Bender*, 1997 ND 103, ¶¶ 10-11, 564 N.W.2d 291 (noting that it is unfair to allow a party to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable).

Heidi's bankruptcy filings allowed this divorce action to become part of the bankruptcy estate, and due to the deceitful nature in which Heidi attempted to use the bankruptcy court, Judge Romanick had a legal and factual basis to add Bankruptcy Trustee Wagner to these proceedings. (JEA 75-76.) Judge Romanick's ruling was not an abuse of discretion.

Rather, Judge Romanick's decision is one that protects John, as envisioned by ***Rule 19, N.D.R.Civ.P.***, from being "subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest." Here, Judge Romanick's decision to add the Bankruptcy Trustee insured that any award of the

marital estate was going to be paid to the appropriate party and not subject John to inconsistent obligations.

Arguendo, if Heidi were to convince this Court that Judge Romanick's ruling to add the Bankruptcy Trustee was in error (which John does not concede), then Heidi bears the burden in convincing this Court that such error was not "harmless error." ***Matter of Estate of Murphy***, 554 N.W.2d at 440, and ***Rule 61, N.D.R.Civ.P.*** Heidi has not–and cannot–meet this burden that the addition of the Bankruptcy Trustee to this divorce action affected her substantial rights. ***Id.*** In fact, these circumstances created by Heidi which were subsequent to oral argument and prior to a final ruling by Judge Romanick, are analogous to any litigant prior to a final ruling experiencing an untimely death, a debilitating stroke, or assigning their rights in a lawsuit to another. In any one of these circumstances, the trial court would be absolutely justified to, and need to, add the personal representative, the guardian and/or conservator, or the assignee. Furthermore, the addition of the Bankruptcy Trustee, if anything, benefitted Heidi because it gave her a potential advocate that she be entitled to property from the marital estate which is the opposite of what John argued. (JEA 76-78.)

Accordingly, Heidi's continued objection to the addition of the Bankruptcy Trustee to this divorce action must be overruled because she has failed to show that Judge Romanick's ruling to add the Bankruptcy Trustee was an abuse of discretion or how it was not simply "harmless error." ***Matter of Estate of Murphy***, 554 N.W.2d at 440, and ***Rule 61, N.D.R.Civ.P.***

II. Judge Romanick's Equitable Distribution of the Eberle Marital Estate was not Clearly Erroneous.

A. Clearly Erroneous Standard of Review Applies.

The well-stated standard for an equitable distribution of the parties' marital estate and this Court's review of the trial court's equitable distribution of a marital estate is as follows:

> A trial court must make an equitable distribution of the marital property pursuant to N.D.C.C. § 14-05-24. The Court must ascertain the value of the marital estate and then apply the Ruff-Fischer Guidelines to equitably distribute the property. The Ruff-Fischer factors for the trial court's consideration include:
>
> The respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material. The district court is not required to make specific findings, but it must specify a rationale for its determination. In fact, the district court does not need to make specific findings on each Ruff-Fischer Guideline, but must explain the rationale in its decision.
>
> Upon appellate review, the trial court's determination regarding an equitable distribution of the marital property is a finding of fact. It will not be reversed on appeal unless the trial court's findings are clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous review of the law, there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence a reviewing court is left with a definite and firm conviction a mistake has been made. **A property division need not be equal to be equitable, but a substantial disparity must be explained.**

Wold v. Wold, 2008 ND 14, ¶¶ 5-6, 744 N.W.2d 541. (emphasis added).

Furthermore, the supreme court views the evidence in the light most favorable to the findings, and the trial court's findings of fact are presumptively correct. ***Hitz v. Hitz***, 2008 ND 58, ¶ 10, 746 N.W.2d 732.

Equally important to this standard of review is precedent that the supreme court gives great deference to the trial court's opportunity to observe the witnesses and determine credibility. ***Hill v. Weber***, 1999 ND 74, ¶ 12, 592 N.W.2d 585. The trial court is in the best position to weigh the testimony of the witnesses. ***Id.*** Most importantly, when witnesses give conflicting testimony, this Court does not decide to believe a witness different from the one believed by the trial court. ***Id.***, citing ***City of Fargo v. Lee***, 1998 ND 126, ¶ 7, 580 N.W.2d 580 (recognizing that conflicts in testimony are resolved in favor of affirmance, recognizing the trial court is in a superior position to assess the credibility of witnesses and weigh the evidence.) *See also,* ***State v. Stridiron***, 2010 ND 19, ¶ 31, — N.W.2d — , 2010 WL 276044; ***Eberle v. Eberle***, 2009 ND 107, ¶ 26, 766 N.W.2d 477; ***In the Interest of M.S.***, 1999 ND 117, ¶ 8, 594 N.W.2d 924; ***In the Matter of Estate of Robinson***, 2000 ND 90, ¶ 17, 609 N.W.2d 745; and ***DesLauriers v. DesLauriers***, 2002 ND 66, ¶ 6, 642 N.W.2d 892 (all cases recognizing that the trial court is in the best position to weigh conflicting evidence and judge the credibility of witnesses).

Finally, since the division of a marital estate is based upon equity, this Court must keep in mind two equitable maxims: "A person cannot take advantage of that person's own wrong," and the "unclean hands" doctrine. N.D.C.C. § 31-11-05(8); ***Robar v. Ellingson***, 301 N.W.2d 653, 663 (N.D. 1981); and ***Precision Instrument Mfg. Co. v.***

Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15, 65 S.Ct. 993, 89 L.Ed. 1381 (1945).

B. The Evidence Supports Judge Romanick's Findings Regarding the Parties' Conduct.

Judge Romanick found that the parties duration and conduct during the marriage as a significant ***Ruff-Fischer*** guideline and made specific findings regarding this factor. (App. 19-21, ¶¶ 8-13.) Judge Romanick's findings are not clearly erroneous, but rather well-supported by the evidence.

Judge Romanick's findings regarding John's conduct are stated at paragraph nine (9) of the Findings of Fact, Conclusions of Law and Order for Judgment. (App. 19 and 20.) The record fully supports Judge Romanick's findings: (1) John's hard work to provide for his family (Trial Transcript (TT), 46-48); (2) John's hard work allowed for a comfortable living and to pay debts in full which Heidi accumulated (TT, 46-48; 149:8-25; 150:1-12); (3) John helped raise the children (TT, 35:9-25; 36:1-8); and (4) John adopted CME at the start of the marriage (TT, 33:14-22). Judge Romanick's findings concerning John are not clearly erroneous.

Regarding Heidi's conduct, Judge Romanick made specific findings concerning the pattern of Heidi's fiscal irresponsibility during the marriage. (App. 20 & 21, ¶¶ 10-12.) The record again fully supports Judge Romanick's findings: (1) Heidi brought nothing to the marriage in the way of assets and John paid off Heidi's debt (TT, 31:4-25; 32; 33:1-6); (2) Heidi purchased baby items when the parties didn't have money to spend (TT, 47:4-21); (3) Heidi's fiscal irresponsibility increased throughout the marriage and

was a constant discussion for the parties (TT, 46:10-25; 47; 48:1-13; 149:8-25; 150:1-12); (4) the solution to Heidi's spending was John simply working harder. *Id.*; (5) Heidi's credit card charging habits were explained by Exhibit 14; (6) Heidi's spending did not increase the assets of the marriage (Exhibit 15); and (7) Heidi engaged in extra-marital affairs (TT, 37:11-25; 38-39; 40:1-3).

All of these findings, supported by the evidence, justify Judge Romanick's conclusion that Heidi was entitled to less property because of her fiscal irresponsibility. ***Halverson v. Halverson***, 482 N.W.2d 869, 871 (N.D. 1992). Judge Romanick's Findings of Fact and Conclusions of Law as to the conduct of each party must be affirmed.

C. Judge Romanick Saved the Third-Generation Eberle Family Farm.

This Court recognizes in divorce proceedings the importance of preserving the viability of a business operation like a family farm and the potential for economic hardship if such an entity is divided. ***Horner v. Horner***, 2004 ND 165, ¶ 20, 686 N.W.2d 131. In fact, this Court has upheld the distribution of farm assets to one spouse with an offsetting monetary award to the other spouse. ***Id.***

With this legal authority in mind, Judge Romanick again made findings that were supported by the evidence and not clearly erroneous. First, Judge Romanick adopted John's Rule 8.3 Property and Debt listing because the values were taken from Exhibits 26 and 27 (the Financial Statement and Chattel Appraisal completed for Strasburg State Bank in March, 2007), and thus the best snapshot of property at the time of divorce in March, 2007. (App. 21, ¶14; Exhibit 15; TT, 67:21-25 and 68:1-2.) Second, the court noted from tax returns that the Eberle farm "is a viable farming unit that is making a

profit." (App. 21, ¶15; Exhibits 51-56.) Judge Romanick also made an important, common-sense finding that it is the Eberle farm and its income-producing ability that allows John to pay child support at the level he does. (App. 22, ¶ 15.) *See, Schwartz v. Schwartz*, 1997 ND 91, ¶¶ 6-7, 563 N.W.2d 391 (affirming an unequal property award to the wife in order for her to provide support for the minor child.)

Judge Romanick's finding that the origin of the Eberle farm was through the Eberle family is well-supported in the record. (App. 22, ¶ 16; TT, 72:4-23 & 73.) An additional correct finding was that John brought to the marriage approximately 500 acres of farmland he purchased on Contract-for-Deed from his parents and Heidi brought debt to the marriage. (App. 22, ¶ 16; TT, 29:1-25, 30:1-3, 31:4-25, 32 & 33:1-6; Exhibit 34.) Based upon all these facts, Judge Romanick correctly concluded that it would be inappropriate to sell a third-generation family farm. (App. 22, ¶ 16.) *Horner v. Horner*, 2004 ND 165 at ¶ 20; *see Lapp v. Lapp*, 293 N.W.2d 121, 131-32 (N.D. 1980) and *Schwartz*, 1997 ND 91 at ¶ 7 (recognizing that the trial court can consider the origin of the property in making a division).

The most important testimony Judge Romanick heard regarding the equitable division of the Eberles' marital estate was that Heidi never refuted testimony of Strasburg State Bank loan officer, Andy Hulm (Hulm). (TT, 171-214.) Hulm laid the foundation that he had intimate knowledge of the Eberle farm, having worked as John's loan officer for nine years. (TT, 180:9-17.) Accordingly, Judge Romanick was correct to recognize that Heidi never refuted the cash flow analysis prepared by Hulm. (Exhibits 28-30; TT, 181-191.) Finally, it should be noted that Hulm, when asked, by Heidi herself on cross-

examination, whether it would be impossible for John to keep farming if Heidi received 50 percent of the net estate, Hulm stated:

Q (Grenz): Okay. Based upon your opinion, if Heidi would receive an equitable share of 50 percent of that net estate, would it be impossible for John to continue to farm?

A (Hulm): Based on the numbers I have. yes.

Q (Grenz): So if that award was given, what you're saying is going to be sell the farm in order to make the payment?

A (Hulm): Based on what I have, yes.

Heidi failed to offer any rebuttal testimony to Hulm's conclusion that a liquidation of this family farm would have to occur to achieve a 50-50 distribution of the marital estate.

In summary, Judge Romanick correctly recognized that Heidi was advocating for the death of this third-generation family farm, despite the farm being the direct source of the child support payments her children receive. (App. 22, ¶ 15.) Judge Romanick, based upon the facts and law, correctly refused to allow that to happen. Judge Romanick's findings surrounding the farm property, its income-producing ability and its origin are not clearly erroneous and must be affirmed. *Wold*, 2008 ND 14 at ¶¶ 5-6; *Schwartz*, 1997 ND 91 at ¶¶ 6-7; *see Dvorak v. Dvorak*, 2006 ND 171, ¶ 22, 719 N.W.2d

362 (affirming a divorce case on remand where the trial court gave sufficient explanation for the disparity in its property distribution).

D. Heidi's "Unclean" Hands Justified Judge Romanick's Equitable Division of the Marital Estate.

Judge Romanick found Heidi's lies to the court regarding the original agreement and Heidi's lies in her voluntary Chapter 7 Bankruptcy amounted to Heidi having "unclean" hands. (App. 22-23, ¶¶ 18 & 19.) As this Court will recall from ***Eberle I***, when it reviewed Judge Romanick's November 25, 2008, Order filed concerning the reopening of the original agreement, Judge Romanick clearly found:

> "Heidi has testified to ***different versions*** as to how the Agreement was signed"; "Heidi's testimony is ***self-serving*** and at times ***untrue***"; "Heidi has ***confused her 'stories'*** as to when she signed documents and how she signed them"; "This court as it has indicated ***does not accept*** the testimony that Heidi was pressured or under any duress at the time the Agreement was signed or entered into. In fact, this Court finds Heidi's testimony regarding signing the Agreement and Quit Claim Deed as ***untrue***." (emphasis added).[2]

In ***Eberle I***, this Court did not reverse these findings by Judge Romanick. *Eberle*, 2009 ND 107, ¶ 26, 766 N.W.2d 477.

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[2] In addition, it must not be forgotten the malice Heidi showed for John and her children with her statement to John during the course of these proceedings, "I'm taking you down. I'm taking you down. I'm taking half of everything." (TT, 81:4-25.)

The record also fully supports Judge Romanick's conclusion that Heidi lied in her voluntary Chapter 7 Bankruptcy Petition. The questions asked by Bankruptcy Trustee Wagner at the First Meeting of Creditors were straight forward, yet Heidi gave misleading and evasive answers as to her position in this divorce action. (JEA 70-71.) Heidi could not bring herself to tell Bankruptcy Trustee Wagner that she believed she was entitled to a half-million dollars from the marital estate. Accordingly, Judge Romanick's conclusion that Heidi's lies allow for a substantial disparity in the property award is well-supported by the law. (App. 23, ¶ 19.)

The United States Supreme Court and this Court have recognized that the "unclean hands" doctrine gives courts a wide range of discretion in refusing to aid the unclean litigant. ***Precision Instrument Mfg. Co.***, 324 U.S. at 814-15 and ***Robar***, 301 N.W.2d at 663. The Eighth Circuit Court of Appeals refused to reinstate a union employee to his job because he had lied under oath. ***Precision Window Mfg., Inc. v. NLRB***, 963 F.2d 1105, 1109-1110 (8th Cir. 1992). While the Court acknowledged that the employee eventually had the truth 'hammered out' of him, the Court noted that "the law has little tolerance for half-baked explanations of phony testimony" and that "[t]his court cannot condone such a cynical usurpation of the fact-finding process. No tribunal should be required to plumb the depths of deceit and skulduggery to discover the truth." ***Id.*** at 1110. Bankruptcy Judge William A. Hill has noted that bankruptcy is "intended to afford the honest but unfortunate debtor the opportunity to gain for himself a fresh start: bankruptcy is not meant to reward the dishonest debtor" or "to carry out a dishonest scheme." ***In Re: Zaleski***, 216 BR 425, 429 (Bankr.D.N.D. 1997). Even a president was

not immune for his conduct for "giving false, misleading and evasive answers" in a discovery deposition. *See, Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir.) (noting in the Order adopting the agreed Order of Discipline for William Jefferson Clinton that he was only the second president to be impeached, was fined $90,000 as a civil contempt, and suspended from practice of law for five years and fined $25,000 because he gave false, misleading and evasive answers in a discovery deposition).

The facts and the law support Judge Romanick's ultimate conclusion that Heidi be awarded $150,000 as the equitable division of this marital estate. Judge Romanick got it exactly right. A contrary decision would set a dangerous precedent that lying in court will go unpunished. This must not be the precedent to set if our legal system is to have any credibility to the people it serves.

III. Judge Romanick Correctly Stopped the Alienation that Heidi was Causing Between the Eberle children and John.

A trial court's determination of parenting time is a finding of fact, which will not be reversed unless clearly erroneous. *Edwards v. Edwards*, 2010 ND 2, ¶ 7, — N.W.2d — , 2010 WL 93165. It is the complaining party's burden to prove that a finding of fact is clearly erroneous. *Dronen v. Dronen*, 2009 ND 70, ¶ 7, 764 N.W.2d 675.

Judge Romanick's findings regarding parenting time were supported by both a correct view of the law and by ample evidence from the exhibits, affidavits and testimony at the September 21, 2009, hearing. The findings stated in Judge Romanick's September 23, 2009, Findings of Fact, Conclusions of Law and Order for Judgment and the supporting evidence on the record are as follows:

- ¶ 4, "The parties operated under the judgment with John having parenting time from Thursday to Sunday upon verbal agreement. From testimony and exhibits, John appears to have had parenting time with the children for well over 50% of the time." (App. 56; JEA 79-81; and 9/21/09 Hr'g Tr. 10:9-25,11:1-13.)
- ¶ 5, "There appears to be a pattern of less parenting time for John coinciding with the parties returning to court over the property division issue. (App. 56; JEA 79-81; and 9/21/09 Hr'g Tr. 13:2-25, 14:1-25, 15:1-13.)
- ¶ 6, "This past summer John's parenting time decreased dramatically." (App. 56; JEA 81; and 9/21/09 Hr'g Tr. 17:10-25, 18, 19, 20:1-23.)
- ¶ 7, "John testified he has had difficulty arranging parenting time with Heidi and is unable to or has extreme difficulty reaching the children via telephone calls." (App. 56; 8/19/09 Aff. of John Eberle, ¶¶ 7-8; and 9/21/09 Hr'g Tr. 32:18-23, 33:13-25, 34, 35:1-6.)
- ¶ 8, "Heidi testified she left it up to the children to determine if they desired to spend time with or talk to John. Heidi testified she cannot speak or work with John regarding parenting time." (App. 56; and 9/21/09 Hr'g Tr. 124:5-25, 125:1-6.)
- ¶ 9. "Testimony provided by counselors indicated the children are having some difficulty with John due to questioning by John about mom and what

goes on in mom's life." (App. 56; and 9/21/09 Hr'g Tr. 77:15-21. 102:3-10.)

→ ¶ 10, "That H.M.E. and J.J.D.E. have seen counselors regarding issues they are having with John's parenting time. H.M.E. has recently had parenting time with John. J.J.D.E. has limited parenting time with John in the last few months." (App. 56; JEA 81; and 9/21/09 Hr'g Tr. 71:17-21. 73:9-22, 101:22-25. 102:1-10, 17:10-23, 25:10-18.)

Pursuant to N.D.C.C. § 14-05-22 and the findings made, Judge Romanick modified the parties' parenting time and set forth a parenting plan. Judge Romanick stated that the Court's parenting plan was not "simply a revamp of what had been the norm for over two years". (App. 58, ¶ 4.1.5.) Judge Romanick's statement is correct. Judge Romanick set forth a plan in the best interest of the children and. in doing so, the rotation Judge Romanick put in place for the parents and children is one where the children have parenting time with John for two. consecutive weekends and one weekend with Heidi with any special days and/or holidays taking precedent over weekend parenting time. (App. 58 & 59.) Judge Romanick further modified the parties' past schedule by allowing John to have parenting time with the children on the two Wednesdays after his second weekend from 10:00 a.m. to 8:00 p.m. or after school to 8:00 p.m. (App. 59, ¶ 4.1.5.) Judge Romanick also modified the summer vacation by putting in place the same weekend rotation as during the school year, but then giving both John and Heidi a two-week rotation period with the children. (App. 60, ¶ 4.1.5.)

Judge Romanick's Findings and Order are well-supported by the law by being in the best interest of the children, the facts on the record. and Judge Romanick's ability to

weigh and assess the credibility of the witnesses. Judge Romanick's Findings and Order on parenting time are not clearly erroneous and must be affirmed.

IV. Judge Romanick's Order Denying Transcript Costs is Correct.

This Court's June 17, 2009, Judgment indicated that costs are "to be taxed and allowed in the court below." (App. 7.)

A trial court's decision on fees and costs under N.D.C.C. § 28-26-06 will not be overturned on appeal unless an abuse of discretion is shown. ***Dowhan v. Brockman***, 2001 ND 70, ¶ 10, 624 N.W.2d 690. *See also*, ***Rule 39, N.D.R.App.P.*** (cross-referencing a number of statutes under Chapter 28-26).

Here, Judge Romanick did not abuse his discretion when concluding that Heidi had not used the trial transcript on appeal, as contemplated in N.D.C.C. § 28-26-06(4). Accordingly, he correctly denied the transcript costs be reimbursed for Heidi. This conclusion was not in any way, shape or form arbitrary, capricious or unreasonable. Rather, it correctly concludes a party should not be reimbursed for something they never used.

John does, however, admit that he misinterpreted the Supreme Court's e-mail to Attorney Grenz in having to file a corrected brief. Accordingly, it appears that the $36.00 filing fee was a correct taxable cost.

CONCLUSION

The death of a family farm is contrary to North Dakota values. The death of a family farm at the hands of this Court to benefit a litigant with "unclean" hands would be absolutely unjust. Judge Romanick prevented the death of this third-generation Eberle farm by clearly articulating the property award he made. His decision was supported by the evidence; it is not clearly erroneous. It must be affirmed.

Respectfully submitted on this 26th day of February, 2010.

BORMANN, MYERCHIN,
MONASKY & ESPESETH, LLP
Attorneys for the Plaintiff/Appellee
418 East Broadway Avenue, Suite 240
P.O. Box 995
Bismarck, ND 58502-0995
Phone: 701-250-8968

By: _____
Paul H. Myerchin (#05412)

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **BRIEF FOR APPELLEE** was served on the following at his last known address on the 26th day of February, 2010, via e-mail and by depositing the same in the U.S. Mail with the First Class postage fully prepaid and firmly affixed:

Donavin Grenz
Attorney at Law
P.O. Box 637
Linton, ND 58552-0637

dlgbek@bektel.com

Michael L. Wagner
Bankruptcy Trustee
P.O. Box 639
Bismarck, ND 58502-0639

mwagner@wlfpc.net

_____
Paul H. Myerchin (ID #05412)