20090332

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 28, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

John Eberle,	)	
	)	
Plaintiff/Appellee,	)	2010 ND 107 Supreme Court No. 20090332
	)	
vs.	)	District Court Civil No. 07-C-0016
	)	
Heidi Eberle,	)	
	)	
Defendant/Appellant	)	

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

HONORABLE BRUCE A. ROMANICK

PETITION FOR REHEARING OF APPELLANT, HEIDI EBERLE

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¶1. The above named Defendant/Appellant, hereby petitions the North Dakota Supreme Court for a Rehearing, based upon the following:

¶2. STATEMENT OF CASE AND FACTS:

¶3. Case was commenced on March 7, 2007. Admission of Service and Settlement Agreement was signed on March 12, 2007. Judgment was entered March 19, 2007. Defendant sought relief from the Judgment which Judge Haskell granted on March 4, 2008. Judge Romanick, subsequently issued Order Denying Relief From Judgment, November 19, 2008, countermanding Judge Haskell's Order. Heidi appealed Judge Romanick's orders. In Eberle v. Eberle, 766 N.W.2d 477, 2009 ND 107, the Supreme Court held:

> "We conclude the settlement agreement is procedurally and substantively unconscionable and the district court abused its discretion in denying Heidi Eberle's motion for relief from Judgment. We reverse and remand for an equitable division of the marital estate." (Id. ¶37)

The Supreme Court concluded, the district did not abuse its discretion in denying Heidi Eberle's motion for attorney fees, but stated, "The district court may revisit this issue on remand." (Id. ¶40)

The Supreme Court also mandated that, "Heidi Eberle have and recover from John Eberle costs and disbursement on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below."

¶4. On remand the trial court allowed Heidi only recovery of her filing fee and denied transcript costs and additional filing fees of $1,816.00. (Register of Actions #189). On September 10, 2009, the trial court also issued Findings of Fact, Conclusions of Law and Order for Judgment (Register of Actions # 188) concluding that: Heidi had

been fiscally irresponsible during the marriage; their marriage had essentially ended due to Heidi's extra-marital affairs; she lied regarding the parties' settlement agreement; and she lied to the Bankruptcy Court regarding her position in this lawsuit. The Court ordered that in addition to property in her possession, she be awarded a $150,000 payment by John within 90 days from the Court's Amended Judgment. An Amended Judgment was entered on September 25, 2009. On September 23, 2009, the trial court issued its Findings of Fact, Conclusion of Law and Order for Amended Judgment, and a Second Amended Judgment was entered on September 30, 2009. Heidi was awarded primary residential responsibility, but John was awarded the majority of parenting time. Heidi appealed the aforementioned order and judgments.

¶5. On June 10, 2010 the North Dakota Supreme Court made its decision in Eberle v. Eberle, 2010 ND 107, affirming the trial court's property distribution and parenting time, reversing the district court's denial of costs and disbursements, and remanding for imposition of costs and disbursements. (Id ¶25)

¶6. ISSUES:

¶7. (1) Based upon the entirety of the record and evidence, were the trial court's findings of fact clearly erroneous?

¶8. (2) Were the trial courts' findings influenced by the trial judge's bias or prejudice against Heidi?

¶9. (3) Did the trial court consider impermissible factors in making its findings and conclusions?

¶10. LAW AND ARGUMENT:

¶11. The trial court found Heidi brought little non-farm-related property to the marriage, whereas, John brought to this marriage,"… nearly 500 acres of farmland, and the start of a successful farming operation while Heidi brought nothing more than debt..." (September 10, 2009 Findings page 7 ¶ 16). John did not bring 500 acres of farmland into the marriage, he brought a Contract for Deed dated January 6, 1992 to purchase approximately 440 acres of land from his parents for $115,000 over 20 years which was payable in 20 annual installments of $5,750.00 with 6% interest with the first installment to be paid on December 1, 1992, and each succeeding installment to be paid on each December 1st thereafter. (Trial Exhibit 34). What John brought into the marriage was the equity created by the four annual payments which he had made on this Contract for Deed. Heidi and John were married on September 14, 1996.

¶12. Another fact ignored by the Court was that Heidi was gainfully employed at Rosenbluth International at the time they were married. She brought the income and benefits of her employment into the marriage, which continued until she and John agreed she should quit and work with him on the farm.

¶13. Based solely upon John's accusations that Heidi had an extra-marital affair early in their marriage and had an affair after they were divorced, the Court concluded that the marriage had "…essentially ended due to Heidi's extra-marital affairs." (September 10, 2009 Findings of Fact, page 6, ¶13). These allegations were denied by Heidi and were apparently refuted by John's letter and card to Heidi dated 2-26-07. (September 21, 2009 Transcript pages 55, 56, Exhibit 1; Reg.of Actions #187) Even if John's allegations were true, the one alleged act early in the marriage was obviously condoned by John under NDCC § 14-05-13. Any relationship Heidi may have had after

the divorce is irrelevant. Heidi testified she wanted a trial separation, not a divorce. John claimed he did not want a divorce, but did not waste time securing one.

¶14. The Court found that Heidi was fiscally irresponsible and based this opinion upon credit card charges which she made in 2006-2007. The Court ignored the evidence that in 2006 their oldest son was undergoing treatment for inappropriate behavior, Heidi and John were undergoing counseling, the family had taken trips together to Minneapolis, and it was Heidi's responsibility to acquire food, merchandise and goods for the entire family, which she did using a credit card. To arrive at the $150,000 awarded to Heidi as being fair and equitable, the trial court had to have deducted nearly all expenditures made by Heidi during the term of the marriage from her share of the marital estate. The Court also ignored or gave little regard to the necessary expenses for a family of six. The Court erroneously assumed that Heidi made the same amount of charges from 1996-2005 that she made in 2006-2007. Charges that Heidi made in 2007 after the divorce are irrelevant and should not have been considered by the Court, except as to her need to be awarded attorney fees and expenses. On the one hand the trial court was critical of Heidi for allegedly not informing the Bankruptcy Court of her anticipated share of the marital property, and on the other hand was critical of Heidi for relying upon a fair and equitable division being awarded to her. For purposes of making a fair and equitable division of marital property, the debts incurred by Heidi after the divorce was granted were irrelevant and should not have been considered by the Court.

¶15. When ordering specific parenting time and responsibility, the Court ignored testimony and recommendations from the children's counselors, who recommended that John have only supervised visitations until he completed family counseling with the

children because of his inappropriate questioning and interrogation which was causing them to suffer emotional distress. The Court also ignored the fact that the parties had originally agreed Heidi was to have primary physical custody of the children; a verbal agreement gave John additional visitation commencing on Thursdays on a temporary basis during the time Heidi was furthering her education; and this schedule was to continue only until Heidi completed her education and obtained gainful employment.

¶16. When determining the value of the marital property the Court states that it adopted John's values, which John testified were values determined by his banker who used a USDA publication which set forth average rents and values of the rented property, which did not use comparable sales, or as admitted by said banker, did not take into consideration soil classifications of the real property. The Court did not take into consideration the value of a tractor which John failed to list on his 8.3, nor cash surrender value of John's life insurance policy and other farm assets which John failed to list. The Court also erroneously concluded that Heidi had in her possession $5,000.00 in her checking account; the undisputed fact is that $2,500.00 of the $5,000.00 had been re-deposited into John's account at his insistence to pay off the Credit Card Debt, which was paid off and non-existent, but had still been listed by John as a debt. In determining the value of the farm marital assets, the Court ignored the testimony of Heidi's expert witnesses, Jim Weisser, real estate agent/certified appraiser, and Milton Brandner, auctioneer/farmer/rancher. Although an owner may testify about the value of his land, it is an abuse of discretion by the court to use a farmer's lower valuations when there is reliable and unrefuted evidence establishing a higher market value. (Defendant's Exhibit 58).

¶17. A Court's valuation and distribution of marital property and award of custody are treated as findings of fact, subject to the clearly erroneous standard of review; a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is not evidence to support it, or if after reviewing the entirety of the evidence, the Supreme Court is left with a definite and firm conviction a mistake has been made. (Eberle v. Eberle, 2010 ND 107; Wolt v. Wolt, 778 N.W. 2d 477, 2010 ND 26) In this case not only were many of the trial court's findings erroneous, but Judge Romanick also based his decisions upon erroneous views of the law; failed and refused to recognize the validity of the order issued by Judge Haskell; failed and refused to honor the Supreme Court's mandate to allow and award Heidi costs of appeal basing his decision upon an erroneous view of the law; and refused and neglected to give any credence to the filed affidavit made by Edwin W. F. Dyer III refuting that Heidi had lied to the Bankruptcy Court (Register of Actions 181 and 202).

¶18. In numerous cases the Supreme Court has held a trial court is in a better position than the Supreme Court to judge the credibility and observe the demeanor of witnesses and to determine property values; unfortunately, the Supreme Court is not able to view the demeanor, posturing, and voice inflections of a trial judge, but instead must glean a judge's bias from the entire record available. As held in Reems v. St. Joseph's Hosp. and Health Center, 536 N N.W.2d 666 (N.D.1995) and in Lucas v. Riverside Park Condominiums Unit Owners Association, 776 N.W.2d 801, 2009 ND 217, adverse rulings alone are not evidence of judicial bias or partiality; however in this case not only were there adverse rulings but rulings which were contrary to law and evidence which was disregarded. Although the Supreme Court has held that failure to raise the issue of

judicial bias in the district court ordinarily precludes review on appeal, judicial bias is not always ascertainable until after final rulings are made by the trial court.

¶19. In this case Judge Romanick's bias was not fully evident until after he made his final division of marital property and refused to comply with the Supreme Court's mandate to tax and allow Heidi appeal costs, or reasonable attorney fees. A full review of all evidence presented and rulings made should leave the Supreme Court with a definite and firm conviction that because of Judge Romanick's bias, several mistakes have been made, including but not limited to awarding Heidi only the sum of $150,000 from a marital estate consisting of farm land valued at $800,000-$1,065,000 and other assets (not including those not listed by John) worth approximately $325,145, with debts of approximately $236,000, including therein a $5,000 credit card debt which had been paid in full. In this case the Court's decision is clearly erroneous because it considered impermissible factors, such as debts incurred after the divorce.

¶20. Rather than attempting to enforce a judgment imposed pursuant to an unconscionable agreement, Judge Romanick, being the only person fully aware of his true feelings, should have disclosed the same and recused himself from the case. As the Supreme Court stated in State v. Jacobson, 747 N.W.2d 481, 2008 ND 73:

> "[6] It is important that our judicial system maintain an appearance of propriety. See Sargent County Bank v. Wentworth, 500 N.W.2d 862, 880 (N.D. 1993). The Due Process Clause of the United States Constitution entitles parties in both criminal and civil matters to an impartial, neutral, and disinterested tribunal. State v. Anderson 427 N.W.2d 316, 320 (N.D. 1988) the public's respect and confidence in the integrity of the judicial system " ' can only be maintained if justice satisfies the appearance of Justice.'" Wentworth, 500 N.W.2d 877 (citation omitted). A judge is presumed by law to be unbiased and not prejudiced. Farm Credit Bank of St. Paul v. Brakke, 512 N.W.2d 718, 720 (N.D.1994). However, to maintain the judiciary's appearance of propriety, a judge is to recuse himself from any matter in which the judge's impartiality would be questioned. See N.D.Code Jud. Conduct Canon 3(E)."

> "[7] A judge's disqualification decision is directed by the North Dakota Code of Judicial Conduct. Wentworth, 500 N.W.2d at 877. The Code mandates that a judge shall avoid impropriety and the appearance of impropriety. N.D.Code Jud. Conduct Canon 2. "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned…." N.D.Code Jud. Conduct Canon 3(E)(1). The Code provides a non-exhaustive list of instances when a judge must recuse himself from a matter."
>
> An objective standard is used to determine whether a judge must recuse himself. Brakke, 512 N.W.2d at 721. "[T]he judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality." Id. "Even without intentional bias, disqualification can be essential to satisfy the appearance of justice." Wentworth, 500 N.W.2d at 877-78."
>
> "[11] A judgment may be reversed because of a judge's violation of the North Dakota Code of Judicial Conduct. Wentworth, 500 N.W.2d at 879-80. However, "the failure to raise the question of judicial bias in the trial court ordinarily precludes our review of that question on appeal." Delzer v. United Bank, 484 N.W.2d 502, 509 (N.D. 1992)".

The Supreme Court states that their concept and interpretation of Canon 3 requires disqualification for both actual partiality and the appearance of partiality and that the disqualification directions in Rule 3 (C) are not merely guidelines; they are mandatory. (Id ¶30)

¶21. CONCLUSION:

¶22. Some facts determined by the Court were clearly erroneous, its findings were influenced by bias and partiality, and the Court considered impermissible factors when rendering its decision. Defendant's petition for rehearing should be allowed and thereafter appropriate relief and/or direction should be mandated.

¶23. Dated this 28th day of June, 2010.

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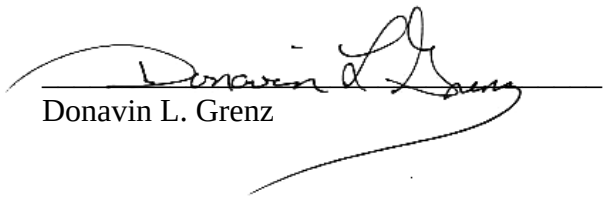
¶24. CERTIFICATION OF SERVICE

¶25. I, Donavin L. Grenz hereby certify that on this 28th day of June, 2010, I emailed the original foregoing document to Penny Miller, Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov; and copies of the same to Paul Myerchin, attorney at law at clarklaw@btinet.net, and Michael Wagner, Bankruptcy Trustee at mwagner@wlfpc.net.



Donavin L. Grenz