

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

FILED
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JANUARY 29, 2010
STATE OF NORTH DAKOTA

John Eberle,)	Supreme Court Case No. 20090332
)	District Court Case No. 15-07-C-16
Plaintiff - Appellee)	
)	
vs.)	
)	
Heidi Eberle,)	
)	
Defendant - Appellant)	

APPEAL FROM THAT ORDER JOINING BANKRUPTCY TRUSTEE AND ORDER DENYING REQUEST TO REMOVE DEFENDANTS ATTORNEY; ORDER ON COSTS ON APPEAL DATED SEPTEMBER 10, 2009; FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT DATED SEPTEMBER 10, 2009; AMENDED JUDGMENT DATED SEPTEMBER 25, 2009; FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT DATED SEPTEMBER 23, 2009; AND SECOND AMENDED JUDGMENT DATED SEPTEMBER 30, 2009; ALL OF WHICH WERE ISSUED BY THE HONORABLE BRUCE A. ROMANICK IN EMMONS COUNTY DISTRICT COURT CASE NO. 15-07-C-16

APPELLANT’S BRIEF

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¶ 1 STATEMENT OF FACTS AND CASE

¶ 2 The original Judgment entered in this case was reversed by the North Dakota Supreme Court, and remanded to the District Court with the instruction to tax and allow costs of appeal, and to make a fair and equitable division of the marital estate. Heidi Eberle has appealed the actions and decisions subsequently rendered by District Court Judge Bruce Romanick on both of these issues. Since the case was remanded, District Court Judge Bruce Romanick has also ordered that the Bankruptcy Trustee, Michael Wagner be added as a party to the parties' divorce action and although no motion for change of custody was made, in response to a motion for specific visitations rights, Judge Romanick did enter an order which granted the majority of parenting time to John Eberle. Heidi Eberle has appealed both of these orders.

¶ 3 The majority of facts germane to this case were previously set forth in the Supreme Court's opinion in Eberle v. Eberle, 2009 ND 107, 766 N.W.2d 477. As a recap of those facts, John and Heidi Eberle were married on September 14, 1996. Heidi had a child from a previous relationship who was approximately three years of age at the time they were married, and approximately fourteen years of age when John initiated the action for divorce. This child John adopted after he and Heidi were married. During the course of their marriage, John and Heidi had an additional three children, who were approximately nine, six and three years of age at the time John initiated the action for divorce (Register of Actions #2 Complaint, #4 Settlement Agreement)

¶ 4 On January 6, 1992, John had entered into a contract for deed with his parents to purchase approximately 440 acres of land (3/3/08 Trans: pg 20, lines 3-25; 10/23/08 Trans: Depo. Exhibit #34, pg 29, lines 11-25; pg 30, lines 1-14). This Contract for Deed

was subsequently modified after John and Heidi had been married. At the time of their marriage, Heidi was gainfully employed, but after discussions with John it was decided that she should quit so she and John could engage in a dairy operation (3/3/08 Trans: pg. 10, lines 20-23, ; 10/23/08 Trans: pg 256, lines 12-24) .

¶ 5 On June 30, 2004, John and Heidi entered into a contract for deed to purchase and additional 1000 acres of land from John's mother (3/3/08 Trans: Depo Exhibit # 8; pg 21, lines 1-24; pg 68, lines 1-22; pg 69, lines 1-13) Marital problems arose. On February 26, 2007, Heidi Eberle and the children moved out of the parties' farm residence. When Heidi Eberle left she took the parties' 2001 Ford Winstar minivan, some clothing, a few household items, personal effects, and \$5,000 from a joint bank account with John Eberle, which at the time contained over \$20,000.00. Heidi subsequently returned half of the \$5,000 to pay off credit card debt.

¶ 6 John Eberle hired LaRoy Baird to seek a divorce from Heidi, who prepared and signed a Summons and Complaint on March 7, 2007, together with a Property Settlement and Child Custody Agreement (Reg. of Actions 1 &2). These documents were presented to Heidi at the same time, but as to when these documents were presented to Heidi is disputed between the parties; however, the settlement agreement was signed on March 12, 2007 and was filed on March 15, 2007 (Reg. of Actions # 4). District Court Judge Bruce Romanick issued Findings of Fact, Conclusions of Law and Order for Judgment and pursuant thereto a Judgment incorporating the settlement agreement was entered and filed on March 19, 2007 (Reg. of Actions 6 & 7).

¶ 7 Heidi Eberle moved for relief from the judgment. On March 4, 2008, District Court Judge Bruce Haskell issued an order granting Heidi Eberle's motion for relief from

the judgment (Reg. of Actions 50). On April 4, 2008, John Eberle moved for certification of the order to allow for an appeal (Reg. of Actions 51-54). On April 2, 2008, Judge Haskell recused himself from the case (Reg. of Actions 55). District Court Judge Robert Wefald who had been assigned the matter, denied the motion for certification (Reg. of Action 56 & 66).

¶ 8 On April 14, 2008, Heidi Eberle filed an answer and counterclaim to John's initial complaint and moved for an award of attorney fees (Reg. of Action 57, 58). On May 7, 2008, Heidi Eberle moved to compel John Eberle to comply with N.D.R.Ct. 8.3(a) for preparation of joint informational statement and preliminary property and debt listing (Reg. of Actions 71-76). After being reassigned to the case, on August 7, 2008, District Court Judge Bruce Romanick denied Heidi Eberle's motion to compel and to award her attorney fees (Reg. of Actions 80, 92, 93).

¶ 9 A hearing was held before District Court Judge Bruce Romanick on October 23, and 24, 2008. As the North Dakota Supreme Court stated in its previous opinion in this case, the District Court found the parties' farmland to be worth between \$800,000 and \$1,065,000 and their other farm and financial assets to be worth approximately \$325,145.00 with their farming operation having a debt of approximately \$236,000 at the time of the divorce. (Eberle v. Eberle, 2009 ND 107, ¶34)

¶ 10 On November 19, 2008, District Court Judge Bruce Romanick, contrary to District Court Bruce B. Haskell's previous findings and order, found the agreement was not unconscionable, and ordered the Divorce Judgment dated March 19, 2007, to remain in full force and effect (Reg. of Actions 127). Heidi Eberle appealed Judge Romanick's

findings, orders and resulting judgment to the North Dakota Supreme Court (Reg. of Actions 128-136).

¶ 11 On June 17, 2009, the North Dakota Supreme Court concluded that the settlement agreement was procedurally and substantively unconscionable; the district court had abused its discretion in denying relief from the judgment, and reversed and remanded for an equitable division of the marital estate. (Eberle, supra ¶37, ¶43). The North Dakota Supreme Court held that the district court did not abuse its discretion in denying Heidi Eberle's motion for attorney fees, but in its opinion stated: "The district court may revisit this issue on remand." (Eberle, supra ¶40). In the Judgment dated June 17, 2009, signed by Chief Justice, Gerald W. VandeWalle, and attested by Clerk of Supreme Court, Penny Miller, it was specifically provided:

"IT IS FURTHER ORDERED AND ADJUDGED that Heidi Eberle have and recover from John Eberle costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below." (Appellant's Appendix #3, page 7)

¶ 12 On September 8, 2009, District Court Judge Bruce A. Romanick, granted Plaintiff's motion to join the Bankruptcy Trustee as a party to the action, denied Plaintiff's motion to force or compel Defendant's attorney to withdraw, and therein held that:

"Defendant has filed bankruptcy while this action was pending at the North Dakota Supreme Court and failed to include this action as a possible asset."... "The divorce assets are large and Defendant stands to receive an equitable portion of the divorce assets." (Appellant's Appendix #6, page 11)

¶ 13 On September 10, 2009, District Court Judge Bruce A. Romanick issued Findings of Fact, Conclusion of Law and Order for Judgment, therein directing, among other things, that Heidi Eberle be awarded that marital property in her possession and the

sum of \$150,000 to be paid by John Eberle within 90 days from the Court's Amended Judgment, that Bankruptcy Trustee, Michael Wagner be added as a party to the action, and that each party pay their own attorney fees (Appellant's Appendix #9, page 16-25).

¶ 14 After Defendant sought payment of the appeal costs, on September 10, 2009, District Court Judge Bruce Romanick issued an Order On Cost On Appeal, denying the awarding to Heidi Eberle the \$36.00 of filing fees paid to the North Dakota Supreme Court and the \$1,780.00 paid to Lisa Soma for the transcripts, awarding only \$125.00 of the \$1,941.00 in costs which were incurred. (Appellant's Appendix #8, pages 14-15)

¶ 15 Plaintiff alleged that after the Supreme Court decision, he was being deprived of reasonable and liberal visitation and moved the court to order and establish a specific visitation schedule. Defendant concurred that a specific visitation or parenting schedule was needed, but requested the court to appoint a guardian ad litem or investigator for the minor children and/or issue an order appointing a parenting coordinator, and that the reports, opinions and recommendations made by such entities be taken into consideration before entering a final order regarding visitation or parenting time. Defendant argued that such appointments were necessary because Plaintiff continued to dictate his visitations with the children and questioned them in inappropriate manners to the extent the children did not wish to visit with Plaintiff (Appellant's Appendix #10, pages 26-28). In support of Defendant's return to Plaintiff's motion, Defendant submitted affidavits by the children's two counselors, Valerie Meyers, MS, LPCC (Appellant's Appendix #12, pages 32-33) and Shannon Hilfer, M.Coun., LPCC (Appellant's Appendix #13, pages 34-35). On September 23, 2009, District Court Judge Bruce A. Romanick issued Findings of Fact, Conclusions of Law and Order for Amended

Judgment leaving primary residential responsibility with Heidi, but placing the majority of parenting time with John Eberle (Appellant's Appendix #16, pages 55-61). An Amended Judgment was entered on September 25, 2009 (Appellant's Appendix #17, pages 62-63), and a Second Amended Judgment was entered on September 30, 2009 (Appellant's Appendix #18, pages 64-69). Heidi Eberle has appealed the above referenced orders and judgments (Appellant's Appendix #19, pages 70-71).

¶ 16 ISSUES:

- ¶ 17 (1.) Did Judge Romanick commit reversible error when adding Bankruptcy Trustee, Michael Wagner, as a party to this action?
- ¶ 18 (2.) Should Judge Romanick's Order On Costs On Appeal be reversed?
- ¶ 19 (3.) Did Judge Romanick commit reversible error in his September 10, 2009, Findings of Fact, Conclusions of Law and Order for Judgment in ordering each party to be responsible for their own attorney fees and costs, and when limiting Heidi Eberle's equitable division of marital property to those few nominal assets of limited value which she took at the time the parties separated in February of 2007, and to a payment of \$150,000.00?
- ¶ 20 (4.) Should the Findings of Fact, Conclusions of Law, Order for Judgment and the Second Amended Judgment issued pursuant thereto, which awarded the majority of the parenting time to John Eberle be reversed with at least equal parenting time being awarded to Heidi Eberle?

¶ 21 LAW AND ARGUMENT:

¶ 22 In this case the Plaintiff and his attorney sought to have the Michael Wagner, the Bankruptcy Trustee in the Chapter 7 bankruptcy petition brought by Edwin W. F.

Dyer, III. on behalf of Heidi Eberle joined as a party to the divorce action (8/20/09 Trans. Pg. 3:17-25) They alleged that Heidi had not disclosed the value of the marital assets which she could be awarded to the Bankruptcy Trustee and argued that Heidi's attorney in the divorce action should be compelled to withdraw as her attorney because the bankruptcy action gave rise to a conflict of interest, and that Heidi should not be awarded any part of the marital estate because of her unconscionable acts. (Register of Actions 155-158). As shown by the Affidavit of Edwin W. F. Dyer III (Appellant's Appendix #11, pages 29-31), the Plaintiff's allegations that Heidi lied or attempted to conceal marital assets were untrue and made without merit. The transcript of the June 5, 2009, bankruptcy proceeding also shows that when petitioning for bankruptcy relief from debts totaling approximately \$175,000, Heidi had informed the bankruptcy court of the marital assets and the pending appeal (Register of Actions #161, Exhibit #3 of first creditor's meeting: page 7: 15-25; pages 8-10; page 11:1-11).

¶ 23 In his brief, Plaintiff's attorney argues and alleges that because of Heidi's dishonesty and unconscionable acts, that, contrary to the June 17, 2009, Judgment entered by the North Dakota Supreme Court, the District Court should not award Heidi any of the marital assets (Register of Actions #157). As Michael Wagner set forth in his brief, this argument by Plaintiff's attorney is inappropriate and not based upon the law (Register of Actions #162). Apparently Plaintiff's attorney made these allegations for the purposes of harassing Heidi, depriving her of legal representation in the divorce action, keeping her in financial straits, and to prejudice Judge

Romanick against her, which based upon Judge Romanick's subsequent orders, apparently worked.

¶ 24 Although the Bankruptcy Trustee in his Brief (Register of Actions #162) ultimately concluded:

“The Trustee requests that the court add the Trustee as a real party in interest and award the Bankruptcy Estate all property that would have otherwise been awarded to the debtor, Heidi Eberle.”

in his Brief he also acknowledged that this was not normally necessary and stated therein:

“As a matter of policy, the Trustee generally does not seek to be substituted as a real party in interest in every litigation case in which debtors are involved. Rather, the Trustee waits to see if the Asset will indeed benefit the estate. If so, the Trustee determines whether there is good cause to be substituted as a real party in interest. In most cases, the Trustee simply notifies the parties that the Bankruptcy Estate is entitled to any assets in which the debtor would have been entitled, saving much time, expense and confusion generally caused by substitution of parties. That being said, the Trustee does not object to being substituted as a real party in interest.”

For these and other reasons, Heidi opposed joining the Bankruptcy Trustee as a party to the divorce action (Register of Actions: #158 and #159).

¶ 25 Although Plaintiff alleged that Heidi was attempting in the bankruptcy petition to discharge approximately \$175,000 in debts, he was not named as a debtor or creditor in this action, and these were debts which arose after the judgment was entered. If the debts were not fully discharged, and if Plaintiff were required to pay Heidi for her fair share of the marital estate, Plaintiff's only concern should have been whether he was to make the payment through the bankruptcy trustee or directly to Heidi.

¶ 26 CONCLUSION:

¶ 27 It was not necessary for the District Court to join the Bankruptcy Trustee as a party to the divorce action. Plaintiff's motion was without merit, and for all practical purposes all it did was delay a fair and equitable distribution of the marital estate, increase Heidi's costs and expenses, further prejudice the District Court Judge against her, and advocated the District Court to disregard and ignore the mandate from the Supreme Court. The joinder of the Bankruptcy Trustee should be reversed, and Heidi should be awarded reasonable attorney fees and expenses incurred in opposing the motion. Rather than joining the Bankruptcy Trustee, the District Court should be directed to order that payments to Heidi of her share of the marital estate be paid through the Bankruptcy Trustee until all debts are paid and satisfied or finally discharged by the Bankruptcy Court.

¶ 28 At the conclusion of Heidi Eberle's appeal to the North Dakota Supreme Court, on June 17, 2009, the Supreme Court entered Judgment in Heidi's favor which in part provided:

“IT IS FURTHER ORDERED AND ADJUDGED that Heidi Eberle have and recover from John Eberle costs and disbursements on this appeal under Rule 39, N.D.R.App.p., to be taxed and allowed in the court below.”(Appellant's Appendix #3, page 7)

Heidi sought payment of the \$125.00 filing fee, \$1,780.00 paid for the transcript, and \$36.00 for fee paid to Supreme Court because Brief and Appendix which were electronically filed exceeded 100 pages (Appellant's Appendix #4, page 8). On June 26, 2009, Plaintiff objected to Defendant's amended costs on appeal because: (1) Judgment was not final because deadline for Petition for Rehearing had not expired and Plaintiff intended filing such petition; (2) the \$36.00 in additional filing fees sought by Defendant was caused by Defense Counsel's errors; and (3) in Appellant's Brief, defense counsel

made no direct cites or statements contained in the transcripts (Register of Actions # 142). On September 10, 2009, District Court Judge Bruce Romanick issued an Order which denied payment of the \$1,780.00 for transcript fees, and the \$36.00 in additional filing fees and ordered costs on appeal in only the sum of \$125.00 finding that "...the transcript was not used as contemplated in NDCC 28-26-06(4) and" ... "the additional filing fee" ... "was due to Heidi's own failure in filing." (Appellant's Appendix #8, pages 14 and 15)

¶ 29 Rule 10 N.D.R.App.Proc. provides that the original papers and exhibits filed with the district court, two copies of the transcript, and a certified copy of the docket entries prepared by the clerk of the district court constitute the record on appeal, and in part specifically provides:

"If an appeal is taken in a case in which an evidentiary hearing was held, the appellant must order a transcript of the proceedings ..." (Rule 10(b)(1) N.D.R.App.Proc.)

Rule 10(c)(3) N.D.R.App.Proc. requires the appellant to make advance payment for the transcript, unless advance payment is waived, or transcript preparation is extended or is not necessary because of stipulations entered into between the parties.

¶ 30 The applicable provisions of N.D.R.App.Proc. Rule 39 provides:

- (a) **Against whom assessed.** Unless the law provides or the court orders otherwise:
 - (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.
- (e) **Costs on appeal in civil cases taxable in district court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs:
 - (1) the preparation and transmission of the record;
 - (2) the transcript if necessary to determine the appeal;
 - (4) the fee for filing the notice of appeal.
- (f) **Costs in supreme court.**

(1) Taxable costs. In original proceedings before the court, costs as applicable under subdivision (e) may be taxed by the supreme court clerk in favor of the party entitled to costs.

(2) Execution for costs. An execution signed by the supreme court clerk may issue upon direction of the court to enforce any judgment for costs made and entered in an original proceeding before the court. The execution may issue and be directed to the sheriff of any county, and may be enforced in any county in the state in which a transcript of the judgment for costs is filed and docketed.

¶ 31 In this case Heidi did not have an option as to whether or not to obtain and file a transcript of the proceedings. She had no option other than to pay for the transcript costs, otherwise she could not pursue her appeal. Her attorney did have an option in regard to how and to what extent he would utilize the transcripts of the proceedings had before the district court in Heidi's appeal to the Supreme Court. The transcripts did support the statement of facts and argument set forth in Appellant's Brief. Although Heidi's attorney chose not to cite specific provisions contained in the transcripts, Plaintiff's attorney did so, and could not have done so, if no transcript would have been provided.

¶ 32 Plaintiff's argument against taxation of the costs ordered by the Supreme Court is erroneous, contrary to law and misguided. District Court Judge Bruce Romanick's application of NDCC § 28-26-06 as justification for denying Heidi the costs mandated by the Judgment of the Supreme Court is not only erroneous, but is arbitrary and capricious. The costs and disbursements enumerated under NDCC § 28-26-06 apply to costs arising in the district court and not to costs which are mandated by the North Dakota Supreme Court. The Supreme Court in Fowler v. Delzer, 177 N.W.2d 756 (ND1970) held that the expense of transcript upon which reversal of an order was granted, was a "necessary disbursement" properly taxed to the prevailing party. Although the Supreme Court in Syndicae v. Pugh, 25 N.D. 490, 142 N.W.919 (1913) held that costs for making transcript

on appeal were taxable under this section, this is not the sole authority for the awarding and taxation of costs. NDCC Chapter 28-31 entitled “Practice Before the Supreme Court” originally contained provision as to the taxation of and execution on costs for actions before the Supreme Court. The taxation of costs were governed by NDCC § 28-31-10 and execution of costs ordered by the Supreme Court were governed by NDCC § 28-31-11, until superseded by N.D.R.App.P., Rule 39.

¶ 33 Administrative Order 14 - ELECTRONIC FILING PILOT PROJECT (C) in part provides:

“4. A party filing electronically must pay for internal reproduction of the document by the supreme court.” ...

“b. A party electronically filing any brief, whether in an appeal, request for supervision, or request for extraordinary writ, must pay \$25. No payment is required fore a reply brief or a petition for rehearing.

c. No payment is required for an appendix 100 pages or less in length. A party must pay \$.50 per page for each appendix page in excess of 100 pages. The charges under this subparagraph apply to any appendix that is electronically filed, regardless of whether it is filed separately or with a brief, motion, or other request.”

“5. A party must pay all required fees and payments within five days of submitting a document filed electronically. If fees and payments are not paid within five days of submission, the document will be returned by the supreme court clerk and the party will be required to refile the document.”

¶ 34 CONCLUSION:

¶ 35 Plaintiff’s argument that the \$36.00 filing fee was assessed because of late filing is not only erroneous but also misleading.. The \$36.00 was assessed because the Appendix exceeded 100 pages which contained documents authored by Plaintiff. Judge Romanick’s order denying appeal costs is arbitrary and capricious. Based upon all documents filed and proceeding had before the Court, it already knew that Heidi’s income was limited; that her request for attorney fees had been previously denied; that

she had not only incurred transcript costs, but also appraisal fees, attorney fees, education expenses, expert witness fees and expenses to acquire a home, furniture, appliances and other necessities for herself and her children. Based upon documents filed by the Plaintiff to join the Bankruptcy trustee, the Court knew that Heidi had incurred debts of approximately \$175,000. The District Court should not be permitted to ignore a directive set forth in a Supreme Court Judgment. Judge Romanick's order should be reversed and either remanded with the order to tax specified amount of appeal costs, or in the alternative, the supreme court clerk should be directed to tax these costs as authorized under Rule 39(f)(1) of the North Dakota Rules of Appellate Procedure.

¶ 36 In the opinion rendered in Eberle v. Eberle, 2009 ND 107, 766 N.W.2d 477, the North Dakota Supreme Court more than adequately addressed the case law applicable to a when determining a fair and equitable division of marital property and debts. District Court Judge Bruce Romanick, initially determined that based upon an agreement which the North Dakota Supreme Court found to be unconscionable, that as to a division of marital property, Heidi Eberle was only entitled to that limited personal property which she took with her when she left the marital residence in February of 2007, and that John Eberle was entitled to keep the balance of the marital estate which, without taking into consideration specific sales or soil types, had been conservatively valued by Mr. Hulm, John's banker, and John Eberle on his 8.3 Property and Debt Listing to have a net value of \$852,094.70 (10/23/08 Trans: pg 199, lines 1-17) which did not include the value of items which John had failed to list, including but not limited to: a life insurance policy earning \$59.00 in interest annually (10/23/08 Trans: pg 143 lines 2-25; pg 144 line 1-10), the value of 2006 grain sold in 2007 (10/23/08 Trans: pg 144 lines 24, 25; pg 145

lines 1-5), a 4320 John Deere tractor with a 158 loader valued at between \$6,000 and \$11,500, and calf hutches valued at \$50 to \$100 a piece, a bale shredder valued at \$5,500, a feed wagon value at \$300, a Heston Stacker valued at \$500, and a second grain truck at \$250.00 and farm truck (10/23/08 Trans: pg 129, lines 17-25; pgs. 130-133; pg 143; pg. 144, lines 1-12; pg 156, lines 22-25; pg 157, lines 1-24; pg. 158, lines 1-18; pg 158, lines 1-10; pg. 208, lines 7-25, pages 250-254; pg 278, lines 1-10; pg. 279; pg 280).

¶ 37 After reverse and remand, District Court Judge Bruce Romanick ordered that Judgment be entered awarding Heidi Eberle those personal property items which she took with her when she left the marital home and a \$150,000 payment to be made by John, and awarding to John the balance of the marital estate having a net fair market value in excess of one million (\$1,000,000) dollars (Register of Actions: #122 - Exhibit 58 -Uniform Agri Appraisal Report; #125 - Exhibit 64-8.3 Property and Debt Listing ; 10/24/08 Trans: pg 296, lines 13-16; pg 297, lines 7-15; pg 326, lines 3-8). In an attempt to justify this award the court concluded that Heidi committed economic waste during the term of the marriage, engaged in extra marital affairs, and made no contributions to the acquisition of the marital estate. All of which are not supported by the record. Holding hands with a male friend after the divorce was entered does not constitute an extra marital affair. Being surprised by one kiss of appreciation does not constitute an extra marital affair.

¶ 38 Heidi had no extra marital affairs and during their marriage, was never unfaithful to John (03/03/08 Trans: pg. 83, lines 20-25; pg 86, lines 1-8; 10/23/08 Trans: pg. 240, lines 12-19; pg 245, lines 10-12). For John and their children, Heidi cleaned, painted and maintained the family home. She washed their cloths and prepared their meals. John's only experience with meal preparation was pouring cereal into a bowl and

adding milk. Heidi purchased the groceries, clothing and necessities for the family, transported the children, ran errands and purchased parts, delivered meals to the fields, and in addition thereto, assisted with the milking operation and farming operation (10/23/08 Trans: pg 111, lines 2-23; pg 113, lines 1-25; pg 114, lines 1-7; pg 241, lines 4-25; pg 242, lines 1-23)

¶ 39 Laundering one change of clothing per day, for each person in a family of six, is no small task. Without considering all under garments and sweat shirts which may be worn, and assuming the number of items of clothing worn by each person totals 5, and without considering additional daily changes in clothing which might occur because of work, contact with animals or other events, and without considering the laundering of dish towels, bath towels, wash cloths and bedding, keeping clothing clean for a family of six requires the washing and drying of a minimum of 10,950 items of clothing per year or slightly over 210 items per week. As John admitted even after ten years of marriage he did not know how to wash clothing (10/23/08 Trans: pg 43, lines 1-11) Like many men who take their spouses for granted, they do not know how to wash clothing without causing colors to run or clothing to shrink, and most of these could probably not even tell you how many washing machine loads it would take to wash 210 items of clothing. One need only think about and project the number of pots, pans, dishes, glasses, knives, spoons, forks and other cooking utensils and serving dishes which must be used and cleaned each day to feed a family of six, without considering the additional number needed to feed extended family members, guests or hired or voluntary help. One should be ashamed to conclude that Heidi made no contribution to the acquisition of the marital estate. Life experiences reveal to most people the fact that two alternating care givers for

one elderly person are often compensated at a rate of \$15.00 to \$20.00 per hour on a 24/7 basis for performing the same services which a mother will perform for her children and husband.

¶ 40 In an effort to portray Heidi as a person who did nothing but spend John's money, John and his attorney introduced credit card charges which they alleged were only made by Heidi, and attempted to conceal the facts that the bulk of these charges were made for benefit of John and the parties' children and were made during times when the children and John were with her. John claimed a marital credit card debt of \$5,681 but subsequently admitted this debt should not have been listed since it had been paid off (10/23/08 Trans: pg 71; pg 94; pg 95; pg 96 lines 1-13).

¶ 41 John admitted that they enjoyed a comfortable living and had no farm operating loan debt at the time of the divorce (10/23/08 Trans pg 70, lines 22-25). The only outstanding farm debt was what was owed to John's mother for payments on the two contract of deeds, with the debt on the first contract for deed having been renegotiated and with payment obligation increased to \$115,000.00 after Heidi and John were married to obtain additional funding which John wanted (10/23/08 Trans: pg 106, lines 4-20).

¶ 42 John testified that there were months when he, not Heidi, would spend in excess of \$15,000 per month and admitted that for tax purposes, in 2006 he had deferred to 2007, \$57,854 of 2006 income (10/23/08 Trans: pg 85, lines 16-21; pg 87, lines 1-13; Reg. of Actions #120 - Exhibit #56). This income earned in 2006 which John Eberle deferred for tax purposes to 2007, when added to his reported adjusted gross 2006 income of \$60,464 would place his actual adjusted gross income for 2006 at over \$100,000 or at \$118,318 (10/23/08 Trans: page 85, lines 16-21; page 87, lines 1-13; Reg.

of Actions #120-Exhibit 56-2007 tax return). Including the \$118,318 as earnings in 2006, and averaging it with the income earned in 2002, 2003, 2004, and 2005, under the Child Support Guidelines would result in a monthly child support obligation for four children in a sum of \$1,443.00 per month (Reg. of Actions #41-45, Exhibits 1-5, 2002-2006 tax returns). John argued that he should not have been obligated to pay \$1,200 per month in child support, but rather \$916.00 per month, and implied that after Heidi had the Judgment set aside, she should have reimbursed him for the difference which she did not do (10/23/08: pg 52, lines 14-25; pg 53, lines 1-21).

¶ 43 A review of John's testimony and the transcripts in their entirety shows that John unwarrantedly minimized and even ignored Heidi's contributions to the marital estate (10/23/08 Trans: pg 111, lines 2-23; pg 113, lines 1-25; pg 114, lines 1-7). Until cross-examined John swore that he had disclosed and listed all marital property when in fact he had failed to disclosed ten of thousands of dollars worth of assets on his 8.3 Property and Debt Listing(10/23/08 Trans. Pg. 61, lines 19-20, pg 62; pg 68, lines 3-9), and had listed thereon a credit card debt in excess of \$5,000 which in fact had been paid off before the divorce judgment was entered (10/23/08 Trans. Pg. 94, 95, and pg 96, lines 1-13). It appears that the only time that John was totally honest is when he gave Heidi a card and hand written letter just before she vacated the marital farm residence (Reg. of Actions #187, Defendant's Exhibit A, Appellant's Appendix #19, pages 70-74).

¶ 44 CONCLUSION:

¶ 45 The division of marital property ordered by District Court Judge Bruce Romanick was arbitrary and capricious and nearly as unconscionable as the settlement agreement which was initially accepted by him and incorporated into the judgment. The

judgment which he entered after remand should be reversed and remanded with specific instructions to award to Heidi approximately 50% of the marital estates fair market value, with an initial up front payment of \$200,000 and the balance payable over a ten year period of time. The fact that Heidi was compelled to file for bankruptcy protection is not evidence that she dissipated the marital estate, but rather is evidence of the initial unfair and unconscionable division of marital assets, her need for temporary spousal support to provide for herself and her children, and attorney fees and expenses to obtain her fair share of the marital estate.

¶ 46 The parenting plan or visitation schedule ordered by District Court Judge Bruce Romanick totally ignored the fact that the parties had agreed and stipulated that Heidi was to have primary physical custody, and that the visitation ordered was to be reasonable and liberal. It ignored the fact that after judgment had been enter, Heidi and John had verbally agreed that the children would stay with John from Thursday through Sunday, for a brief period time while Heidi continued her education and secured appropriate living accommodations for her and the parties' children, but thereafter John would not agree to Heidi having the children every other weekend (9/21/09 Trans: pg 41: lines 13-15; pg 42, lines 1-25; pg 113, lines 1-25; pg 114, lines 1-25; pg. 115, lines 1-25; pg 116, lines 1-1-10). John admitted that he questioned the children and would contact and disrupt them at school but denied that anyone told him this was not appropriate (9/21/09 Trans. Pg 42 lines 24-25; pg 43 lines 1-17) Judge Romanick apparently discounted the detriment which John's questioning and interrogation of his children was inflicting upon them and ignored the opinions of the children's two counselors who were well qualified to advise on what was in the children's best interest (Appellant's Appendix

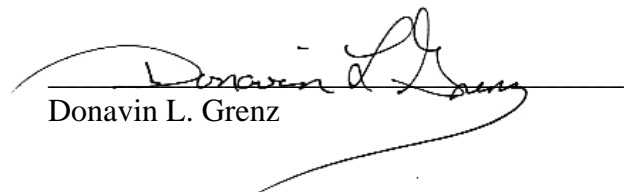
pgs 29-31 and 32-33; Curriculum Vitaes: Appellant's Appendix pgs 36-54; 9/21/09 Trans: pgs 70-97; 98-111). Apparently Judge Romanick concluded that Heidi's decision not to compel the children to go to their father's residence was more inappropriate than John's inappropriate behavior, and implied that the children would be determined to be unruly if they did not immediately resume visitations with their father even though the counselor's recommended counseling first to correct John's inappropriate behavior and to help the children express their true feeling before engaging in visitations with John (9/21/09 Trans: pg 141 lines 7-21).

¶ 47 When the children expressed their fears about visiting with their father, Heidi discussed the problems with the children's counselor; thereafter she did not compel the children to visit with their father, but did not restrict their contact with John and permitted them to visit with him whenever they stated they wanted to visit, believing that this was in the best interests of the children (9/21/09 Trans: pg 124, lines 5-25; pg 125, lines 1-6; pg 126, lines 3-25; pg 127, lines 1-21).

¶ 48 CONCLUSION:

¶ 49 Judge Romanick's order and resulting amended judgment awarding to John the majority of parenting time with the children should be reversed and remanded with the instruction that Heidi have parenting time with the children from Thursday through Sunday every other weekend and name a parenting coordinator or mediator for the parties to contact should there be any problems with the counseling which was recommended.

¶ 50 Dated this 29th day of January, 2010.

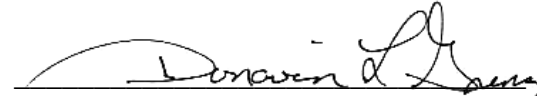

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¶ 51 CERTIFICATE OF SERVICE

¶ 52 I, Donavin L. Grenz, hereby certify that on January 29, 2010, I did serve true and correct copies of Appellant's Brief, and Appellant's Appendix, together with this Certificate of Service upon Paul Myerchin, Attorney for John Eberle by email @ clarklaw@btinet.net; Michael Wagner, Bankruptcy Trustee @ mwagner@wlfpc.net and did serve the same for filing with Penny Miller, Supreme Court Clerk @ supclerkofcourt@ndcourts.gov.

¶ 53 Dated this 29th day of January, 2010.


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