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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kathleen Markgraf and Marilyn Shanahan, Plaintiffs and Appellees v. Connie Welker, Vicki Ostrem, Defendants and Appellants and Margaret Rehmer, Robert Leroy Hannah, Jr., Robert Hannah, Cheryl Hannah, Donna Shilliam, William J. Hannah, Estate of William J. Hannah, Mary Hannah, Estate of Mary Hannah, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, Kathryn Hannah Nelson, Barbara Eggert, Estate of Barbara Eggert, Arnold Hannah, Estate of Arnold Hannah, Donald Hannah, Estate of Donald Hannah, Larry Erickson, Estate of Larry Erickson, and all other persons unknown claiming any estate interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, legatees, personal representatives, devisees, creditors or otherwise, Defendants and Appellees	**SUPREME COURT NO. 20160449** Civil No. 31-2013-CV-00151

ON APPEAL FROM ORDER ON REMAND AND ORDER FOR JUDGMENT DATED NOVEMBER 17, 2016 AND THE JUDGMENT DATED NOVEMBER 21, 2016

MOUNTRAIL DISTRICT COURT
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE RICHARD L. HAGAR

APPELLANTS' BRIEF

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II. Does a district court err in imposing an implied trust distributing mineral rights to claimants when their claims are barred by the twenty-year statute of limitations for quiet title actions?

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

[¶2] This is an appeal from a judgment for the Plaintiffs, Kathleen Markgraf and Marilyn Shanahan ("Markgraf & Shanahan"), in a quiet title action. Markgraf & Shanahan sued their cousins, Connie Welker and Vicki Ostrem ("Welker & Ostrem"), along with others who did not appear in the action, under an implied trust theory to determine ownership of certain Mountrail County, North Dakota mineral rights to which Welker & Ostrem hold record title. (A ("Appendix") at 9).

II. TRIAL COURT.

[¶3] The Honorable Richard L. Hagar, District Court, North Central Judicial District.

III. COURSE OF PROCEEDINGS.

[¶4] In September of 2014, Markgraf & Shanahan and Welker & Ostrem each moved for summary judgment on Markgraf & Shanahan's implied trust claims. (A. at 81; 83; 91; and 93). Hearing on both summary judgment motions was held on November 3, 2014. (A. at 173).

[¶5] The District Court issued its *Order Granting Plaintiff's Motion for Summary Judgment; Denying Defendants' Motion for Summary Judgment; Order for Judgment; and Judgment* on March 6, 2015. (A. at 156). The District Court granted Markgraf & Shanahan's *Motion for Summary Judgment*. (Id.). The District Court quieted title in the manner suggested by Markgraf & Shanahan. (Id.).

[¶6] Welker & Ostrem appealed to this Court for the first time on April 24, 2015 in Markgraf v. Welker, 873 N.W.2d 26, 2015 ND 301 ("Markgraf v. Welker I"), contending the District Court had erred in entering summary judgment for Markgraf & Shanahan because their claims were barred by the statute of limitations and because the record

demonstrated they could not prove their claims by clear and convincing evidence. (A. at 168). In Markgraf v. Welker I, this Court concluded summary judgment for Markgraf & Shanahan was not appropriate, and reversed and remanded the matter to the District Court for further proceedings consistent with its decision. (A. at 203).

[¶7] On remand to the District Court, Markgraf & Shanahan and Welker & Ostrem submitted a stipulated statement of facts and exhibits. (A. at 220). The parties each also submitted a Post-Trial Brief (A. at 341; A. at 363) and Response Brief (A. at 392; A. at 406). A short bench proceeding was held on August 30, 2016. (A. at 424).

IV. DISTRICT COURT'S DISPOSITION.

[¶8] The District Court issued its *Order on Remand; Order for Judgment; and Judgment* on November 21, 2016. (A. at 414). In its *Order on Remand*, the District Court found "that there is clear and convincing evidence that a resulting trust was created for the benefit of the family of W.J. and Mary Hannah" (A. at 418). The District Court also found that "Arnold did not repudiate the trust." (A. at 422). The District Court quieted title in the manner suggested by Markgraf & Shanahan. (Id.).

V. THE APPEAL.

[¶9] Welker & Ostrem have now appealed to this Court for the second time. Welker & Ostrem contend the District Court erred in entering judgment for Markgraf & Shanahan because the record shows Markgraf & Shanahan cannot prove their implied trust claims by clear and convincing evidence, and because their claims are barred by the twenty-year statute of limitations for quiet title claims. (A. at 461).

STATEMENT OF THE FACTS

[¶10] On December 27, 1965, "W.J. Hannah, a single man" conveyed four parcels of Mountrail County, North Dakota land (the "Property") to "Arnold Hannah, Trustee" by

Grant Deed (the "1965 Grant Deed"). (A. at 232). The 1965 Grant Deed was executed to "Arnold Hannah, Trustee", but fails to identify the beneficiary of any trust or the nature of any trust. (Id.)

[¶11] Both parties to the 1965 Grant Deed are deceased – W.J. Hannah, the grantor and Arnold Hannah's father, is believed to have died in early 1966 (A. at 229); Arnold Hannah, the grantee, died on March 31, 1993. (Id.). During the time between the recording of the 1965 Grant Deed and Arnold Hannah's death in 1993, Arnold Hannah conveyed the surface of the Property to various parties by deed, reserving for himself title to the minerals (the "Mineral Rights"). (A. at 248, 256, 258, 270, and 272). Welker & Ostrem, who are Arnold Hannah's only children, are the successors-in-interest to Arnold Hannah's interest in the Mineral Rights. (A. at 225-26).

[¶12] From the time of his parents' deaths in 1965 and 1966, until December 30, 1989, it appears, based on the aged correspondence admitted as evidence, that Arnold managed all of the assets of his parents' estates and distributed proceeds from them, including from the Mineral Rights, between himself and his relatives. (See, e.g., A. at 233, 256, 267, and 268.

[¶13] Several of Arnold's writings from 1965 to December 30, 1989 detail his role in the management and distribution of his parents' assets. On March 24, 1967, Arnold wrote to his brother Donald:

> Shortly after Mothers death, it was felt that rather than have all the monies, properties, etc., t[r]ansfer[r]ed to me by authority of the Power of Attorney, personally, as Arnold Hannah, and which had been done prior to her death, it might tend to confuse my other personal, and business holdings and interests, taxwise and otherwise, so we decided it should be made in the name of Arnold Hannah, Trustee, and that way I could keep everything separate and in good order with the minimum amount of Bookkeeping.

(A. at 233).

[¶14] Several of Arnold's other writings from 1965 to 1989 address his use of "Arnold Hannah, Trustee" on the legal documents he executed during that time. In an October 5, 1971 note to a Shell Oil Company representative, Arnold Hannah wrote:

> Note: Just for the record, there is no trust agreement as such. This property was deeded to me along with other property by my parents W.J. & Mary C. Hannah, and with the full knowledge and consent of other members of the family, and with no strings attached. The name(?) Arnold Hannah, Trustee was used, merely to distinguish from other properties owned by me.

(A. at 247).

[¶15] Writings and correspondence from 1981 detail discussion between siblings Arnold, Kathryn, and Robert about how to handle the Mineral Rights moving forward. In a September 19, 1981 handwritten statement, Kathryn, also appearing to sign for Robert, wrote:

> Pool the mineral rights on all three quarters of the W.J. Hannah estate. In case of Robert L. Hannah's death rights go equally to Robert L. Hannah Jr. and Alan G. Hannah. Death of Kathryn J. Nelson's death rights go equally to Marilyn A. Shanahan Kathleen A. Markgraf. We would like Arnold Hannah to continue management of the mineral rights on all three quarters. Divide the mineral rights profits as
>
> Arnold J. Hannah 40%
> Robert L. Hannah 30%
> Kathryn J. Hannah 30%...

(A. at 262). A handwritten statement from Arnold Hannah dated about a month later, October 27, 1981, details the "Current Status of Land Sales, Lease Monies, Etc." and outlines $33,500.00 payments to be made to Kathryn, Robert, and Arnold. (A. at 265).

[¶16] Sometime between the 1981 correspondence between the siblings and Robert's death on March 11, 1985, the evidence shows Kathryn and Robert agreed that Arnold alone should retain the Mineral Rights moving forward. Arnold Hannah's letter dated

December 30, 1989, which appears to have been sent to his nephews Robert Leroy Hannah and Alan Hannah and his niece Margaret Rehmer, and copied to his sister, Kathryn Hannah Nelson, provides:

> As you may know, after all the North Dakota land as sold, the bills paid, etc., and proceeds d[i]vided among all concerned **it was decided by your father [Robert] and Kathryn, that I should have what remained of the mineral rights on the land**, for all the time & legal expense of settling the folk's estate, which took some amount of time & expense, taking care of the folks while they were here, managing the farm, selling it, etc. They had deeded everything to me, knowing that I would d[i]vide the net balance equally, which I have done. However, after a lot of negotiation, I managed a good deal on a bonus, so will share, with you and Allen, Margie. And Kathryn, I don't expect anything more in the future.

(A. at 276). Per Arnold's December 30, 1989 letter, Robert and Kathryn agreed, sometime before Robert's death in 1985, that Arnold would keep the Mineral Rights.

[¶17] Kathryn appears to have received Arnold's December 30, 1989 letter, as Arnold's subsequent January 17, 1990 letter to Kathryn and her husband Walter looks to be Arnold's reply to Kathryn and her husband's response to his December 30, 1989 letter. (A. at 277).

[¶18] There is no evidence Arnold distributed any proceeds from the Mineral Rights to Kathryn or any other family members after his December 30, 1989 letter. There is no evidence that the agreement between Kathryn, Robert, and Arnold that Arnold should keep what remained of the Mineral Rights moving forward was modified. Via Affidavit, Connie Welker has provided testimony that Arnold was an honest person, and was known in the community as a person of honesty and a good businessman. (A. at 338). Kathryn's daughters Kathleen Markgraf and Marilyn Shanahan filed this quiet title action on September 23, 2013, more than twenty-three years after Arnold sent their mother his December 30, 1989 letter.

LAW AND ARGUMENT

[¶19] The District Court erred in entering judgment in favor of Markgraf & Shanahan on their implied trust claims and quieting title to the Mineral Rights in the manner proposed by them. First, the District Court erred in concluding there is clear and convincing evidence supporting the imposition of an implied trust. The record does not provide clear or convincing evidence showing a violation of any agreement, understanding, or confidential relationship concerning the Mineral Rights such that an implied trust should be imposed as a remedy. Second, the District Court erred in concluding that "Arnold did not repudiate the trust" so as to prevent the application of the twenty-year statute of limitations for quiet title claims. Arnold's December 30, 1989 letter informing his relatives he was keeping what remained of the Mineral Rights is a clear repudiation of any alleged trust which required him to distribute the Mineral Rights amongst his relatives.

I. STANDARD OF REVIEW.

[¶20] The District Court's November 17, 2016 *Order* provided:

> After consideration of the parties' arguments and the stipulated and admissible facts and exhibits submitted herein, the Court arrives at the same conclusion it did in its February 17, 2015, *Order* – that there is clear and convincing evidence that a resulting trust was created for the benefit of the family of W.J. and Mary Hannah based on the 1965 Grant Deed…

(A. at 414). Such a conclusion from the District Court is properly viewed as a conclusion of law or mixed question of law and fact to be reviewed under the de novo standard, rather than a question of fact to be reviewed under the clearly erroneous standard.

[¶21] Whether there is clear and convincing evidence to support an implied trust is a question of law or mixed question of fact and law to be reviewed de novo on the entire record. See Workforce Safety & Ins. v. Larry's On Site Welding, 2014 ND 81, ¶ 14, 845

N.W.2d 310 ("In reviewing a mixed question of fact and law, the underlying predicate facts are treated as findings of fact, and the conclusion whether those facts meet the legal standard is a question of law."). A district court's conclusion that the evidence for imposition of an implied trust rises to the level of clear and convincing to support an implied trust is plainly "a conclusion [as to] whether [the underlying predicate facts] meet the legal standard" of clear and convincing. See id. It is not to be viewed "in the light most favorable to the establishment of an implied trust" as if it were a finding of fact. Paulson v. Meinke, 389 N.W.2d 798, 803–04 (N.D. 1986) (Vandewalle, J., dissenting).

[¶22] The manner in which this Court has analyzed past implied trust claims supports that the proper standard of review is de novo rather than clearly erroneous. The Court's opinions demonstrate that the Court conducts a review of the evidence of the entire record to determine whether "the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust" and thus "is not [or is] sufficient to establish a trust." Scheid v. Scheid, 239 N.W.2d 833, 838 (N.D. 1976) (quoting Boddington v. Herman, 35 N.W.2d 561, 563 (N.D. 1948)).

[¶23] Welker & Ostrem believe a de novo review standard should also be applied to the District Court's conclusion "that Arnold did not repudiate the trust" because such a conclusion can be arrived at only by applying rules of law. (A. at 422). As this Court said in E.E.E., Inc. v. Hanson, 318 N.W.2d 101, 104 (N.D.1982), "[f]indings of fact are the realities as disclosed by the evidence as distinguished from their legal effect or consequences." When the ultimate conclusion "can be arrived at only by applying rules of law the result is a 'conclusion of law.'" Id. See also Slope Cty., Etc. v. Consolidation Coal Co., 277 N.W.2d 124, 127 (N.D.1979). The evidence in this case consists entirely of

documents stipulated to by the parties and submitted to the District Court. To the extent the District Court made "findings", those findings were the District Court's application of the stipulated documents to what the Judge thought was the applicable law. There was no "trial" in the ordinary understanding of that term. The District Court's conclusion that Arnold "did not repudiate the trust" is Judge Hagar's application of the law to the facts and is properly viewed as a conclusion of law or mixed question of fact and law which is fully reviewable by this Court.

II. THE DISTRICT COURT'S DETERMINATION THAT THERE IS CLEAR AND CONVINCING EVIDENCE IN SUPPORT OF AN IMPLIED TRUST IS ERRONEOUS BECAUSE THE WEIGHT OF THE EVIDENCE FAVORS THE OPPOSITE CONCLUSION.

[¶24] Markgraf & Shanahan claim a resulting trust, or alternatively a constructive trust, should be imposed. Their claims are based on the premise that Arnold Hannah's retention of the Mineral Rights is a violation of a family understanding that Arnold was required to divide the Mineral Rights equally between himself, his siblings Robert and Kathryn, and his niece Margaret Rehmer, but not his brother Donald. Markgraf & Shanahan's implied trust claims fail because the 1965 Grant Deed unambiguously conveys the Mineral Rights to Arnold Hannah, record title to the Mineral Rights now belongs to his successors-in-interest Welker & Ostrem, and Markgraf & Shanahan cannot prove such a result is inconsistent with or in violation of any discernible family understanding to the contrary by clear and convincing evidence.

A. The 1965 Grant Deed unambiguously conveys the Mineral Rights to Arnold, and his daughters Welker & Ostrem hold legal title to the Mineral Rights.

[¶25] Pursuant N.D.C.C. Section 47-09-12, the 1965 Grant Deed is unambiguous and conveys title to the Mineral Rights to Arnold Hannah in his individual capacity. The 1965

Grant Deed, from W.J. Hannah to "Arnold Hannah, Trustee" fails to identify the beneficiary or nature of any suggested trust. (A. at 232). N.D.C.C. Section 47-09-12 directly addresses this circumstance, and provides:

> If any instrument relating to real or personal property shall be executed by or to any person as trustee...and shall fail to identify clearly the beneficiary by name and the nature of the trust, the qualifying words in such instrument shall be treated as surplusage...

N.D. Cent. Code § 47-09-12. The North Dakota Title Standards, at Section 10-06, clearly derived from the statute, provides:

> Identifications such as "'trustee'...without further identification of the beneficiary by name or the nature of the trust, are merely descriptive and the person is deemed to be acting in an individual capacity.

N.D. Title Standards § 10-06. N.D.C.C. Section 47-09-12 and N.D. Title Standards § 10-06 therefore dictate that the qualifying word "trustee" after Arnold Hannah's name in the 1965 Grant Deed is merely descriptive and Arnold is deemed to be acting individually. (See A. at 232). Accordingly, the 1965 Grant Deed unambiguously conveys title of the Mineral Rights to Arnold Hannah individually, and Arnold's daughters Welker & Ostrem hold legal title to the Mineral Rights as his successors-in-interest.

B. Markgraf & Shanahan have the burden to prove by clear and convincing evidence that Arnold's retention of the Mineral Rights himself was a wrongful taking or holding of them in violation of some agreement to the contrary.

[¶26] It is a well-settled rule that a party asking a court impose an implied trust (which, in legal effect, would set aside a deed absolute on its face) bears a heavy evidentiary burden. Scheid v. Scheid, 239 N.W.2d 833, 838 (N.D. 1976). North Dakota courts employ this high evidentiary burden to implied trust claims because they "are reluctant to ingraft a trust by parol on the legal title to real estate". Rieger v. Rieger, 175 N.W.2d 563, 573 (N.D. 1970). Instead of the preponderance of the evidence standard required in most

civil cases, "[a]n implied trust, whether resulting or constructive, must be established by clear and convincing evidence." McGhee v. Mergenthal, 2007 ND 120 at ¶ 10, 735 N.W.2d 867. "[U]nder the clear and convincing standard, the evidence must be such that the trier of fact is reasonably satisfied with the facts the evidence tends to prove as to be led to a firm belief or conviction." Zundel v. Zundel, 278 N.W.2d 123, 130 (N.D. 1979). "If the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient to establish a trust." Scheid, 239 N.W.2d at 838 (quoting Boddington v. Herman, 35 N.W.2d 561, 563 (N.D. 1948)). Thus, evidence is insufficient to impose an implied trust when "the evidence in the record having any tendency to support a theory of implied trust can just as easily be construed to support other conclusions." McCarney v. Knudsen, 342 N.W.2d 380, 386 (N.D. 1983).

[¶27] When there has been delay in the assertion of the trust against the person with legal title, as there has been here, resulting in difficulty in procuring witnesses and in establishing a defense, implied trust claims are held to an even higher standard of proof, especially where the implied trust is based on communications or transactions with a person since deceased. Johnson v. Larson, 79 N.D. 409, 56 N.W.2d 750, 756-57 (1953); Hendrickson v. Syverson, 82 N.W.2d 827, 835 (N.D. 1957).

[¶28] There are two types of implied trusts: resulting and constructive. Schroeder v. Buchholz, 2001 ND 36, ¶ 5, 622 N.W.2d 202. A resulting trust is based on the parties' intentions and "exists where the acts or expressions of the parties indicate an intent that a trust relation resulted from their transaction." Spagnolia v. Monasky, 2003 ND 65, ¶ 15, 660 N.W.2d 223 (quoting Loberg v. Alford, 372 N.W.2d 912, 915 (N.D. 1985)). "Imposition of a resulting trust gives a vague or incomplete agreement the substance that

was originally intended by the parties." McGhee, 2007 ND 120 at ¶ 12. "A constructive trust is an equitable remedy to compel a person who unfairly holds a property interest to convey it to the rightful owner." Spagnolia, 2003 ND 65 at ¶ 15. Two essential elements must be established to prove the existence of a constructive trust: unjust enrichment and a confidential relationship.

[¶29] An implied trust, whether resulting or constructive, is a remedial device to be imposed to correct a wrongful taking or holding of property. Holbach v. Holbach, 2010 ND 116, ¶ 30, 784 N.W.2d 472 (Sandstrom, J., dissenting) (citing 76 Am.Jur.2d *Trusts* § 132 (2005)). To establish they are entitled to have the Court impose an implied trust, Markgraf & Shanahan must prove by clear and convincing evidence that what did occur with respect to Arnold Hannah's handling of the Mineral Rights ***was in violation of*** a particular understanding concerning their ownership. See id.

C. The record does not show by clear and convincing evidence that Arnold's retention of the Mineral Rights himself was a wrongful taking or holding of them in violation of some agreement to the contrary, an essential element to creation of an implied trust.

[¶30] The Mineral Rights were held by Arnold Hannah, individually, pursuant to N.D.C.C. Section 47-09-12, and are now held by Welker & Ostrem. Markgraf & Shanahan have not proven that Arnold's retention of the Mineral Rights is ***in violation of*** some particular agreement, understanding, or confidential relationship. Therefore, there is no wrongdoing or injustice to be remedied by imposition of an implied trust. See Holbach, 2010 ND 116, ¶ 31 (Sandstrom, J., dissenting) ("I would not reverse on the basis of the implied trust argument either. Here, there was no wrongful taking or unlawful holding of property…the terms of the agreement to agree are not reasonably certain and definite such that they can now be enforced.").

[¶31] The evidence on which Plaintiffs Markgraf & Shanahan rely in support of their claims points to no violation of any understanding, but instead tends only to show Arnold paid out proceeds from the Mineral Rights to his relatives until 1989 ***in accordance with*** some understanding concerning the Mineral Rights and then kept the Mineral Rights himself after 1989 ***in accordance with*** some understanding concerning the Mineral Rights. While there generally may have been some understanding Arnold would manage all the assets of W.J. Hannah and make distributions in some fashion between 1965 and 1989, which is not clear from the record, the particular terms of such an understanding are unclear, and there is no evidence Arnold's retention of the Mineral Rights after December 30, 1989 was in violation of any particular understanding that may have existed.

[¶32] In a March 24, 1967 letter from Arnold to Donald Hannah, Arnold makes clear that his parents' assets included "accounts receivable, the bulk plant, the land, etc." and that before W.J.'s death "we had most of the transfers made direct from him...to me, Arnold Hannah, Trustee...". (A. at 233). Thereafter, from 1965 until December 30, 1989, Arnold apparently managed all of the assets of his parents' estates and distributed proceeds from them, including from the Mineral Rights, between himself and his relatives. (See, e.g., A. at 233, 265, 267, and 268).

[¶33] Arnold's conduct is consistent with what Arnold wrote in his December 30, 1989 letter, which suggests that Arnold had fulfilled the requirements of any understanding with respect to his management and distribution of his parents' assets by that time. (A. at 276) (emphasis added) ("They had deeded everything to me, know that I would d[i]vide the net balance equally, **which I have done**..."). His December 30, 1989 letter makes

clear that he was retaining the Mineral Rights from that point forward, in a manner consistent with an understanding reached between himself, Kathryn, and Robert, who had died in 1985. (Id.) ("As you may know, after all the North Dakota land was sold, the bills paid, etc., and proceeds d[i]vided among all concerned it was decided by your father [Robert] & Kathryn, that I should have what remained of the mineral rights on the land…").

[¶34] Arnold's December 30, 1989 letter is strong evidence that his sole retention of the Mineral Rights after 1989 was done **in accordance with** an understanding between Kathryn, Robert, and himself, rather than **in violation of** some understanding to the contrary. In the face of Arnold's December 30, 1989 letter, Markgraf & Shanahan have not and cannot prove by clear and convincing evidence that Arnold violated any agreement or understanding which may have existed concerning the Mineral Rights by keeping what remained of them after December 30, 1989.

[¶35] There is simply no consistent, reliable, or clear evidence that Arnold Hannah did anything that was not allowed under the parameters of any agreement, understanding, or confidential relationship with respect to the Mineral Rights. The record consists primarily of communications or transactions by or between descendants of W.J. Hannah who are since deceased. Arnold Hannah's December 30, 1989 letter is the best evidence of the Hannah family's (specifically siblings Kathryn, Robert, and Arnold's) agreement with respect to the Mineral Rights – that Arnold alone would keep the Mineral Rights himself "for all the time & legal expense of settling the folk's estate, which took some amount of time & expense, taking care of the folks while they were here, managing the farm, selling it, etc." (A. at 276).

[¶36] Statements within pre-1989 documents contain discussion between the siblings about how to handle the Mineral Rights, but are vague, inconsistent, and likely were made before Kathryn and Robert decided that Arnold would keep the Mineral Rights. (See e.g. A. at 262 ("We would like Arnold Hannah to continue management of the mineral rights on all three quarters. Divide the mineral rights profits as: Arnold J. Hannah 40%; Robert L. Hannah 30%; Kathryn J. Hannah 30%")). Kathryn's own 1981 writing is inconsistent with her conduct of sending the letter to the Mountrail County Register of Deeds in 2002, and with Markgraf & Shanahan's proposed distribution of the Mineral Rights in this action. (See id.). Kathryn's 1981 writing states that Arnold should get 40% of the mineral proceeds distribution, while she and Robert Hannah should get 30%. (See id.). W.J. Hannah had five children, however. One child, Donald, had apparently taken certain other assets of his parents' as his share of their estate. (A. at 233). One child, Wilbert Hannah, had died in 1952 leaving an heir, Margaret Rehmer. (A. at 229). But the 1981 letter from Kathryn seems to contemplate an arrangement under which only the living children of W.J. Hannah were to receive proceeds from the Mineral Rights, as her proposed 100% allocation in 1981 only involved her, Robert and Arnold. (See A. at 262).

[¶37] Arnold's relatives' post-1989 conduct is a much less reliable indicator of Kathryn, Robert, and Arnold's true pre-1989 understanding than the December 30, 1989 letter, and can easily be explained and put into perspective. The relatives' conduct in executing leases was likely nothing more than a response to proposed lessees using the common oil field boom tactic of leasing with every possible person who might make a claim to minerals and letting the dust settle. By engaging in such leasing practices, the lessee can

ensure it ends up with the entire leasehold. The bonus money paid by the lessee to those lessors who may not actually hold good title to mineral rights is a small price for the lessee to pay as part of its overall investment.

[¶38] The relatives' conduct in entering into leases may be evidence those relatives, or the lessee, *thought* they could exercise authority over the Mineral Rights, but it is not evidence their belief was true. See McCarney v. Knudsen, 342 N.W.2d 380, 386 (N.D. 1983). (Susan Knudsen, until informed otherwise by her attorney, may have thought she was required to use the insurance proceeds to pay off the loan; it was not evidence she was so required). The same can be said for Kathryn Nelson's statements in her 2002 letter to the Register of Deeds, as well has her 2012 Statement of Claim. At most, the relatives' post-1989 conduct is in direct conflict with the Hannah siblings' agreement as outlined in the December 30, 1989 letter.

[¶39] Given the conflict in the evidence between the December 30, 1989 letter and the relatives' post-1989 conduct, it cannot be said the state of the evidence leaves the fact finder with a firm belief or conviction that the siblings did not agree that Arnold should keep the Mineral Rights sometime before Robert's death in 1985. See Zundel v. Zundel, 278 N.W.2d 123, 130 (N.D. 1979). ("under the clear and convincing standard, the evidence must be such that the trier of fact is reasonably satisfied with the facts the evidence tends to prove as to be led to a firm belief or conviction.").

[¶40] Simply put, Arnold Hannah's December 30, 1989 letter and his other representations that there were "no strings attached" to his title to the Mineral Rights cannot be ignored. (See A. at 247; 276). Such representations are strong evidence that Arnold kept the Mineral Rights after 1989 in accordance with his family's understanding.

In the face of such evidence, Markgraf & Shanahan have not and cannot demonstrate by clear and convincing evidence that Arnold violated a family understanding by keeping the Mineral Rights, regardless of his relatives' post-1989 conduct. Arnold Hannah's letters and actions were taking place while certain of his siblings were alive, and were made much closer in time to W.J. Hannah's execution of the 1965 Grant Deed than his relatives' inconsistent post-2000 conduct. There is no documentation in the record of any objection made in response to Arnold's December 30, 1989 statement that he was keeping the Mineral Rights and, after 1989, Arnold held the Mineral Rights in his name and made no distributions from the proceeds of the Mineral Rights to his relatives.

[¶41] At the very least, Arnold Hannah's December 30, 1989 letter and his other representations that there were "no strings attached" to his title to the Mineral Rights establish that there are reasonable explanations for Arnold's sole retention of the Mineral Rights other than his violation of a family agreement that the Mineral Rights were to be distributed equally between the Hannah relatives. In its opinion in this matter, the North Dakota Supreme Court said the following with respect to the implied trust evidence:

> Reasonable differences of opinion exist about the inferences to be drawn from the evidence. There was also conflicting evidence which required the court to weigh the evidence or attempt to discern the truth of the matter in order to reach its decision. Because we are reviewing the district court's decision under the standard of review for summary judgment and not the standard of review governing bench trials, we conclude the court erred in finding an implied trust was created and the trust was not altered by a subsequent agreement.

Markgraf v. Welker, 2015 ND 303, ¶ 29, 873 N.W.2d 26, 37. If the evidence relied upon by a claimant to establish an implied trust can just as easily be construed to support other conclusions, there can be no implied trust. See Scheid, 239 N.W.2d at 838; McCarney, 342 N.W.2d at 386.

[¶42] In McCarney v. Knudsen, this Court held that no implied trust had been established by clear and convincing evidence. In so holding, this Court wrote that "[t]he evidence in the record having any tendency to support a theory of implied trust can just as easily be construed to support other conclusions." Id. at 386. After listing several other potential conclusions, this Court wrote that the defendant "may even in her own mind feel a moral obligation to repay the loan, which, however, does not rise to a legal obligation and does not show the existence of an implied trust." Id.

[¶43] Like the evidence in McCarney, the evidence relied on by Markgraf & Shanahan in support of their argument that Arnold's retention of the Mineral Rights was a violation of a family understanding can just as easily be construed to support other conclusions, such as: (1) there was an agreement that Arnold keep the Mineral Rights (2) Kathryn and Robert's September 19, 1981 letter asking to divide the Mineral Rights 40%, 30%, 30% was written before she and Robert decided Arnold should keep 100% ; (3) the relatives signed oil and gas leases in the 2000's under the mistaken belief they owned an interest in the Mineral Rights, or they did not really know; (4) the oil and gas lease lessee entered into leases with the relatives in the 2000's under the mistaken belief or out of an abundance of caution to ensure he obtained full lease rights to the Mineral Rights; (5) by the time Kathryn sent a 2002 letter to the Register of Deeds of Mountrail County, she had forgotten that she and Robert had decided Arnold should keep the Mineral Rights; (6) by the time Kathryn, via her daughter Kathleen Markgraf, filed a Statement of Claim concerning the Mineral Rights in 2012, she had forgotten she and Robert decided Arnold should keep the Mineral Rights sometime before 1985 or was confused as to what she was claiming.

[¶44] If there was any agreement, understanding, or confidential relationship between W.J., Arnold, and the other Hannah siblings with respect to the distribution of the Mineral Rights, there is no evidence indicating that Arnold Hannah's actions were inconsistent with it. No set beneficiaries of any alleged implied trust can be clearly determined from the record. There is nothing in the record to say that Arnold could not, as the final disposition of the Mineral Rights in relation to the whole family, keep them for himself or leave them to his daughters.

[¶45] Markgraf & Shanahan's implied trust claims in fact go completely against what appears to have been the true understanding between Kathryn, Robert, and Arnold with respect to the Mineral Rights. Welker & Ostrem's father Arnold was a straightforward man who would never have taken any action against his siblings' interests or done anything with respect to their parents' assets without his siblings' understanding. (See A. at 338). This is well-evidenced by Arnold's letters telling the family everything he had done and had planned to do with respect to the parents' former assets, including the Mineral Rights. Arnold simply would not have made false statements about the course of events relevant to the Mineral Rights in his December 30, 1989 letter.

[¶46] In sum, there is simply no clear evidence that shows the Mineral Rights were not Arnold Hannah's to do with as he chose. Plaintiffs have not satisfied their high burden in this case to prove their entitlement to have an implied trust imposed. See Johnson v. Larson, 79 N.D. 409, 56 N.W.2d 750, 756-57 (1953) ("'The courts are particularly emphatic in the statements and application of a rule where there has been delay in the assertion of the trust against one having legal title, resulting in difficulty in procuring witnesses and in establishing a defense, especially where the trust is based on

communications or transactions with a person since deceased.'" (citation omitted); Hendrickson v. Syverson, 82 N.W.2d 827, 835 (N.D. 1957) ("The burden of proof in this case is on the plaintiff. It is not lightened by the fact that almost twenty-five years elapsed between the time the farm was deeded to [the legal title holder] and the heirs of the original grantors made an attack upon it.").

[¶47] There is no evidence establishing the terms, beneficiaries, length, or assets of any "trust". Even if there was an agreement or understanding of some kind, which is not clear from the record, that does not mean Arnold Hannah violated it, nor does it mean he did not have the right to hold the Mineral Rights as he decided. To the extent the Court should determine the evidence indicates there was an implied trust created in 1965 requiring Arnold to distribute the Mineral Rights amongst the family, Arnold's December 30, 1989 letter shows that any such implied trust was altered by a subsequent agreement between Kathryn, Robert, and Arnold that Arnold would keep what remained of the Mineral Rights. For all these reasons, there is not clear and convincing evidence that Arnold keeping the Mineral Rights after 1989 was in violation of any family agreement or understanding. Accordingly, the District Court's conclusion that there is clear and convincing evidence supporting the imposition of an implied trust is erroneous, and title to the Mineral Rights should be quieted in Welker & Ostrem.

III. THE DISTRICT COURT'S DETERMINATION THAT ARNOLD DID NOT REPUDIATE ANY ALLEGED TRUST IS ERRONEOUS BECAUSE ARNOLD CLEARLY ASSERTED HIS EXCLUSIVE OWNERSHIP OF THE MINERAL RIGHTS MOVED FORWARD IN HIS 1989 LETTER TO HIS RELATIVES.

A. Arnold repudiated any alleged trust in his December 30, 1989 letter.

[¶48] Even if the Court does not reverse the District Court's conclusion that there is clear and convincing evidence justifying the imposition of an implied trust, Plaintiffs'

implied trust claims nevertheless fail because any implied trust was repudiated over twenty-three years before Markgraf & Shanahan filed this 2013 lawsuit. The twenty-three years commenced when Arnold sent his December 30, 1989 letter expressly informing his sister Kathryn and other family members that he was keeping what remained of the Mineral Rights. (See A. at 276). Therefore, Markgraf & Shanahan's claims are barred by the twenty-year statute of limitations in N.D.C.C. § 28–01–04.

[¶49] The twenty-year statute of limitations in N.D.C.C. § 28–01–04 applies in this quiet title action. Markgraf v. Welker, 2015 ND 303, ¶ 31) ("[t]his is an action to recover real property and N.D.C.C. § 28–01–04 applies."). This Court explained in Markgraf v. Welker I that "[w]hether N.D.C.C. § 28–01–04 applies [to bar Plaintiffs' claims] will depend on whether an implied trust was created and, if a trust exists, whether it was repudiated." Id. at ¶ 34.

[¶50] Any alleged implied trust requiring Arnold to distribute the Mineral Rights amongst the Hannah family was repudiated when Arnold Hannah sent his December 30, 1989 letter, clearly stating to Kathryn and the other family members that he was keeping what remained of the Mineral Rights for himself, to the exclusion of all other family members. Markgraf & Shanahan brought this action to quiet title in 2013.

[¶51] Statutes of limitations generally do not run between the trustee and the beneficiaries unless the trust has been repudiated. Id. at ¶ 33 (citing Hodny v. Hoyt, 243 N.W.2d 350, 357 (N.D. 1976)). A repudiation occurs when a trustee "assert[s] ownership of the property in hostility to the plaintiffs and to their knowledge." Rovenko v. Bokovoy, 77 N.D. 740, 753 (N.D. 1950). "In order to constitute a repudiation there must be something said or done by the trustee in open contravention of the terms of the trust,

and of such character that the relations of the parties will become and continue hostile." Markgraf v. Welker, 2015 ND 303, ¶ 33 (quoting Hodny at 357 (citation omitted)). The mere failure of a trustee to perform his duty is not sufficient to repudiate a resulting trust, rather there must be a distinct act of repudiation amounting to a denial of its existence. Zundel v. Zundel, 278 N.W.2d 123, 132 (N.D. 1979). "[T]he statute of limitations will apply from the date the beneficiary knew of the breach or repudiation or by the exercise of reasonable skill and diligence could have learned of it." Hodny, 243 N.W.2d at 356. (citations omitted).

[¶52] If an implied trust did exist requiring Arnold to distribute the Mineral Rights in the fashion proposed by Plaintiffs (which Welker & Ostrem deny), then Arnold Hannah's December 30, 1989 letter to his nephews Robert Leroy Hannah Jr. and Alan Hannah, his niece Margaret Rehmer, and his sister Kathryn certainly constitutes a repudiation of such implied trust. Arnold Hannah's December 30, 1989 letter provides:

> As you may know, after all the North Dakota land as sold, the bills paid, etc., and proceeds d[i]vided among all concerned **it was decided by your father [Robert] and Kathryn, that I should have what remained of the mineral rights on the land**, for all the time & legal expense of settling the folk's estate, which took some amount of time & expense, taking care of the folks while they were here, managing the farm, selling it, etc. They had deeded everything to me, knowing that I would d[i]vide the net balance equally, which I have done. However, after a lot of negotiation, I managed a good deal on a bonus, so will share, with you and Allen, Margie. **And Kathryn, I don't expect anything more in the future.**

(A. at 276). The December 30, 1989 letter expressly and unequivocally informs Kathryn Nelson and Arnold's other relatives he was retaining the Mineral Rights himself, to the hostility of any interest Arnold's relatives might have in the Mineral Rights, and that there would not be "anything more in the future." Markgraf & Shanahan's mother Kathryn, and the other relatives, therefore had notice on or around December 30, 1989,

over twenty-three years before Markgraf & Shanahan's action, that Arnold was keeping the Mineral Rights. (See Swanson v. Swanson, 2011 ND 74, ¶ 12, 796 N.W.2d 614 ("when a person asserts an ownership interest of certain property to another, such information is notice of that person's purported interest in the property")).

[¶53] Under Plaintiffs' theory that an implied trust existed requiring Arnold to equally distribute the Mineral Rights between all members of the Hannah family, Arnold's December 30, 1989 assertion of sole ownership of the Mineral Rights moving forward is clearly "something said or done by the trustee in open contravention of the terms of the trust, and of such character that the relations of the parties will become and continue hostile", and therefore constitutes a repudiation. See Markgraf v. Welker, 2015 ND 303, ¶ 33. Accordingly, the statute of limitations on any action by Kathryn or her successors-in-interest seeking ownership of Arnold's interest in the Mineral Rights began running on or around December 30, 1989 and expired on or around December 30, 2009.

B. No Hannah relative except Arnold Hannah and his daughters Welker & Ostrem has been seized or possessed of the Mineral Rights since at least December 30, 1989.

[¶54] N.D.C.C. § 28-01-04, entitled "Actions for recovery or possession of real property-Limitation", provides:

> No action for the recovery of real property or for the possession thereof may be maintained, unless the plaintiff, or the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action.

[¶55] Pursuant to N.D.C.C. § 28–01–04, Markgraf & Shanahan are barred from bringing this action, unless they or their mother Kathryn were "seized or possessed" of the Mineral Rights within twenty years before bringing the action. See Markgraf v.

Welker, 2015 ND 303, ¶ 32. The twenty-year period is measured back from the commencement of the action. Id. (citation omitted).

[¶56] The holder of a legal title is not "seized nor possessed" of real property until he is fully invested with either actual or constructive possession of it. Wehner v. Schroeder, 335 N.W.2d 563, 566 (N.D. 1983). "A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it." Haas v. Bursinger, 470 N.W.2d at 223 (quoting Black's Law Dictionary's (Fifth Addition 1979) definition of "possession"). "A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it." Id.

[¶57] In the mineral rights context, a person is not "seized or possessed" of mineral rights once she has notice she does not have authority to exercise dominion over them. Wehner v. Schroeder, 335 N.W.2d 563, 566 (N.D. 1983). The fact that a person executes an oil and gas lease concerning a parcel does not constitute actual possession of it. See Sickler v. Pope, 326 N.W.2d 86, 93 (N.D. 1982) ("The oil and gas leases executed by Sickler and her predecessors, while evidence of possession, do not constitute actual possession sufficient for adverse possession of the severed mineral interest.").

[¶58] Further, once a person has notice she does not have the authority to exercise dominion over mineral interests, she is not in constructive possession of them. See Wehner, 335 N.W.2d at 566 ("They did not have constructive possession because they had constructive notice of the problems in the recorded documents involving the mineral interest and, therefore, did not have the authority to exercise dominion over the mineral

interest.").

[¶59] None of Kathryn or Markgraf & Shanahan's post-1989 conduct is evidence they were in possession of the Mineral Rights. Kathryn's execution of mineral leases in 2001 and 2007, the drafting of a letter to the Mountrail County Recorder in 2002, and the filing of a Statement of Claim in 2012 do not establish she had constructive possession of the Mineral Rights within 20 years of the commencement of this action. Kathryn, and the Plaintiffs, her successors-in-interest, had constructive notice that Arnold Hannah held record title to the Mineral Rights. Kathryn had actual notice of Arnold's assertion of sole ownership of the Mineral Rights in 1989 or very early 1990 when she received Arnold's December 30, 1989 letter informing her he was keeping the Mineral Rights. See Wehner, 335 N.W.2d at 566. Kathryn "did not have the authority to exercise dominion over the mineral interest" when she executed leases for certain of the Mineral Rights, sent a letter to the Mountrail County Recorder, or filed a Statement of Claim. Therefore, none of her conduct is evidence she was in constructive possession of the Mineral Rights. The statute of limitations on any action by Kathryn or her successors-in-interest seeking ownership of Arnold's asserted interest in the Mineral Rights therefore began running on or around December 30, 1989, and expired on or around December 30, 2009.

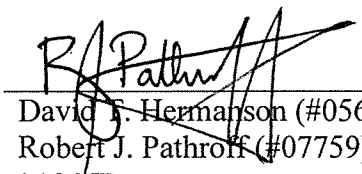
[¶60] The evidence shows neither Markgraf & Shanahan, nor their predecessor-in-interest Kathryn Nelson, nor any other Hannah relative except Arnold and Welker & Ostrem, have been "seized or possessed" of the Mineral Rights within twenty years of Markgraf & Shanahan's filing of this quiet title action on September 23, 2013. Accordingly, pursuant to N.D.C.C. § 28-01-04, Markgraf & Shanahan's claims are barred and must be dismissed. See Haas, 470 N.W.2d at 223.

CONCLUSION

[¶61] The District Court erred in granting judgment for Markgraf & Shanahan because the record is such that Markgraf & Shanahan cannot establish that there is clear and convincing evidence that an implied trust, whether resulting or constructive, should be imposed requiring Arnold Hannah to distribute the Mineral Rights to his relatives, and because Markgraf & Shanahan's implied trust claims are barred by the twenty-year statute of limitations for quiet title actions. Welker & Ostrem are entitled to judgment quieting title to the Mineral Rights in them and dismissing Markgraf & Shanahan's resulting and constructive trust claims. The Court should reverse the holding of District Court and either render judgment for Welker & Ostrem or direct entry of judgment for Welker & Ostrem on remand.

Respectfully submitted April 19, 2017.

VOGEL LAW FIRM

By: 

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kathleen Markgraf and Marilyn Shanahan, Plaintiffs and Appellees v. Connie Welker, Vicki Ostrem, Defendants and Appellants and Margaret Rehmer, Robert Leroy Hannah, Jr., Robert Hannah, Cheryl Hannah, Donna Shilliam, William J. Hannah, Estate of William J. Hannah, Mary Hannah, Estate of Mary Hannah, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, Kathryn Hannah Nelson, Barbara Eggert, Estate of Barbara Eggert, Arnold Hannah, Estate of Arnold Hannah, Donald Hannah, Estate of Donald Hannah, Larry Erickson, Estate of Larry Erickson, and all other persons unknown claiming any estate interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, legatees, personal representatives, devisees, creditors or otherwise, Defendants and Appellees	**SUPREME COURT NO. 20160449** Civil No. 31-2013-CV-00151

ON APPEAL FROM ORDER ON REMAND AND ORDER FOR JUDGMENT DATED NOVEMBER 17, 2016 AND THE JUDGMENT DATED NOVEMBER 21, 2016

MOUNTRAIL DISTRICT COURT
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE RICHARD L. HAGAR

AFFIDAVIT OF ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Alicia Rash, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on April 19, 2017, **Appellants' Brief and Appendix to Appellants' Brief** were filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

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Alicia Rash

Subscribed and sworn to before me this 19 day of April, 2017.

JULIE KINNISCHTZKE
(SEAL)
Notary Public
State of North Dakota
My Commission Expires Nov 23, 2022

Notary Public