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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jason P. Stevenson,	)	
	)	
Plaintiff - Appellant,	)	
	)	
vs.	)	**Supreme Court No. 20190106**
	)	**Civil No. 29-2018-DM-00006**
Rhonda S. Biffert,	)	
	)	
Defendant - Appellee.	)	

APPEAL FROM THE MEMORANDUM DECISION AND ORDER ENTERED OCTOBER 12, 2018 AND JUDGMENT DATED FEBRUARY 1, 2019 IN DISTRICT COURT, COUNTY OF MERCER, STATE OF NORTH DAKOTA THE HONORABLE JAMES S. HILL PRESIDING

BRIEF OF DEFENDANT - APPELLEE

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NO ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

CASES:

STATUTES AND LEGISLATION:

CONSTITUTIONAL PROVISIONS:

RULES:

I. JURISDICTIONAL STATEMENT

[¶1] The trial court had jurisdiction pursuant to N.D. Const. art. VI, § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6 and N.D.C.C. § 28-27-01

II. STATEMENT OF THE ISSUES

[¶2] Issue 1: The trial court properly analyzed and applied the best interests factors as set forth in N.D.C.C. § 14-09-60.2 and a substantial weight of the evidence supports the trial court's findings. Jason has failed to show that the trial court's determination of primary residential responsibility is clearly erroneous.

[¶3] Issue 2: Appellant's issues relating to the real property and the additional offsets are ***moot***.

[¶4] Issue 3: The trial court afforded both parties due process under the law and properly addressed the issues before the court.

[¶5] Issue 4: Appellee should be awarded her attorney fees for having to respond to the arguments made in the appeal.

III. STATEMENT OF THE CASE

[¶6] In addition to the Appellant's Statement of the Case, Appellee, Rhonda S. Biffert (hereinafter "Rhonda") specifically states that on January 30, 2018 her attorney of record at the time filed an Answer and Counterclaim requesting a partition of the real property.[1] (App. 14).

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[1] Rhonda Biffert's first attorney asked for a "partition" of the real estate, however, the property has always been held in the name of Jason Stevenson. (Ex. 8) It is clear from the record, however, that Jason Stevenson agreed that Rhonda Biffert had an equitable interest in the property. (Tr. 149)

[¶7] Thereafter, on February 1, 2018, Appellant, Jason P. Stevenson, (hereinafter "Jason") filed a Reply to Counterclaim also requesting an "equitable distribution" of the real property. (App. 17).

[¶8] Furthermore, the parties entered into a Stipulation for Partial Judgment and Parenting Plan which provided that "Evidence will be presented at the September 28, 2018 Trial as to who shall receive the residence and how the equity in the home shall be apportioned." (App. 133).

[¶9] After the trial court issued its Memorandum Decision and Order, the parties entered into negotiations to address issues which were not addressed by the trial court and/or otherwise required clarification. As a result, the parties entered into a Stipulation for Additional Order for Judgment dated January 30, 2019. (Index No. 193, Supplemental App. 1). Specifically, the parties included a provision for parenting time for Jason (S. App. 4, ¶6); precise provisions for the sale of the real property and the distribution of the proceeds (S. App. 4, ¶7); and a cash payment to Rhonda for a sale of a truck. (S. App. 5, ¶8). Ultimately, all of these terms were included in the Judgment dated February 1, 2019. (App. 276). With the exception of the award of primary residential responsibility and paragraphs 15, 48 and 49, every single word of the Judgment was derived by way of stipulation of the parties. (App. 122; S. App. 3).

IV. STATEMENT OF THE FACTS

[¶10] The facts, as presented by Jason, are largely irrelevant as required under N.D.R.App.P. 28(l), and some are not supported by citations to the record, as required under N.D.R.App.P. 28(f). Rhonda, therefore, has drafted her own Statement of Facts for this Court's review as follows:

[¶11] The following are *undisputed* facts supported by *Jason's own testimony*. Jason and Rhonda were never married. (Tr. 70). There is one child born of the relationship namely, K.S. who was eight years old at the time of trial. Id. When the child was born, Rhonda did more of the hands-on caregiving for the child including picking up and dropping off at daycare, feeding, bathing and clothing. (Tr. 140). As the child got older, Rhonda, for the most part, still maintained the role of the primary hands-on caregiver. Id. Jason started to do more activities with him such as hunting, fishing and playing. (Tr. 141). Rhonda remained responsible for maintaining the home, cleaning the home, doing the laundry and cooking the meals. Id. Jason does not dispute that Rhonda provides good care for K.S and is a devoted mother. Id.

[¶12] K.S. is a well-behaved child who is good in school. (Tr. 126). He loves his mom and his dad. Id. K.S. has a good group of friends, has good manners, is very good at sports and is in good health. (Tr. 127).

[¶13] Jason and Rhonda's relationship ended in approximately November of 2017. Jason moved out of the home and into a townhouse. (Tr. 92). The parties had disagreements regarding the parenting time schedule. (Tr. 94). Jason wanted to have equal parenting time. Id. Jason pursued an interim order to address the parenting time and residential responsibility. (Tr. 96). The parties stipulated that Rhonda would have temporary primary residential responsibility and Jason would have parenting time. (App. 75).

[¶14] Jason has a diagnosis of depressive disorder, ADHD and anxiety disorder. (App. 160). He was prescribed mediation but discontinued the medication without the advice of a doctor. (Tr. 160-161). This had a negative

effect on his mood. Id. Jason works for Otter Tail Power Company just south of Beulah, North Dakota on a full-time basis. (Tr. 70). He works four ten-hour shifts each week. He earns over $80,000 per year. (Tr. 163).

[¶15] Jason and Rhonda purchased a home in Hazen, North Dakota in December of 2013. (Tr. 72). The purchase price was $215,000. (Tr. 73). When the home was purchased, Rhonda initially put a down payment on the home in the amount of $30,000. (Tr. 74, Tr. 148). She then put an additional $90,000 towards the principal on the mortgage. (Tr. 75, Tr. 149). Rhonda contributed a total of $120,000 toward the purchase of the home. (Tr. 149). Jason agreed that Rhonda could receive the home. (Tr. 77). Jason does not dispute that he owes Rhonda her "fair share" of the house. (Tr. 149). Jason has never disputed that Rhonda is entitled to what she financially contributed. (Tr. 169). A market analysis requested by Jason reflected a value of approximately $208,000.[2] (Tr. 154, Ex. 104, App. 236). Jason wanted to be reimbursed the difference between the purchase price, less what Rhonda put into the real property, which he calculated to be approximately $101,702. (Tr. 78). Rhonda asked that she be awarded 57% of the net proceeds. (Tr. 251). This is the amount she contributed to the property, based on the current fair market value. Both parties asked for a "partition" of the real property. (See Appellee's Statement of the Case.)

[¶16] The following are *undisputed* facts based upon the testimony of the parenting investigator. The parenting investigator was not familiar with Rule 8.6, N.D.R.Ct. (Tr. 177). The parenting investigator spent approximately 6.15 hours

[2] The exact estimated fair market value reflected on Exhibit 104 is $208,969.

with Jason and/or K.S. and 2.9 hours with Rhonda and/or K.S. (Tr. 206). The parenting investigator spent only 45 minutes with Rhonda and K.S. together. (Tr. 204). The parenting investigator did not follow up with Rhonda after receiving allegations from Jason's collateral contacts to see how she responded to the allegations. (Tr. 206-208). She agreed that her report could be viewed as "one-sided." Id. The parenting investigator evaluated N.D.C.C. § 14-209-06.2 (1)(a) under old law. (Tr. 209). It is also apparent that she misapplied this factor as well. (Tr. 212-218).

[¶17] The parenting investigator did not property cite to the resources used in her report to form some of her opinions. (Tr. 231-232). She included statements in her report based on statements she took out of context from the mental health providers. (Tr. 235). She further misapplied factor (j) when preparing her report, which is made abundantly clear from her testimony. (Tr. 238).

[¶18] The court rejected the recommendations of the parenting investigator and awarded Rhonda primary residential responsibility. The trial court did not make specific findings regarding the parenting time to be awarded to Jason. (App. 249). After the Memorandum Decision and Order but before the entry of Judgment, the parties entered into a stipulation to resolve those issues left unaddressed by the Court or those issues needing further clarification. (S. App. 3). Neither party filed post-trial motions.

V. STANDARD OF REVIEW

[¶19] A trial court's determination of primary residential responsibility is a finding of fact which will not be reversed unless it is clearly erroneous. Law v. Whittet, 2015 ND 16, ¶ 4, 858 N.W.2d 636. The clearly erroneous standard "does

not allow [the Court] to reweigh the evidence, reassess the credibility of witnesses, or substitute [its] judgment for a district court's initial decision." Martiré v. Martiré, 2012 ND 197, ¶ 6, 822 N.W.2d 450.

VI. LAW AND ARGUMENT

Issue 1: The trial court properly analyzed and applied the best interests factors as set forth in N.D.C.C. § 14-09-06.2 and a substantial weight of the evidence supports the trial court's findings. Jason has failed to show that the trial court's determination of primary residential responsibility is clearly erroneous.

[¶20] A trial court must consider the best interests of the child in awarding primary residential responsibility, and in doing so must consider all the relevant best interest factors contained in N.D.C.C. § 14-09-06.2(1).

[¶21] These factors include all of the following when applicable:

a. The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance.

b. The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.

c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.

d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.

e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

f. The moral fitness of the parents, as that fitness impacts the child.

g. The mental and physical health of the parents, as that health impacts the child.

h. The home, school, and community records of the child and the potential effect of any change.

i. If the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court also shall give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.

j. Evidence of domestic violence. In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility. The court shall cite specific findings of fact to show that the residential responsibility best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary, to protect the welfare of the child, residential responsibility for a child may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards residential responsibility to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent residential responsibility. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

k. The interaction and inter-relationship, or the potential for interaction and inter-relationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.

l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child.

m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.

[¶22] The trial court's findings must contain sufficient specificity to show the factual basis for the court's decision. As the Court notes in Molitor v. Molitor, 2006 ND 163, ¶ 6, 718 N.W.2d 13.

> [T]he trial court's findings of fact should be stated with sufficient specificity to enable us to understand the factual basis for the court's decision. *Id.* On review, a trial court's opportunity to observe the witnesses and determine credibility should be given great deference. Hanson v. Hanson, 2003 ND 20, ¶ 11, 656 N.W.2d 656. A trial court's custody determination is a finding of fact that will not be set aside on appeal unless it is clearly erroneous. Shaw, 2002 ND 114, ¶ 5, 646 N.W.2d 693. The complaining party bears the burden of showing that a trial court's custody determination was clearly erroneous. L.C.V. v. D.E.G., 2005 ND 180, ¶ 3, 705 N.W.2d 257. A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) only if it is induced by an erroneous view of the law, there is no evidence to support it, or, though some evidence supports it, on the entire record we are left with a definite and firm conviction a mistake has been made.

[¶23] Jason, in support of his position that the decision of the trial court is clearly erroneous, argues that the court erred by using an improper legal standard; by ignoring and misstating substantive and uncontroverted evidence; and by improperly analyzing the best interest factors in making its determination to award Rhonda primary residential responsibility.

[¶24] Jason is unable to articulate, however, how the legal standard was improperly applied. In support of this argument, Jason cites to one paragraph of the court's Memorandum and Order wherein the court states that "Jason works without credible evidence to 'shift' the primary residential responsibility." (App. 258). If this paragraph is read within the entire context of the Memorandum and Order the reader will see that this language was not and did not place an additional burden on Jason. The trial court did not state that Jason had to prove that that child was endangered, nor did the court require Jason to show that there had been

a willful interference with his parenting time. The court did not cite to nor reference any other higher burden of proof as suggested by Jason. The court was simply stating that the weight of the evidence did not support awarding Jason primary residential responsibility after Rhonda was granted interim residential responsibility. Perhaps the use of the word "shift" is not an ideal choice of words, but this does not rise to the level of a misapplication of the law upon reading the Memorandum and Order as a whole. There is nothing else in the record which supports the statement that the trial court misapplied the law.

[¶25] Not only did the trial court make extensive factual findings under N.D.C.C. §14-09-06.2 (1), but it also made extensive observations and findings of fact regarding the credibility of the witnesses. Jason quotes portions of the record, sometimes out of context, to support his argument that the court misapplied the law or misstated the facts of the case. This Court in Molitor made the same observation and held:

> In his brief on appeal from the initial custody determination, Molitor invites us to reexamine the record in bits and pieces favorable to his case. Under our standard of review, however, we look to whether there is evidence to support the trial court's decision. There is clearly evidence on the record which supports this decision. Our standard of review also allows us to reverse if our review of the entire record leaves us with a definite and firm conviction a mistake has been made. Our standard of review does not allow us to reverse the trial court merely because of the possibility we may have decided a case differently. As we have said, when dealing with findings of fact:
>
> > [R]eading a cold transcript is no substitute for hearing and observing witnesses as they testify. Tones of voice, hesitations, confusion, surprise, and other telltale indications of mental state convey to trial judges and jurors much that is lost to appellate judges. If we were to judge from the cold print, we might decide many cases differently than trial judges do, and this case might be one of them. But, if we decided differently, we would have no assurance that ours was the better decision.

> City of Jamestown v. Neumiller, 2000 ND 11, ¶ 12, 604 N.W.2d 441 (quoting State v. Tininenko, 371 N.W.2d 762, 764-65 (N.D. 1985)). Our standard requires a definite and firm conviction a mistake has been made. We have no such conviction in this case.

Id. ¶ 9.

The Court Properly Disregarded the Parenting Investigator Report.

[¶26] Jason also suggests that the trial court's frustration with the parenting investigator "seemed to color it legal analysis and lead the district court to use the incorrect legal standard." (Appellant's Brief, ¶ 33). This statement is neither supported by any argument, nor are there any facts which would tend to support this statement. The record is very clear that the parenting investigator did not do a thorough investigation of the matters in this case. Any "frustration" of the trial court was equally shared with Rhonda and clearly justified and more than supported by the record including the testimony of the parenting investigator.

[¶27] The trial court is not required to follow a [parenting] investigator's recommendation and has the discretion in deciding what weight to assign to the investigator's conclusion. Marsden v. Koop, 2010 ND 196, ¶13, 789 N.W.2d 531 (citing, Wolt v. Wolt, 2010 ND 26, ¶ 9, 778 N.W.2d 786). The record supports that the parenting investigator was not familiar with Rule 8.6, N.D.R.Ct. (Tr. 177); or all of the best interest factors under N.D.C.C. § 14-09-06.2(1) (Tr. 210-212); or the definition of domestic violence (Tr. 239); failed to make additional inquiry or investigation regarding those statements made to her (Tr. 206-208); spent a disproportionate amount of time with Jason and failed to afford Rhonda a similar amount of time in interviews or observations (Tr. 206); and spent a

disproportionate amount of time with Jason's collateral contacts and failed to afford Rhonda's collateral contacts a similar amount of time. Id.

[¶28] The fact that the trial court correctly identified the flaws in the investigative practices of the parenting investigator is not an appealable error. Here, not only did the trial court review the report of the investigator, the court also had an opportunity to observe the parenting investigator as a witness and make a determination as to her credibility. On review, a trial court's opportunity to observe the witnesses and determine credibility should be given great deference. Hanson v. Hanson, 2003 ND 20, ¶ 11, 656 N.W.2d 656. The trial court properly rejected the findings and recommendations of the parenting investigator under these circumstances.

The Court Made Findings of Fact Consistent with the Evidence Presented.

[¶29] In making its decision, the trial court found that N.D.C.C. § 14-09-06.2 (1) (b) (f) (g) and (l) favored neither party; that factors (a) (d) and (e) favored Rhonda and that factors (c), (h) and (k) slightly favored Rhonda; and factors (i) and (j) were not applicable to this case. Jason has asked this Court to reweigh the evidence presented at trial. This Court should refuse the invitation to reweigh the evidence on appeal and defer to the trial court's opportunity to observe and assess the witness credibility. Doll v. Doll, 2011 ND 24, 794 N.W.2d 425 (ND 2011).

[¶30] Jason cites to Law v. Whittet, 2014 ND 69, 844 N.W.2d 885 for the proposition that "the court may not wholly ignore and fail to acknowledge or explain significant evidence clearly favoring one party." Id. at ¶ 10. However, Law is factually distinguishable from this case now being decided. In Law, the trial court awarded the parties joint residential responsibility. In doing so, the court made no

findings and ignored the evidence that Whittet's employment had been sporadic, that she had 10 residences in four years, that Law demonstrated he had a more stable home and that Whittet had in fact committed acts of domestic violence, yet the court concluded that "neither party engaged in domestic violence" (a statement completely contrary to the record). The trial court not only considered the evidence presented but also made several credibility determinations regarding the testimony. The trial court did acknowledge the evidence presented by Jason. The trial court was not buying what Jason was selling on the day of trial.

[¶31] Each and every issue raised by Jason on this appeal as it relates to K.S. is a matter of the weight of the evidence presented and an invitation to reweigh that evidence. This Court has consistently held, "we will not substitute our judgment for that of the trial court and will not reverse a trial court's finding under the best interests of the child factors merely because we might have reached a different result." Doll, ¶ 24. Jason cannot argue bits and pieces of the transcript before this Court as the record needs to be viewed as a whole and the trial court's interpretation or view of the evidence.

The Trial Court Did Not Improperly Insert Itself in the Proceeding.

[¶32] The trial court did not "dictate" the parties' presentation of the case by stating that it wanted to hear testimony from the parenting investigator. The parenting investigator was listed as a witness on Jason's Witness and Exhibit List (Index 124), so it is disingenuous to state that the trial court somehow compelled Jason to call the parenting investigator as a witness. Furthermore, Jason made no objection at trial that he should not have to call the parenting investigator as a witness.

[¶33] Jason argues that the trial court inappropriately interjected during testimony, took an investigative role, interjected more during Jason's testimony than Rhonda's testimony and required Jason to "provide testimony he was wholly unqualified to provide." These arguments must be rejected by this court as well. It is unclear if Jason is arguing that the trial court was biased in its evidentiary rulings or its questioning during the trial, but one thing is certain: A trial court has broad discretion in its control of the presentation of evidence, and clear authority under Rule 614, N.D.R.Ev. to interrogate witnesses, particularly in a matter tried to the court. Mayo v. Mayo, 2000 ND 204, ¶ 39, 619 N.W.2d 631.

[¶34] Furthermore, because Jason did not object during the trial regarding these issues, his arguments on appeal must be rejected. Issues not raised before the trial court cannot be raised for the first time on appeal. Klose v. Klose, 524 N.W.2d 94, 96 (N.D. 1994). The purpose of this rule is to prevent a party from inviting error upon the trial court and then seeking to prevail upon appellate review of the invited error. Id.

[¶35] Jason may have preserved an objection regarding the question whether he thought his depression could be more organic than situational, to which he responded, "no." (Tr. 161, 11). Jason appeared to understand the question and answered it. He was speaking from his own personal knowledge. Furthermore, the trial court specifically found that, "there is nothing in the record to suggest that either parent is mentally or physically unhealthy." (Index No. 191; App. 269). Therefore, even if the court did err in allowing this question and answer, such an error was harmless because it did not factor into the ultimate decision of the court.

Issue 2: Appellant's issues relating to the "partition" of real property and the additional offsets are moot.

[¶36] Jason's arguments regarding the real property and the offsets are rendered moot due to his voluntary agreement to pay disputed amounts to Rhonda. (S. App. 7). On January 30, 2019 the parties entered into an agreement which contained the following relevant and conclusively binding agreements which reads in part:

> WHEREAS, the parties are desirous of amicably settling their differences with regard to the matters contained herein and the parties are signing this document and agree that they shall appear by way of this agreement, and shall not make a further appearance herein.
> ...
>
> WHEREAS, the parties understand and agree that this Stipulation contains their complete agreement, and that there are no other matters which need to be resolved unless this agreement identifies those issues.
> ...
>
> The parties agree that the following terms and provisions may, if approved by the Court, be entered in the above-captioned matter as an additional Order for Judgment.
> ...
> Upon the sale, the proceeds shall be paid as follows: Expenses of sale, which means the usual and customary expenses of the sale such as attorneys' fees, points, real estate commissions, etc.; A credit to the party for 100% of the verified costs related to a realtor recommended improvement made, but not mutually agreed upon by the parties. The remaining proceeds shall be divided such that Rhonda receives 57% and Jason receives 43%.
> ...
>
> **PAYMENT FOR TRUCK**. Jason shall pay Rhonda the sum of Eight Thousand Dollars ($8,000) by no later than April 10, 2019 as and for her share of the truck proceeds. Jason may pay this amount from his share of the proceeds from the sale of the house pursuant to paragraph 47 herein, so long as he also pays the North Dakota judgment rate for interest, calculated monthly.

[¶37] The general rule in North Dakota is that a party accepting substantial benefits pursuant to a divorce judgment waives the right of appeal. Geier v. Geier,

332 N.W.2d 261, 263 (N.D. 1983). "Before the waiver of the right to appeal can be found to exist, there must be an unconditional, voluntary, and conscious acceptance of a substantial benefit under the judgment." Grant v. Grant, 226 N.W.2d 358, 361 (N.D. 1975). Granted, this is not a divorce judgment, however, the parties were on notice of all of the issues, agreed that those issues would be decided, did not object to the court deciding the issues, actually ***stipulated*** to the issues (Index No. 193, Supplemental App. 1), and then carried out the terms of the stipulation. [3]

[¶38] Here, Jason has satisfied all conditions of the Judgment dated February 1, 2019. The real property has been sold and transferred. All stipulated payments have been made. All court ordered payments have been made.

Issue 3: **The trial court afforded both parties due process under the law and properly addressed the issues before the court.**

[¶39] Jason argues that he was not provided notice that issues of property and other offsets would be decided at trial. This claim is disingenuous at best. The issues relating to the real property were plead in the initial pleadings and issues relating to real property and the offsets (the loan and the truck) were completely discussed, disclosed and debated during the entire proceeding. These issues are also moot for the reasons stated hereinafter.

[¶40] A partition action is commenced by service of a complaint under N.D.C.C. 32-16-02, which states:

> The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint specifically and particularly as far as known to the plaintiff, and if one or more of the parties,

[3] Motion pending in district court to supplement the record on appeal to include the Satisfaction of Judgment.

> or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain, or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder so that such parties cannot be named, that fact must be set forth in the complaint.

[¶41] An action for the partition of real property may partition personal property in the same action. N.D.C.C. § 32-16-01. Rhonda's Counterclaim meets these minimal criteria to put Jason on notice of the proceeding. Furthermore, the parties Stipulation for Partial Judgment states "the parties agree and stipulate to the fact that the District Court captioned above has both in personam and subject matter jurisdiction over all issues arising in the action in the above-captioned case, and that this jurisdiction extends, but is not limited to issues of primary residential responsibility parenting time, child support, ***and partition of real property.***" (App. 2). (Emphasis supplied). For Jason to claim that he was not on notice of this proceeding is patently inaccurate.

[¶42] Jason introduced testimony and exhibits regarding the real property at trial. (Tr. 72-78 Ex. 8-11). He further testified that he wanted to receive a percentage of the equity from the real property. (Tr. 77-78). Jason argues that the trial court did not explain how it arrived at the award of 57% of the net proceeds to Rhonda from the sale of the house. It is an undisputed fact that Rhonda contributed $120,000 to the purchase price of the house. (Tr. 149, 169). The evidence presented at trial suggested a fair market value of the house of $208,969. (Ex. 104). Simple math reveals that Rhonda invested 57% into the total value of the property.

[¶43] The trial court received Exhibit 104 over Jason's objection. (Tr. 150-154). The court permitted this evidence to come in after Jason testified that he

and Rhonda wanted to have a market analysis done, that he chose the person to prepare the market analysis, and the market analysis was prepared, at his request, just days before trial. Id. This was the only evidence the trial court had regarding the value of the real property. Jason presented no evidence or testimony regarding the current value of the real property. Even if the trial court made a mistake in allowing the document to come into evidence, this would also be a harmless error, because there was no other evidence the court had before it regarding the value.

Issue 4: **Appellee should be awarded her attorney fees for having to defend this appeal.**

[¶44] "If the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees." Rule 38, N.D.R.App.P.

[¶45] This Court has held:

> An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith. Holbach v. Holbach, 2010 ND 116, ¶ 17, 784 N.W.2d 472 (quoting Healy v. Healy, 397 N.W.2d 71, 76 (N.D.1986)). Tarnavsky's claims on appeal are nothing more than collateral attacks on the district court's previous judgments and orders and are 'so factually and legally devoid of merit that he should have been aware of the impossibility of success on appeal.' Questa Res., Inc. v. Stott, 2003 ND 51, ¶ 8, 658 N.W.2d 756. We award Tschider double costs, and nominal attorney fees of $500, for defending the appeal. See United Valley Bank v. Lamb, 2003 ND 149, ¶ 5 n. 1, 669 N.W.2d 117 ("[A] request for attorney's fees should be accompanied by an affidavit documenting the work performed on appeal if more than a nominal amount is requested.")

Tarnavsky v. Tschider, 2011 ND 207, ¶ 2, 806 N.W.2d 438.

[¶46] Rhonda requests that she be awarded her reasonable attorney fees for having to respond to and defend this appeal. Jason is appealing the court's ruling on the division of land and, although it is not clear, the court's decision to

address two other collateral issues, the $5,000 loan and the proceeds from the sale of the truck. He is also appealing the award of primary residential responsibility to Rhonda.

[¶47] The Judgment in this matter was largely stipulated between the parties as shown by the Stipulation for Partial Judgment (App. 122) and Stipulation for Additional Terms for Judgment. (S. App. 3). Jason voluntarily agreed to the terms that would be incorporated into the Judgment because the parties were "desirous of amicably settling their differences with regard to the matters..." (S. App 3, ¶2). He voluntarily agreed to specific terms for the sale of the house, including a 57% to 43% division of the equity and he further agreed to pay Rhonda $8,000 for her interest in the truck.

[¶48] How can Jason possibly assert the trial court did not have authority to address these issues, when he stipulated as to how the issues should be treated and he voluntarily paid the amounts to Rhonda? How can Jason possibly assert that the trial court made a mistake regarding the division of the real property when he has already received the benefits from the sale of the property? The simple answer is, he cannot. Jason could not reasonably expect to prevail on these issues when the issues have been stipulated to and resolved according to that stipulation. He has made no argument as to why he should be relieved from the obligations contained in his stipulated agreement, and is unable to explain how the court erred in making its decision.

[¶49] Further, Jason's arguments are largely unsupported by facts or law. For example, Jason makes no argument about the subject matter jurisdiction of the court other than to state, "if this court determines the trial court had subject

matter jurisdiction." It is clear that the parties cannot stipulate to subject matter jurisdiction, that is a well resolved concept in the law. (See e.g. Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 10, 580 N.W.2d 583, "Subject-matter jurisdiction is the court's power to hear and determine the general subject involved in the action....". Long v. Long, 439 N.W.2d 523, 525 (N.D.1989) "Subject-matter jurisdiction is derived from the constitution and the laws, and cannot be conferred by agreement, consent or waiver."

[¶50] However, the trial court clearly has subject matter jurisdiction over a piece of land situated in the State of North Dakota. The relief granted by the court was specifically pled *by both parties* so there are no "due process violations" here. While it is true, that it is unorthodox to decide property issues within the context of a parentage dispute, what the court did here (with the consent of all of the parties) was essentially consolidate actions, which probably should have been brought separate and apart from each other. The result would be exactly the same. Both parties were on notice of all of the issues and the trial court had jurisdiction to decide the matter. For Jason to argue otherwise at this point is devoid of merit.

[¶51] Jason also presents arguments to the court regarding its decision on residential responsibility which also lack merit. Without articulation, he asserts that the court applied the "incorrect legal standard" in his case, violated his due process rights and misstated the facts. "The proper function of an appeal is to convince the appellate court that the decision of the trial court should be reversed or rectified. Consequently, while appeals must by necessity test the validity of established legal principles and seek the adoption of new legal propositions, they must have some legitimate basis in fact and law Otherwise, courts and litigants,

especially appellees, are forced to engage in the disposition, costly in terms of both time and money, of trifling and unnecessarily bothersome claims." Mitchell v. Pruesse, 358 N.W.2d 511, 514 (ND 1984) (Citation omitted.)

[¶52] Here, Jason asks this Court to supplant its own judgment for that of the trial court. He asks the court to reweigh the evidence produced at trial. He picks and chooses those facts befitting his narrative in an attempt to convince the Court that "the evidence submitted at trial does not support the district court's analysis, nor conclusion." (Appellant Brief, ¶79). He even cites to affidavits from the interim proceeding in this matter, when the affiants were not available for cross examination on the day of trial. Because Jason's appeal lacks all merit, Rhonda must be awarded her attorney fees.

VII. CONCLUSION

[¶53] Jason, as the complaining party, has failed to demonstrate on appeal that any of the court's findings of fact on primary residential responsibility are clearly erroneous. The trial court was presented with two fit, but imperfect, parents, and performed the difficult task of assessing the evidence and the credibility of the witnesses to make the decision while applying the factors enumerated in N.D.C.C. § 14-09-06.2(1). There is evidence in the record to support the trial court's findings of fact, including its ultimate finding that the best interest of the child would be better served by awarding primary residential responsibility to Rhonda.

[¶54] Jason's arguments regarding the division of the real property and the offset issues are moot because he stipulated to the treatment of those issues and has already satisfied the terms of the stipulation. There is nothing for this Court to decide with regard to these matters.

[¶55] Rhonda requests an award of attorney fees consistent with Affidavit of DeAnn M. Pladson on file herewith.

Respectfully submitted this 23rd day of September, 2019.

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CERTIFICATE OF COMPLIANCE

[¶56] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32(e) in that the brief was prepared with Arial, size 12-point font, proportional typeface and that the total number of pages does not exceed Twenty-seven (27) pages.

Dated this 23rd day of September, 2019.

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CERTIFICATE OF FILING AND SERVICE

[¶57] I, DeAnn M. Pladson, an attorney licensed in the State of North Dakota, hereby certify that on September 23, 2019, the following documents were filed with the Supreme Court Clerk of Court at supclerkofcourt@ndcourts.gov:

a. Appellee's Brief (PDF & Word version);

b. Supplemental Appendix; and

c. Affidavit of DeAnn M. Pladson.

[¶58] Copies of these documents were served electronically via email on all separately represented parties at the e-mail addresses listed below:

Kristen Redmann
Attorney at Law
kredmann@redmannlawpc.com

[¶59] This service was made under N.D.R.Ct. 3.5 and N.D.R.App.P. 25.

Dated this 23rd day of September, 2019.

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