

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Allan Herbert Froemke, Deceased)	Supreme Court Case No.:
)	2022-0321
Reginald Froemke, Personal Representative, Petitioner and Appellee,)	Ransom County No.:
)	37-2020-PR-00019
v.)	
)	
Terry Carter and Brenda Ciccone,)	
)	
Respondents and Appellants,)	
)	
and)	
Melody A. Reams, Debra L. Reinke, Duffy A. Froemke, Carrie Mennis, Benjamin P. Froemke, Stephanie A. Nielsen, LeeJoy Froemke, Andy Froemke, and Jackie Freymiller, and Daniel J. Froemke,)	
Respondents.)	

**REPLY BRIEF OF APPELLANT
TERRY CARTER**

REPLY BRIEF OF APPEAL FROM THE RAMSON COUNTY DISTRICT
COURT’S SEPTEMBER 13, 2022 JUDGMENT IN FAVOR OF THE PERSONAL
REPRESENTATIVE

DISTRICT COURT OF THE SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE MARK T. BLUMER PRESIDING

ORAL ARGUMENTS REQUESTED

Dated this 17th day of April, 2023.

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INTRODUCTION

1. COMES NOW, the Appellants, Terry Carter and Brenda Ciccone, by and through their respective attorneys of record, Will Budke of Lies, Bullis, and Hatting, PLLP, and Brandon Erickson of O’Keeffe, O’Brien, Lyson, Ltd, hereby submits the following in Reply to Appellee’s Brief. This Reply Brief I brough pursuant to Rule 28(d) of the North Dakota Rules of Appellate Procedure. All supporting facts have been pleaded in Appellant’s Brief.

LAW AND ARGUMENT

A. Timing.

2. Rule 31(a) of the North Dakota Rules of Appellate Procedure allow an appellant to serve and filed a reply brief within 14 days after service of the appellee’s brief. N.D.R.App.P. 31(a). However, if there is less than fourteen days before oral arguments the reply brief must be filed at least 5 days before argument. *Id.* When a period is stated in Days or a longer unit of time, exclude the day of the event that triggers the period; count every day, including intermediate Saturdays, Sundays, and legal holidays; and include the last days of the period, but if the last is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. N.D.R.App.P. 26(a)(1).

3. Here, oral arguments are scheduled for April 20, 2023. Arguments are currently less than 14 days away and thus a Reply Brief must be filed at least 5 days before the argument. The triggering event in this case is April 20, 2023 and backwards looking. Five days from today’s date, April 14, 2023, counting each intermediate Saturdays, Sundays,

and holidays is April 19, 2023. Therefore, by filing and serving on April 14, 2023, this Reply Brief is timely.

B. Amounts owing to the Estate.

i. \$1,603.00.

4. The Contract for Deed between Allan Froemke and Terry Carter had been satisfied by the parties actions and the contract had expired. A contract may be discharged by performance in accordance with its terms. Am. Jur. Contracts § 513. The Contract for Deed provided for the duration of the contact; specifically providing “Upon Purchase’s full performance of this Contract, Seller shall: (a) Execute, acknowledge and deliver to Buyer a Warranty Deed, in recordable form, conveying marketable title to the Property to Buyer...” R39: ¶3(a). Reginald testified that Terry finalized the contract for deed and he conveyed a warrant deed to Terry. R:128:63:14-18. The Warranty Deed certified that the full consideration paid for the property described in the deed is \$45,000.00. R:62. Reginald agreed the warranty deed evidence the completion of the contract. R:128:64:23-25. An expired contract releases all parties from their respective contractual obligations. Am. Jur. Contracts § 519. Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction. N.D.C.C. § 9-13-05. On August 1, 2019, Terry received the warranty deed certifying the contract was satisfied. Reginald, now nearly three years later, claims there were outstanding taxes yet on the contract for deed. Should there have been outstanding taxes, he should not have certified the Warranty Deed as to the full performance of the Contract.

5. Neither Reginald nor Allan sought to cancel the contract for deed or bring a claim for breach of contract due to alleged outstanding taxes. Instead of taxing either formal

approach, Reginald attempts to circumvent the legal process and collect through the probate process. Evidence of the conveyance of the Warranty Deed shows Terry fully satisfied the Contract for Deed.

ii. \$5,000.00.

6. Reginald did not establish the \$5,000.00 check was a loan. Reginald, in his Response Brief, bypasses this issue in its entirety. Reginald alleges that Petitioner's Exhibit 4 contained a copy of the bank statements showing the check "exactly as they appeared when they were processed at the bank." There is no evidence to support this allegation. Conversely, Reginald testified to not knowing who wrote the word "LOAN" on the document. R:123:107:16-21. Therefore, there is no evidence of who wrote the word "LOAN" on the check at issue. One thing the parties could agree on was the word "LOAN" was not in Allan's handwriting. Meaning that someone, who remains unknown, wrote the word "LOAN" on the document.

7. Reginald failed to provide any evidence that Brenda received the check or that the \$5,000.00 was ever taken from Allan's account. Brenda had never heard of the alleged \$5,000.00 outstanding until probate process despite the check being from 2014. This creates a pattern from Reginald in which he claims money is owed to the Estate from family members he does not get along with and provides no evidence.

C. Inadmissible Evidence.

8. The purpose of the North Dakota Rules of Evidence "...should be construed so as to administer every proceeding fairly, eliminate unjustifiable expenses and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." N.D.R.Ev. 102. The Rules of Evidence apply to civil actions or

proceedings. N.D.R.Ev. 101. Rule 1101 provides for the applicability and exceptions to the Rules of Evidence. See N.D.R.Ev. 1101. Specifically, the rules of evidence apply in civil cases and proceedings. N.D.R.Ev. 1101(b)(1). Probate proceedings do not fall within an exception to the Rules of Evidence. See N.D.R.Ev. 1101.

9. Hearsay is not admissible unless allowed by statute, the rules of evidence or other rules prescribed by the North Dakota Supreme Court. N.D.R.Ev. 802. “Inadmissible hearsay statements are not competent evidence.”. Schumacker v. Schumacker, 2011 ND 75, ¶ 15, 796 N.W.2d 636; N.D.R.Ev. 802. A district court judge is not immune from committing reversible error on evidentiary rulings. In Haas v. Hudson & Wylie, LLP, 2020 ND 650, 940 N.W.2d 650, this court addressed this very issue. In Haas, Haases owned an adjacent parcel of land from Hudson & Wylie. Id at ¶ 2. The Haases filed a complaint for adverse possession at against Hudson and Wylie. Id at ¶ 4. At a bench trial, Terry Hudson and Luann Wylie testified their late father, Raymond Hudson, told them he knew he owned the portions of land and gave the Haases permission to use the land. Id at ¶5. In a post-trial brief, the Haases objection to the admissibility of this testimony. Id. The district court took the matter under advisement and dismissed the case, concluding the Haases had not adversely possessed the property because their use was permissive. Id at ¶7. On appeal, this Court concluded that the district court committed reversible error by admitting the hearsay statements and remanded the case for a finding without consideration of the hearsay evidence. Id at ¶17. This Court further concluded that it appeared the district court based its conclusion that Raymond Hudson gave the Haases permission to use the property on the hearsay testimony. Id. Affirmatively appearing that the incompetent evidence induced the court to make an essential finding which may not otherwise have been made.

Id. This case is littered with incompetent evidence that was admitted over objections. Nearly all findings the district court made are in reliance on incompetent evidence over competent evidence.

10. As it relates to the appraisals of the farmland, there was no competent evidence admitted. Despite having brought the Motion, Reginald failed to call the appraisers to testify to their appraised value. A witnesses' testimony must be taken in open court unless a statute, the rules of evidence, the rules of civil procedure, or other court rules provide otherwise. N.D.R.Civ.P.43(a). A party must give notice if a witness is unable to testify orally or if testimony by contemporaneous transmission may be necessary. Id. There are two types of witnesses, Lay and Expert. See N.D.R.Ev. 701 and 702. A witness may testify to the matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. N.D.R.Ev. 602.

11. Here, the witnesses who have personal knowledge of the appraised value are the individuals providing the appraisals. Reginald failed to provide notice that these witnesses were either unavailable to testify or would appear by contemporaneous transmission. Neither appraiser was present and subject to cross-examination. Reginald has no personal knowledge nor expertise on the appraised values. By failing to adhere to the Rules of Civil Procedure and the Rules of Evidence, Reginal seeks to be rewarded with the Courts acceptance of hearsay evidence.

12. Further, Reginald testified on behalf the alleged opinion of heirs relating to a purchase. Reginald again had no personal knowledge of the heirs opinion and the heirs were not called to be subject to cross-examination.

13. As for the appraisal of the personal property, Ms. Vanderbrink provided sufficient competent evidence opposing Reginald's speculative value personal property. However, despite the undisputed evidence from Ms. Vanderbrink, the Court relied upon the incompetent evidence proffered by Reginald. It is clear the court was induced to make a finding of the sale of the property based upon the incompetent evidence.

D. In-Kind Distribution.

14. Partitioning property in-kind is the preferred method of distribution of the property. While the Courts may be given discretion to provide alternative avenues for distribution of property, in-kind distributions should be made whenever feasible. Here, there is clear evidence on the record that the in-kind distribution is feasible. The land sought to be partitioned is not tillable, pasture type land directly to the west of Terry's property. Reginald agreed that the land Terry is seeking would not interfere with the ingress and egress of the remaining parcel.

15. The argument that partition is impracticable is short sighted and seeks only to prevent in-kind inheritance to Terry. There was no objection raised to partitioning the proposed parcel, while the evidence on record contains Brenda's support in partition. Reginald testified he did not know if what reduction in sale price of the land would be, there is no boundary issue, and no issue relating to access. Essentially, outside of survey or partition costs, which Terry testified she would provide, there is no reason not to provide Terry with this distribution in-kind.

16. Therefore, this Court should reverse the district court's ruling.

E. Pending Issues.

17. Reginald argues the pending issues are not outcome determinative. The following are issues raised on the motion not addressed by the Court:

- Reginald's untimely and incomplete inventory;
- The omission of vehicles and property previously bid on, such as the Ford Tractor;
- Reginald's Breach of Fiduciary Duty and Self-Dealing; and
- The omission of vehicles and property owned by the estate but not identified.

18. The issue raised on an untimely and incomplete inventory was not addressed at all in the district court's findings. Further, the omission of vehicles and property bid on that was not addressed goes to the heart of the issue. Reginald seeks an order to sell the vehicles for \$12,000.00. Of those vehicles, Terry submitted a bid on a Tractor that was on one inventory and seemly lumped together in the latest to avoid further distribution to Terry.

19. As it relates to the issues of Reginald's Breach of Fiduciary Duty and self-dealing are outcome determinative. Should it be found that Reginald breached his duty and is self-dealing, the district court should at a minimum supervise the estate and its distributions from prejudice against the heirs.

20. For these reasons, the pending issues should be remanded back to the district court.

F. Conclusion.

21. For the reasons stated above, Terry Carter and Brenda Ciccone request the trial court's decision be reversed in its entirety and remanded for proper findings.

22. Respectfully submitted this 14th day of April 2023.

/s/ Will Budke

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Representative,)	
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v.)	
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and)	
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Duffy A. Froemke, Carrie Mennis,)	
Benjamin P. Froemke, Stephanie A.)	
Nielsen, LeeJoy Froemke, Andy)	
Froemke, and Jackie Freymiller, and)	
Daniel J. Froemke.)	

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) SS
COUNTY OF RICHLAND)

I, Will Budke, being first duly sworn, deposes and says that he is of legal age and not a party to the above-entitled matter and that on the 14th day of April, 2023, a true and correct copy of the following document(s):

- Appellants Terry Carter and Brenda Ciccone Reply Brief

were filed and served electronically with the Clerk of Court through Odyssey and that Odyssey will send a Notice of Electronic Filing (NEF) to:

Don Eppler, Eppler Law Office, 502 Main Street, Suite A, P.O. Box 740, Lisbon, North Dakota 58054-0740, at the following last known email address: epplead@drtel.net;

Brandon Erickson of O’Keeffe O’Brien Lyson, Ltd., 720 Main Avenue, Fargo, North Dakota 58103, at the following last known email address: brandon@okeeffeatorneys.com;

Michael T. Andrews of ABST Law, 3142 30th Avenue SW, Suite 100, P.O. Box 10247, Fargo, ND 58106-0247 at email address mandrews@abstlaw.net.

and North Dakota Supreme Court at the last known email address: supclerkofcourt@ndcourts.gov;

/s/ Will Budke

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Michael T. Andrews of ABST Law, 3142 30th Avenue SW, Suite 100, P.O. Box 10247, Fargo, ND 58106-0247 at email address mandrews@abstlaw.net.

and North Dakota Supreme Court at the last known email address: supclerkofcourt@ndcourts.gov;

/s/ Will Budke

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