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Divorce—Proceedings and Disposition of Property: The Effect of the Death of a Party During a Divorce Proceeding on the Incidental Issues to the Divorce *Albrecht v. Albrecht*, 2014 ND 221, 856 N.W.2d 755

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DIVORCE—PROCEEDINGS AND DISPOSITION OF
PROPERTY: THE EFFECT OF THE DEATH OF A PARTY
DURING A DIVORCE PROCEEDING ON THE INCIDENTAL
ISSUES TO THE DIVORCE

Albrecht v. Albrecht, 2014 ND 221, 856 N.W.2d 755

ABSTRACT

In *Albrecht v. Albrecht*, the North Dakota Supreme Court held that a judgment in a divorce action is not final and appealable when it dissolves the parties' marital status but saves division of the incidences of marriage for further proceedings. The court reviewed the district court decision to allow the deceased party's estate to act as a substitute for the deceased party, Sharleen Albrecht, for purposes of distributing the parties' marital property. The court concluded that Sharleen Albrecht's death before the entry of a final judgment abated the divorce action. The court reached this conclusion despite the district court having entered a "judgment" for divorce prior to Sharleen's Albrecht's death. *Albrecht* illustrates the necessity to explicitly certify the severance of a judgment of divorce from the issues incidental to the judgment, especially the division of marital property.

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I. FACTS

In February 2010, after a marriage of nearly fifty years, Glenvin Albrecht sued Sharleen Albrecht for a divorce in the District Court of Stutsman County, Southeast Judicial District, North Dakota.¹ Trial for the divorce took place on October 1, 2012, and an “order for judgment on the divorce expressly directing entry of judgment” was entered October 18, 2012.² On October 19, 2012, a judgment was entered “order[ing], adjudg[ing] and decree[ing] that each party was entitled to a divorce from the other.”³ This judgment reserved “disposition of all property issues for further proceedings.”⁴

1. Albrecht v. Albrecht, 2014 ND 221, ¶ 2, 856 N.W.2d 755, 756.

2. *Id.* ¶ 23, 856 N.W.2d at 762.

3. *Id.* ¶ 2, 856 N.W.2d at 756.

4. *Id.*

The district court held a trial on the reserved property issues on March 5, 2013.⁵ The district court then issued a memorandum opinion on August 2, 2013, which stated Sharleen Albrecht had died following the March 5, 2013 trial and distributed the marital property equally.⁶ The August 2, 2013, memorandum opinion ordered that Glenvin Albrecht pay Sharleen Albrecht “\$815,479 to equalize the property distribution.”⁷ The district “court [then] issued a subsequent order substituting Sharleen Albrecht’s estate as a party in the divorce action.”⁸ Glenvin Albrecht appealed from a September 27, 2013, judgment allocating the parties’ marital property to the North Dakota Supreme Court.⁹

II. LEGAL BACKGROUND

The North Dakota Supreme Court has had opportunities in the past to analyze divorce cases where one party to the action has died during proceedings.¹⁰ In most civil actions for damages, the death of a party to the action does not abate the other party’s ability to recover from the deceased party’s estate.¹¹ Divorce actions are unique, however, in that they are entirely personal to the two parties to the marriage.¹²

A. DIVORCE ACTION ABATES UPON DEATH OF A PARTY TO IT

The North Dakota Supreme Court held in *Thorson v. Thorson*¹³ that a divorce action abates upon the death of a party to it.¹⁴ In *Thorson*, decided in 1996, one of the parties, Doris Thorson, died during the course of the divorce action.¹⁵ Her estate attempted to substitute her daughter as the plaintiff to the divorce action to seek equitable distribution of the marital property.¹⁶ The court stated that “in North Dakota, marriage is a relationship personal to the parties of the marriage.”¹⁷ The court also stated that under North Dakota statutory law, the marriage was dissolved by the

5. *Id.* ¶ 23, 856 N.W.2d at 762.

6. *Id.* ¶ 2, 856 N.W.2d at 756.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Jochim v. Jochim*, 2006 ND 186, ¶1, 721 N.W.2d 25, 25; *Thorson v. Thorson*, 541 N.W.2d 692, 693 (N.D. 1996).

11. *Jochim*, ¶ 8, 721 N.W.2d at 27.

12. N.D. CENT. CODE § 14-03-01 (2015) (“Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential.”).

13. 541 N.W.2d 692 (N.D. 1996).

14. *Id.* at 693.

15. *Id.* at 694.

16. *Id.*

17. *Id.* at 696.

death of one of the parties to it.¹⁸ As such, the court in *Thorson* reasoned that the death of Doris Thorson left no issue for the court to decide.¹⁹ Despite arguably conflicting statutory North Dakota law regarding the circumstances under which death causes abatement of a civil action, the *Thorson* court looked to other states to find that a “greater weight of authority holds that a divorce action is abated upon the death of one of the parties.”²⁰

The *Thorson* court also specifically addressed the issue of division of marital property following the death of a party to the divorce during proceedings.²¹ The court reasoned that so long as no dispositive order dividing marital property had been made prior to the death of a party to the divorce, the marital property could not be divided at the request of the deceased party’s estate.²²

B. AN ORDER FOR JUDGMENT IS INSUFFICIENT TO NULLIFY ABATEMENT

The North Dakota Supreme Court has previously held that an order for judgment is insufficient to nullify abatement of a divorce action if one of the parties to the divorce dies before final judgment is entered.²³ In *Jochim v. Jochim*, decided in 2006, two parties to a divorce stipulated to all issues of the divorce “except the amount of child support to be awarded, whether spousal support should be awarded, and whether either party should be awarded attorney’s fees.”²⁴ Following trial on the remaining issues, the court entered an order for judgment on October 24, 2005.²⁵ Then, on November 1, 2005, Greg Jochim, a party to the divorce, died in a car accident.²⁶ A judgment and divorce decree was entered one week later on November 8, 2005.²⁷ The surviving party to the divorce then successfully moved to vacate the November 8 judgment.²⁸

18. *Id.*; N.D. CENT. CODE § 14-05-01 (2015) (“Marriage is dissolved only: 1. By the death of one of the parties; or 2. By a judgment of a court of competent jurisdiction decreeing a divorce of the parties.”).

19. *Thorson*, 541 N.W.2d at 696.

20. *Id.* at 695.

21. *Id.* at 694.

22. *Id.*

23. *Jochim v. Jochim*, 2006 ND 186, ¶ 9, 721 N.W.2d 25, 27.

24. *Id.* ¶ 2, 721 N.W.2d at 26.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* ¶ 3.

Greg Jochim's estate challenged the motion to vacate, arguing that the divorce had already been effectively granted at the time of death, since the parties stipulated to most of the issues and the district court issued an order for judgment of divorce.²⁹ The North Dakota Supreme Court reasoned, however, that the order for judgment prior to Greg Jochim's death was insufficient to make the divorce final.³⁰ The court further reasoned that an order for judgment is not sufficient to conclude divorce proceedings and is not appealable absent an entry of judgment by the court.³¹ As such, the court held the divorce action was concluded by the death of Greg Jochim on November 1, 2005, and not by the October 24, 2005, order for judgment.³²

Although both *Thorson* and *Jochim* are relatively recent cases, they represent the best opportunities prior to *Albrecht* the North Dakota Supreme Court has had to review the effect of a party's death during divorce proceedings. In *Thorson*, despite conflicting statutory law, as discussed hereinafter, the court held that death abates a divorce action in the middle of proceedings.³³ However, there was never an order for judgment in *Thorson*,³⁴ and the circumstances were fairly straightforward when compared to *Jochim*.

The abatement doctrine adopted in *Thorson* was further explained in *Jochim* in the face of an order for judgment of divorce entered prior to the death of a party, which was ultimately deemed inconsequential as judgment only occurred after the death of a party.³⁵ The *Jochim* holding thus makes clear that even if the issues to the divorce proceeding have all been decided, the divorce is only truly final once *judgment* of divorce has been entered.³⁶ Although both *Thorson* and *Jochim* are factually similar to *Albrecht*, the new issue presented by *Albrecht* is the consequence of an order labeled "judgment," though perhaps mistakenly so, entered prior to the death of a party to the divorce but saving issues to the divorce for later consideration.

29. *Id.* ¶ 5.

30. *Id.* ¶ 10, 721 N.W.2d at 26; see N.D.R. Civ. P. 58 ("On the filing of an order for judgment, the prevailing party must submit to the clerk an appropriate form of the judgment. The clerk must sign and file the judgment and enter it in the register of civil actions, at which time the judgment becomes effective.").

31. *Jochim*, ¶ 10, 721 N.W.2d at 26.

32. *Id.* ¶ 12, 721 N.W.2d at 28.

33. *Thorson v. Thorson*, 541 N.W.2d 692, 696.

34. *See id.*

35. *Jochim*, ¶¶ 1-3, 721 N.W.2d at 26.

36. *Id.* ¶ 10, 721 N.W.2d at 27.

III. ANALYSIS

The North Dakota Supreme Court divided its analysis of *Albrecht* into two parts: the abatement doctrine and the divisible divorce doctrine.³⁷

A. THE COURT’S INTERPRETATION OF CONFLICTING LAWS REGARDING ABATEMENT OF A DIVORCE ACTION

There are several conflicting statutory laws relevant to the abatement of a divorce action by death of a party to the action during proceedings in North Dakota.³⁸ Under North Dakota statutory law, marriage can only be dissolved by the death of one of the parties to the action or a judgment of divorce by a court.³⁹ However, the North Dakota Rules of Civil Procedure provide that death does not abate any action after an order for judgment is made in that action.⁴⁰ Therefore, when a party to a divorce dies after an order for judgment has been made but prior to the entry of judgment, the laws conflict.⁴¹

The North Dakota Supreme Court held in *Thorson* that the rules of civil procedure do not create an exception to the general rule that death of a party to a divorce action abates the action because there is no longer a marriage for the court to dissolve when a party to the divorce action has died.⁴² The *Thorson* court explained that the “greater weight of authority” holds that death abates a divorce action, with citations to other Midwest states, including South Dakota, Iowa and Nebraska, that have marriage statutes similar to North Dakota.⁴³

In *Jochim*, the North Dakota Supreme Court furthered its analysis of the finality of an order for judgment and reasoned that under the rules of civil procedure,⁴⁴ although an order for judgment is required before a valid judgment can be entered, it alone is insufficient to make a divorce final.⁴⁵

37. See generally *Albrecht v. Albrecht*, 2014 ND 221, ¶¶ 8-15, 856 N.W.2d 755, 758-60.

38. See generally *id.* ¶¶ 3-7, 856 N.W.2d at 756-58.

39. N.D. CENT. CODE § 14-05-01 (2015).

40. N.D.R. CIV. P. 25(a)(3) (“If a party dies after a verdict is rendered or an order for judgment is made, the action does not abate, and substitution of parties must be allowed.”). See also N.D.R. CIV. P. 54(d) (“If a party dies after a verdict or decision on any issue of fact and before judgment, the court may still render judgment.”).

41. See *Albrecht*, ¶3, 856 N.W.2d at 756.

42. *Thorson v. Thorson*, 541 N.W.2d 692, 696.

43. *Id.* at 695.

44. N.D.R. CIV. P. 58.

45. See *Jochim v. Jochim*, 2006 ND 186, ¶ 10, 721 N.W.2d 25, 27-28.

Under North Dakota law, a “judgment” includes any order from which an appeal lies,⁴⁶ and an order for judgment is not appealable.⁴⁷

In light of the holdings in *Thorson* and *Jochim*, the North Dakota Supreme Court found in *Albrecht* that the October 19, 2012, “judgment” entered by the district court was not dispositive of all the issues of the divorce and therefore was not a true judgment effectuating a divorce.⁴⁸ The court acknowledged that the district court “judgment” addressed the parties’ marital status but that it also, however, reserved the issue of division of property for a later evidentiary hearing.⁴⁹ Therefore, the district court “judgment” was not final and appealable and was not dispositive of the divorce action.⁵⁰ In addition, the North Dakota Supreme Court noted that Sharleen Albrecht did not request certification⁵¹ that the parties’ marital status was dissolved following the October 19, 2012, “judgment.”⁵² Such certification would have allowed the district court to direct final judgment as to the marital status of the parties but save the issue of property distribution for later proceedings.⁵³

B. THE COURT’S INTERPRETATION OF THE DIVISIBLE DIVORCE DOCTRINE

The North Dakota Supreme Court recognized the divisible divorce doctrine, which allows the parties to a divorce action to sever judgment of the dissolution of marital status from the adjudication of the incidences of marriage.⁵⁴ This doctrine allows the parties to a divorce to become single with the option to legally remarry, while partitioning the other issues to the divorce to a later date through a severed judgment of a court. Under the North Dakota Rules of Civil Procedure, a court may only sever the claims

46. N.D.R. Civ. P. 54(a) (“‘Judgment’ as used in these rules includes a decree and any order from which an appeal lies.”).

47. N.D. CENT. CODE § 28-27-02 (2015) (listing what orders are reviewable).

48. *Albrecht v. Albrecht*, 2014 ND 221, ¶ 9, 856 N.W.2d 755, 758-59.

49. *Id.* at 759.

50. *Id.*

51. *See* N.D.R. CIV. P. 54(b) (“If an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or if multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.”).

52. *Albrecht*, ¶ 10, 856 N.W.2d at 759.

53. *Id.*

54. *Id.* ¶ 11 (citing *Kelly v. Kelly*, 2009 ND 20, ¶ 9, 759 N.W.2d 721, 723).

to an action if it “expressly determines that there is no just reason for delay.”⁵⁵

In *Albrecht*, the district court did not explicitly sever the dissolution of the parties’ marital status from the property distribution.⁵⁶ The district court’s October 19, 2012, “judgment” both ordered “that each party was entitled to a divorce from the other” and that property issues were reserved for further proceedings.⁵⁷ The district court did not expressly state there was any reason to sever the claims or that there was any just reason to avoid delaying the dissolution of the parties’ marital status.⁵⁸ As such, the North Dakota Supreme Court did not find a severance had occurred and reversed the district court decision, holding that “Sharleen Albrecht’s death before entry of a final judgment from which an appeal could be taken abated the divorce action.”⁵⁹

C. CONCURRENCE: IF THE DISTRICT COURT HAD EXPRESSLY ALLOWED THE PARTIES TO REMARRY, THE JUDGMENT WOULD HAVE BEEN FINAL

Chief Justice VandeWalle provided a concurring opinion.⁶⁰ The concurrence agreed that the October 19, 2012, “judgment” was not a final and appealable judgment.⁶¹ Chief Justice VandeWalle wrote separately to note that if a Rule 54(b)⁶² order were part of the “judgment” or if the “judgment” contained a provision allowing either party to marry immediately, he would consider the “judgment” final and the marriage dissolved.⁶³ The Chief Justice further noted that it is the duty of the court granting a divorce to specify in the order for judgment whether the parties are permitted to remarry.⁶⁴

55. N.D.R. CIV. P. 54(b)

56. *Albrecht*, ¶ 14, 856 N.W.2d at 760.

57. *Id.* ¶ 2, 856 N.W.2d at 756.

58. *See generally id.* ¶¶ 2-6, 856 N.W.2d at 756-57.

59. *Id.* ¶ 15, 856 N.W.2d at 760.

60. *Id.* ¶ 18, 856 N.W.2d at 761 (VandeWalle, C. J., concurring).

61. *Id.*

62. N.D.R. CIV. P. 54(b).

63. *Albrecht*, ¶ 18, 856 N.W.2d at 761.

64. *Id.*; *see also* N.D. CENT. CODE § 14-05-02 (2015) (“It is the duty of the court granting a divorce to specify in the order for judgment whether either or both of the parties shall be permitted to marry, and if so, when. The court shall have jurisdiction to modify the decree of divorce at any time so as to permit one or both of the parties to marry, if the court deems it right.”).

D. DISSENT: THE DISTRICT COURT PROPERLY SEVERED THE DIVORCE ACTION FOR THE PROPERTY DISTRIBUTION PROCEEDING

Justice Crothers, joined by Justice Kapsner, provided the court's dissenting opinion.⁶⁵ The dissent disagreed that the divorce action abated and argued that the district court properly severed the divorce action from the property distribution proceeding.⁶⁶ Justice Crothers argued that the majority "overlooks the reality that a divorce action and the marital property division cannot always occur simultaneously."⁶⁷ As such, the dissent interpreted the October 19, 2012, "judgment" as a severance of marital status and property distribution.⁶⁸ Justice Crothers also noted that permitting severance of divorce from adjudication is a narrow holding, which "should not be read as granting license for piecemeal adjudication of cases in other areas of civil law."⁶⁹

IV. IMPACT ON NORTH DAKOTA PRACTITIONERS

As acknowledged by the dissent, the holding in *Albrecht* is a narrow one. The 3-2 split of the North Dakota Supreme Court highlights how difficult it is to predict whether what purports to be a "judgment" is in fact so. It also highlights the importance of certifying issues of severance in a divorce action on a case-by-case basis.

Albrecht illustrates the importance for the North Dakota lawyer representing a party to a divorce to request express severance of the marital status from the remaining issues to the divorce action if the client so wishes. In other words, if a party to a divorce wishes to quickly remarry or if there may be a significant delay in the division of property that party's lawyer should request the court to explicitly and unmistakably sever the marital status portion of the action and enter judgment thereon immediately. The lawyer should present evidence that there is no just reason to delay final judgment of the divorce. The desired outcome is that the client may continue her life without having to question whether she is still married in the eyes of the law months and potentially years after what she believed was a valid judgment dissolving her marriage. In addition, in divorce actions for elderly or sick parties, certification of severance of marital status is particularly important for estate planning purposes.

65. *Albrecht*, ¶ 19, 856 N.W.2d at 761 (Crothers, J., joined by Kapsner, J., dissenting).

66. *Id.*

67. *Id.* at ¶ 20.

68. *Id.* at ¶ 23, 856 N.W.2d at 762.

69. *Id.*

V. CONCLUSION

Albrecht's holding that a judgment in a divorce action is not final and appealable when it dissolves the parties' marital status but saves division of the incidences of marriage for further proceedings expands upon the principles set out in *Thorson* and *Jochim*. It highlights the importance for both lawyers and judges to follow the statutory and common law requirements in certifying the severance of issues to a divorce or writing a judgment of severance of issues to perfection.

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