

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

**In the Matter of the Estate of Robert W. Cashmore, Deceased**

Thain M. Cashmore, individually, as Personal  
Representative of the Estate of Robert W.  
Cashmore, and as Trustee of the Robert Cashmore  
Trust; and Bourck D. Cashmore, individually and  
as Trustee of the Robert Cashmore Trust,

Petitioners - Appellants,

vs.

Trudy Cashmore, Tricia Cashmore, and Kendra  
Cashmore,

Respondents - Appellees.

---

Supreme Court No. 20090315

---

Appeal from Order on Motion to Approve Amended  
Final Report and Account and Proposed Distributions

Ward County District Court  
Northwest Judicial District  
The Honorable Richard L. Hagar  
Probate No. 02-P-0212

---

**JOINT REPLY BRIEF OF APPELLANTS**

---

Attorneys for Thain M. Cashmore and Bourck D. Cashmore,  
individually and as Trustees of the Robert Cashmore Trust

Kent Reiersen (ID #03685)  
Kirsten M. Sjue (ID #06067)  
Crowley Fleck PLLP  
P.O. Box 1206  
Williston, North Dakota 58802  
(701) 572-2200

Attorneys for Thain M. Cashmore, as Personal Representative of  
the Estate of Robert W. Cashmore

Clark J. Bormann (ID #04655)  
Bormann, Myerchin, Monasky & Espeseth, LLP  
P.O. Box 995  
Bismarck, ND 58502-0995  
701-250-8968

## **TABLE OF CONTENTS**

Table of Contents.....	i
Table of Authorities .....	ii
I. Argument .....	¶1
A. The District Court Abused Its Discretion in Denying the Motion to Approve the Amended Final Accounting. ....	¶1
B. The District Court Abused Its Discretion in Reducing the Amount of Personal Representative’s Fees and Attorney’s Fees When It Did So Without Any Reason. ....	¶5
II. Conclusion .....	¶10
CERTIFICATE OF SERVICE.....	¶12

## **TABLE OF AUTHORITIES**

### **CASES**

¶

<u>Estate of Fisk</u> , 2010 ND 64, -- N.W.2d -- .....	5,6
<u>Kuehl v. Lippert</u> , 401 N.W.2d 523 (N.D. 1987) .....	2
<u>Laib v. Laib</u> , 2010 ND 62, -- N.W.2d -- .....	9
<u>Van Beek v. Umber</u> , 2010 ND 47, 780 N.W.2d 52 .....	7

### **STATUTES**

N.D.C.C. § 28-26-31 .....	7
---------------------------	---

### **RULES**

N.D.R.App.P. 38 .....	9
N.D.R.Civ.P. 59 .....	1
N.D.R.Civ.P. 60 .....	1, 2

## **I. ARGUMENT**

### **A. The District Court Abused Its Discretion in Denying the Motion to Approve the Amended Final Accounting.**

[¶1] Although Trudy contends that Rules 59(j) and 60(b), N.D.R.Civ.P., apply to the personal representative's motion to approve the amended final accounting, she completely fails to address the fact that the personal representative was not seeking to change the judgment or obtain relief from it. Rather, as Trudy points out several times in her brief, the estate is now insolvent, and the personal representative moved for approval of the amended final accounting to show the district court the substantial change that had occurred in the estate assets during the year-long period the original final accounting was pending before the court. The personal representative was not seeking to be relieved from his calculated and deliberate choices, nor was he using the motion as a substitute for appeal. He was simply seeking to effectuate the judgment of the district court and provide a final resolution of the estate. Therefore, application of Rules 59 and 60, N.D.R. Civ.P., in this case would not further the purpose of the rules.

[¶2] Kuehl v. Lippert, 401 N.W.2d 523 (N.D. 1987), is inapposite for several reasons. First, it involves the application of Rule 60(b), which is not the proper procedural vehicle for analyzing the personal representative's motion. See id. at 523. Second, the case involved property distribution in a divorce judgment, not the final accounting of an estate. See id. at 524. Finally, the personal representative did not move for the amended final accounting due to an unexpected decrease in the value of property in the estate. In Kuehl, the ex-husband in a divorce proceeding moved for relief from the judgment under Rule 60(b) on the grounds that he could no longer make the payments ordered due to a decrease in the value of his farm land and a declining market for his

crops. See id. at 525-26. This Court rejected his argument, holding as a matter of law that “a change in the value of property distributed in a divorce judgment is, for purposes of Rule 60(b)(v), foreseeable and thus insufficient to support relief from the judgment,” and to conclude otherwise “would obliterate the finality of property distributions by leaving them open always to change in response to changing market values.” Id. Here, on the contrary, the personal representative was not acting in response to changing market values, but rather following the orders of the district court and disposing of estate property in an attempt to avoid insolvency and pay the obligations of the estate.

[¶3] Finally, as to the declining value of the estate vehicles, it should be noted that Trudy objected to the personal representative’s handling of the vehicles at every possible point during these proceedings. In her brief, Trudy acknowledges that she objected to the reclassification of the vehicles as estate property. The personal representative asserts that much of the delay and “declining value” of the vehicles may be attributed to Trudy, as she would not let the personal representative take the vehicles until ordered to do so by the district court.

[¶4] The numerous changes resulting from the district court’s January 20, 2009 Order, as well as the additional changes which had occurred in the year since the filing of the original final report and account, necessitated the filing of an amended final report and account. The district court abused its discretion when it denied the personal representative’s motion to approve the amended final accounting in these circumstances, particularly in light of the fact that the district court provided no explanation for its decision.

**B. The District Court Abused Its Discretion in Reducing the Amount of Personal Representative's Fees and Attorney's Fees When It Did So Without Any Reason.**

[¶5] It is well established that a district court's decision on the reasonableness of personal representative's fees and attorney's fees will not be overturned absent an abuse of discretion. See Estate of Fisk, 2010 ND 64, ¶ 6, -- N.W.2d --. Here, the district court clearly abused its discretion when it arbitrarily and unreasonably reduced the personal representative's and attorney's fees requested without comment or explanation. The only evidence before the district court on the issue of additional fees was the testimony of Thain Cashmore at the June 16, 2009 hearing. Thain testified about the numerous changes in the accounting of the estate and his continued work with counsel for the personal representative on estate matters, including two trips to the Minot area to deal with sale of the estate vehicles. Thus, despite Trudy's assertions in her brief to the contrary, the personal representative did present evidence in support of his request for additional fees.

[¶6] Furthermore, Trudy is confusing the burden of establishing an abuse of discretion on appeal with her burden to object to the requested fees. In the district court, Trudy filed two written objections to the motion to approve the amended final accounting, neither of which mentioned the request for additional personal representative's and attorney's fees. She objected to the fees for the first time at the June 16, 2009 hearing. Due to the lateness of Trudy's objection, the personal representative was not aware the fees would be in issue at the hearing, and therefore he was not prepared to introduce items such as invoices, statements, and canceled checks. Thain Cashmore as personal representative did, however, testify concerning the expenses

incurred and why. *Hr'g Tr.* 21-22, 24-25, 38-41. The district court failed to address this testimony in its order. Trudy, on the other hand, presented no evidence that either the personal representative's fees or attorney's fees claimed were excessive or inappropriate. See Estate of Fisk, 2010 ND 64, ¶ 8, -- N.W.2d -- (noting that the personal representative offered an affidavit of his expenses in support of his request for fees, and the Department of Human Services, which opposed the fees, "offered no evidence to support its claim that fees paid or taken by the personal representative were excessive or inappropriate").

[¶7] In her brief, Trudy argues that it is "implicit" in the district court's order that the request for fees is unreasonable. However, this argument illustrates exactly why the district court's order was unfair and an abuse of discretion – litigants and their attorneys should not have to guess why their request for relief was denied. Here, because the district court did not make any findings on the evidence presented or the reasonableness of the requested fees, there are simply no findings to support the district court's conclusion on the issue of fees, nor is there any way to determine whether the district court's decision is the product of a rational mental process leading to a reasoned decision. See Van Beek v. UMBER, 2010 ND 47, ¶¶ 5, 7, 780 N.W.2d 52 (reversing an award of attorney's fees under N.D.C.C. § 28-26-31 because the district court failed to provide findings in support of its decision). Thus, the district court's decision on the personal representative's request for fees should be reversed as an abuse of discretion.

[¶8] Furthermore, it should be noted that the request for additional fees is not unreasonable simply because it would have rendered the estate insolvent. Although Trudy calculates the value of the probate estate at \$168,640.87 and points to this figure as illustrating the unreasonableness of the fees, her argument fails to recognize that the total



amount at issue was well over \$2 million, including the augmented estate and gifts outside the estate. Trudy has contested these proceedings and the actions of the personal representative at every step along the way, driving up the personal representative's and attorney's fees, yet she now argues that those fees are excessive. In light of the substantial assets Trudy has already received, and the fact that the personal representative has been paying these fees out of his own pocket to close the estate, her concern about the insolvency of the estate rings rather hollow.

[¶9] Finally, the personal representative strongly objects to Trudy's characterization of this appeal as frivolous and asks that her request for an award of attorney's fees and costs be denied in its entirety. See Laib v. Laib, 2010 ND 62, ¶ 11, -- N.W.2d -- (stating that an appeal is frivolous under N.D.R.App.P. 38 "if it is flagrantly groundless or meritless, or if it manifests persistence in the course of litigation that could be seen as evidence of bad faith").

## **II. CONCLUSION**

[¶10] For the foregoing reasons, Thain Cashmore and Bourck Cashmore respectfully request that the district court's Order on Motion to Approve Amended Final Report and Account and Proposed Distributions be reversed, and that this case be remanded for a rehearing on the issues of approval of the amended final accounting and personal representative's fees and attorney's fees payable out of the estate.

[¶11] DATED this 3rd day of May, 2010.

CROWLEY FLECK PLLP  
Attorneys for Petitioners-Appellants Thain  
M. Cashmore and Bourck D. Cashmore,  
individually and as trustees  
111 East Broadway, P.O. Box 1206  
Williston, ND 58802-1206  
Telephone No.: 701-572-2200

By Kent Reiersen  
KENT REIERSON (Bar ID #03685)  
KIRSTEN M. SJUE (Bar ID #06067)

BORMANN, MYERCHIN, MONASKY  
& ESPESETH, LLP  
Attorneys for Petitioner-Appellant Thain M.  
Cashmore, as personal representative  
P.O. Box 995  
Bismarck, ND 58502-0995  
Telephone No.: 701-250-8968

By Clark J. Bormann  
CLARK J. BORMANN (Bar ID #04655)

**CERTIFICATE OF SERVICE**

[¶12] I hereby certify that a true and correct copy of the foregoing Joint Brief of Appellants was served by e-mail this 3rd day of May, 2010, on the following:

Carol K. Larson  
cklarson@srt.com  
P.O. Box 1000  
Minot, ND 58702-1000

By Kirsten M. Sjue  
KIRSTEN M. SJUE