

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, Bourck D. Cashmore, individually
and as Trustee of the Robert Cashmore Trust,

Petitioners – Appellants,

vs.

Trudy L. Cashmore, Tricia L. Cashmore, and
Kendra A. Cashmore,

Respondents – Appellees.

SUPREME COURT NO. 20130012

Appeal from Amended Order Finding Personal Representative in Contempt of
Court and Ordering Personal Representative to Pay Trudy Cashmore and
Awarding Costs and Expenses
and
Order Denying Rule 60(b) Motion to Vacate Amended Order

Ward County District Court
Northwest Judicial District
The Honorable Richard L. Hagar
Probate No. 51-02-P-00212

BRIEF OF APPELLEES

PRINGLE & HERIGSTAD, P.C.
Steven A. Lutt #07242
Carol K. Larson #4406
2525 Elk Drive
PO Box 1000
Minot, North Dakota 58702-1000
(701) 852-0381
Attorneys for Respondents-Appellees

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities	iii
I. Statement of the Issues	¶1
II. Statement of the Case	¶3
III. Statement of Facts	¶6
IV. Law and Argument	¶9
A. The district court did not abuse its discretion by finding Thain Cashmore in contempt	¶10
1. Trudy's Petition for Order to Show Cause was properly before the district court because the Estate was not closed at the time the Petition was filed, and the court therefore had authority to consider whether Thain was in contempt	¶11
a. The district court's January, 2009 Order did not close the Estate	¶13
b. Thain's Verified Statement to Close Estate did not close the Estate	¶19
2. The district court's Amended Order dated August 13, 2012 finding that the Estate had not been closed and finding Thain Cashmore in contempt was not error	¶25
a. The district court's finding that Thain was in contempt was not error	¶27
b. Thain received proper notice that contempt would be part of the subject matter at the hearing on Trudy's Petition for Order to Show Cause	¶29
3. Trudy's Petition for Order to Show Cause was a valid and timely objection to Thain's Verified Statement to Close Estate, and Thain was not deprived of an adequate opportunity to explain his refusal to pay the amount owed to Trudy	¶34

a.	Trudy made a valid and timely objection to Thain's Verified Statement to Close Estate.....	¶35
b.	Thain was not deprived of an adequate opportunity to explain his refusal to pay the sums owed to Trudy.	¶38
B.	The district court did not abuse its discretion by denying Thain's Rule 60(b) Motion to Vacate Amended Order	¶41
V.	Conclusion	¶42
	Certificate of Service	¶44

TABLE OF AUTHORITIES

¶

CASES

<u>Endersbe v. Endersbe</u> , 555 N.W.2d 580 (N.D. 1996)	9
<u>Gajewski v. Bratcher</u> , 240 N.W.2d 871 (N.D. 1976)	9
<u>Holkesvig v. Welte</u> , 2012 ND 14, 809 N.W.2d 323	27, 30
<u>In re Estate of Cashmore</u> , 2010 ND 159, 787 N.W.2d 261	12, 13, 17, 23, 39
<u>Montgomery v. Montgomery</u> , 2003 ND 135, 667 N.W.2d 611	9
<u>State Bank of Burleigh Cnty. Trust Co. v. Patten</u> , 357 N.W.2d 239 (N.D. 1984) ...	9
<u>Van Dyke v. Van Dyke</u> , 538 N.W.2d 197 (N.D. 1995)	27, 30

STATUTES

N.D.C.C. § 27-10-01.3	27, 39
N.D.C.C. § 30.1-16-01	20, 21
N.D.C.C. § 30.1-16-02	20
N.D.C.C. ch. 30.1-21	12, 14, 16
N.D.C.C. § 30.1-21-01	13, 14
N.D.C.C. § 30.1-21-03	12, 15, 16, 19, 20, 21, 22, 23, 24
N.D.C.C. § 30.1-21-03.1	15, 34, 39
N.D.C.C. § 30.1-21-05	34, 35, 36, 37

RULES

N.D.R.Civ.P. 60(b)	9
--------------------------	---

SECONDARY SOURCES

<u>Black's Law Dictionary</u> (3rd Pocket ed. 1996)	37
---	----

I. STATEMENT OF THE ISSUES

[¶1] Whether the district court abused its discretion by finding Thain Cashmore (“Thain”) in contempt for not complying with the district court’s Order requiring Thain to pay \$6,377.83 from the Estate of Robert W. Cashmore (“Estate”) to Trudy Cashmore (“Trudy”).

[¶2] Whether the district court abused its discretion by denying Thain Cashmore’s Rule 60(b) Motion to Vacate Amended Order.

II. STATEMENT OF THE CASE

[¶3] The Appellees generally agree with the Appellants’ Statement of the Case, with the following relevant additions and qualifications:

[¶4] Trudy Cashmore requested in her Petition for Order to Show Cause (“Petition”) that Thain Cashmore be held in contempt because of Thain’s failure to pay Trudy the sums she was owed under the district court’s Order on Motion to Approve Amended Final Report and Account and Proposed Distributions, dated August 17, 2009 (“August, 2009 Order”), and not because the Estate had not been closed within three years of Robert Cashmore’s death, as Appellants suggest. App. 105–07.

[¶5] On May 4, 2012, the district court sent a Notice of Hearing to all of the parties notifying them of the hearing regarding Trudy Cashmore’s Petition for Order to Show Cause. Appellees’ Supplemental Appendix 1 (“Supp. App. 1”).

III. STATEMENT OF FACTS

[¶6] The Appellee generally agrees with the Appellants’ Statement of the Facts, with the following relevant additions and qualifications:

[¶7] The Appellees dispute the Appellants' suggestions in Paragraph 11 of their Brief of Appellants that "Trudy had received monies/assets in excess of what she was entitled" and that "Thain acted in the best interest of the estate and closed the estate with the Sworn Statement."

[¶8] The Appellees dispute the Appellants' suggestion in Paragraph 12 of their Brief of Appellants that Trudy requested that Thain be held in contempt "for not closing the estate within three years of Robert Cashmore's death." Trudy requested that Thain be held in contempt because Thain refused to pay Trudy the monies she was owed under the district court's August, 2009 Order. App. 105–07.

IV. LAW AND ARGUMENT

[¶9] The Appellants argue that the district court erred in finding Thain Cashmore in contempt, and also erred in denying Thain's Rule 60(b) Motion to Vacate Amended Order. The standard of review for a district court's finding of contempt requires a showing that the court abused its discretion. See Montgomery v. Montgomery, 2003 ND 135, ¶ 18, 667 N.W.2d 611 ("Our review of a trial court's determination on contempt is extremely limited. The trial court exercises broad discretion in determining whether to hold an individual in contempt."); Endersbe v. Endersbe, 555 N.W.2d 580, 581 (N.D. 1996) ("A trial court's finding of contempt will not be overturned unless there is a clear abuse of discretion."). The standard of review for a district court's denial of a motion under N.D.R.Civ.P. 60(b) also requires a showing that the district court abused its discretion. See State Bank of Burleigh Cnty. Trust Co. v. Patten, 357 N.W.2d

239, 242 (N.D. 1984) (“When we review a lower court's ruling on a Rule 60(b) motion, we are limited to a determination of whether or not the court abused its discretion, and we will not overturn that court's decision merely because it is not the one we may have made if we were deciding the motion.”); Gajewski v. Bratcher, 240 N.W.2d 871, 886 (N.D. 1976) (“Generally, in reviewing a trial court’s denial of a motion under Rule 60(b) of the North Dakota Rules of Civil Procedure, the function of the Supreme Court . . . is limited to [d]eciding whether the court abused its discretion.”). Applying this highly limited abuse of discretion standard to the circumstances present in this case, it is clear that both of the Appellants’ assignments of error are entirely without merit.

A. The district court did not abuse its discretion by finding Thain Cashmore in contempt.

[¶10] The Appellants advance several arguments as to why the district court abused its discretion by finding Thain Cashmore in contempt. These arguments are addressed below.

1. Trudy’s Petition for Order to Show Cause was properly before the district court because the Estate was not closed at the time the Petition was filed, and the court therefore had authority to consider whether Thain was in contempt.

[¶11] The basis for Appellants’ argument that Trudy’s Petition for Order to Show Cause was improper is that, at the time of Trudy’s Petition, the Estate was already closed, and therefore, a Petition for Order to Show Cause why the Estate had not been closed was unwarranted because the Estate was already closed. App. 112–14. The Appellants advance two theories as to how the Estate had been closed prior to Trudy’s Petition for Order to Show Cause: First, Appellants

claim that the Estate was closed by virtue of the Findings of Fact, Conclusions of Law, and Order for Judgment issued by the district court on January 20, 2009 (“January, 2009 Order”). Pl’s Br. ¶¶ 23–25. Second, Appellants claim that the Verified Statement to Close Estate, executed by Thain Cashmore on September 12, 2011 was sufficient to close the Estate. Pl’s Br. ¶¶ 25–28. Both of these theories are without merit.

[¶12] To test both of the Appellants’ theories, it is critical to know when an estate is actually “closed.” The closing of estates is governed by N.D.C.C. ch. 30.1-21. Nowhere in that chapter is the word “closed” actually defined; however, in the Editorial Board Comment under N.D.C.C. § 30.1-21-03, the Editorial Board states that “[t]he word ‘closing’ refers to circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up.” N.D.C.C. § 30.1-21-03 ed. bd. cmt. (emphasis added). Although the statutes themselves do not explicitly adopt this definition, the Editorial Board’s definition is plainly consistent with the operation of the statutes. Furthermore, this Court has adopted the Editorial Board’s definition as helpful in clarifying the events surrounding the closing of an estate. See In re Estate of Cashmore, 2010 ND 159, ¶ 13, 787 N.W.2d 261. Based on this definition, for an estate to be closed, there must be circumstances tending to show that the estate’s affairs have been wound up or that some relevant party has reasonably alleged that they have been wound up. See N.D.C.C. § 30.1-21-03 ed. bd. cmt. When this definition is applied to either of the theories advanced by the Appellants, it is clear that the Estate was not closed at the time of Trudy’s

Petition, and that the district court did not abuse its discretion by finding that the Estate was not closed at the time of Trudy's Petition.

a. The district court's January, 2009 Order did not close the Estate.

[¶13] Under N.D.C.C. § 30.1-21-01(1), "A personal representative or any interested person may petition for an order of complete settlement of the estate." The Appellants contend that the January, 2009 Order issued by the district court in response to Thain's Motion to Approve Final Report and Account and Proposed Distribution under N.D.C.C. § 30.1-21-01(1) was sufficient to close the Estate. Pl's Br. ¶ 25. As support for this assertion, the Appellants cite this Court's previous statement in Cashmore in which this Court stated that N.D.C.C. § 30.1-21-01(1) "clearly envision[s] a final resolution of the estate" when a court issues an order or orders resolving a petition under that statute. 2010 ND 159, ¶ 13, 787 N.W.2d 261. Appellants also rely on this Court's statements in Cashmore that "[o]nce a final judgment or order has been entered approving a final accounting and distribution under N.D.C.C. § 30.1-21-01(1), the estate proceedings are concluded" and that an order or orders from a district court under N.D.C.C. § 30.1-21-01(1) culminate "in a final judgment or order closing the estate." Id. at ¶ 14.

[¶14] However, all of these statements made by the North Dakota Supreme Court in Cashmore were made in response to an argument by the appellants in that case that an order issued by a court in response to a petition under N.D.C.C. § 30.1-21-01(1) was not a conclusive, final resolution of the estate. See id. at ¶¶ 13–14. These statements by the North Dakota Supreme

Court in no way indicate that such an order exempts the personal representative of an estate from the other provisions of N.D.C.C. ch. 30.1-21 if the personal representative refuses to abide by the court's order. See id.

[¶15] To determine whether the Estate was closed by virtue of the district court's January, 2009 Order, this Court should apply the meaning of "closing" as defined by the Editorial Board. When applying that definition of "closing," it is clear that the district court's mere issuance of an order does not, by itself, produce "circumstances which support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up." See N.D.C.C. § 30.1-21-03 ed. bd. cmt. Although it is true that the January, 2009 Order was a final determination of all matters pertaining to the Estate, Thain's deliberate acts in derogation of that Order, and the court's subsequent August, 2009 Order, cannot possibly be said to contribute to circumstances supporting a conclusion that the Estate's affairs have been wound up. To the contrary, the Estate's affairs clearly had not been wound up because Trudy had not been paid monies to which she was entitled under the January, 2009 Order and the August, 2009 Order. How could the Estate's affairs possibly be wound up when Thain was consciously and willfully ignoring the district court's Order determining the distribution of the estate? When the court's Order is blatantly ignored by the Personal Representative, it would be preposterous to argue, as Appellants do, that the estate has been "closed," such that further relief is not available to the aggrieved party through N.D.C.C. § 30.1-21-03.1.

[¶16] In this case, the Appellants are trying to avoid paying money to Trudy, which they have been ordered to pay, by hiding behind an extremely narrow interpretation of N.D.C.C. ch. 30.1-21. However, the facts of this case make it plainly obvious that the circumstances do not “support the conclusions that the affairs of the estate either are, or have been alleged to have been, wound up.” See N.D.C.C. § 30.1-21-03 ed. bd. cmt. Thain was ordered to pay Trudy Cashmore \$6,377.83 from the Estate. App. 95. Thain did not paid Trudy that sum. App. 118; Hr’g Tr. 4–5. Thain is therefore in violation of the district court’s Order. App. 118–19. Because the Estate’s assets have not been distributed as ordered by the district court, it simply cannot be said that the Estate’s affairs have been wound up.

[¶17] To the extent that the Appellants claim that they have “alleged” that the Estate’s affairs have been wound up, that claim is without merit. The Appellants believe they have good reasons for not paying the ordered sum to Trudy; however, those reasons were not sufficient to overturn the district court’s Order on appeal, and therefore the district court’s Order still stands. See Cashmore, 2010 ND 159, ¶ 17, 787 N.W.2d 261. Moreover, the filing of a verified statement “alleging” that Thain made payment “to the extent [he] was able” does not excuse the personal representative’s noncompliance with the court’s Order, and certainly doesn’t support a conclusion that the Estate’s affairs had been wound up. App. 99.

[¶18] Because Thain failed to comply with the district court’s Order, and because the circumstances of this case clearly do not support a conclusion that

the Estate's affairs have been wound up, the district court's January, 2009 Order did not close the Estate. Because the Estate was not closed, Trudy's Petition for Order to Show Cause was properly before the district court, and that court did not abuse its discretion by hearing that Petition, issuing an Order to Show Cause, or holding Thain Cashmore in contempt.

b. Thain's Verified Statement to Close Estate did not close the Estate.

[¶19] The closing of estates by verified statements is governed by N.D.C.C. § 30.1-21-03, which states:

1. Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court a verified statement stating that the personal representative, or a prior personal representative whom the personal representative has succeeded, has:

a. Fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims that were presented, expenses of administration, and estate, inheritance, and other death taxes, except as specified in the statement, and by distributing the assets of the estate to the persons entitled. If any claims remain undischarged, the statement must state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or the statement must state in detail other arrangements that have been made to accommodate outstanding liabilities.

b. Sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full

account in writing of the personal representative's administration to the distributees whose interests are affected thereby.

If the personal representative has published and mailed notice to creditors as provided by section 30.1-19-01, the personal representative may not file the verified statement until three months after the date of the first publication and mailing.

2. If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

N.D.C.C. § 30.1-21-03 (emphasis added).

[¶20] First, it is worth noting that the procedure for closing an estate by filing a verified statement under N.D.C.C. § 30.1-21-03 is not available in cases in which a court has prohibited the filing of such a statement or the estate has been administered in supervised administration proceedings. See N.D.C.C. § 30.1-21-03(1). It is undisputed that there was no order prohibiting a filing of a verified statement in this case. Hr'g Tr. 11, 15. "Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative, or other order terminating the proceeding." N.D.C.C. § 30.1-16-01. Administering an estate as a "supervised administration proceeding" is normally accomplished by the filing of a petition. See N.D.C.C. § 30.1-16-02.

[¶21] Although it is true that no such petition was filed in this case, a cursory glance at the Register of Actions demonstrates that the administration and settlement of Robert W. Cashmore's Estate has, by all reasonable

standards, taken place “under the continuing authority of the court.” See N.D.C.C. § 30.1-16-01; App. 2–9. Because the administration of the Estate has so clearly been supervised, the Appellants should be precluded from being able to close the Estate by the filing of a verified statement under N.D.C.C. § 30.1-21-03, despite the fact that the Estate’s administration was not a “supervised administration proceeding” in the technical sense.

[¶22] However, even if the heavily supervised nature of the present case does not preclude the Appellants from closing the Estate by filing a verified statement under N.D.C.C. § 30.1-21-03, the Appellants’ Verified Statement to Close Estate still failed to actually close the Estate because it was facially deficient. As is clear from the language of N.D.C.C. § 30.1-21-03(1)(a), in order for a personal representative to close an estate by filing a verified statement, the personal representative must state that he has “[f]ully administered the estate of the decedent by making payment, settlement, or other disposition of all claims that were presented . . . except as specified in the statement, and by distributing the assets of the estate to the persons entitled.” N.D.C.C. § 30.1-21-03(1)(a).

[¶23] In this case, Thain’s Verified Statement to Close Estate was and is plainly at odds with the district court’s January, 2009 Order and August, 2009 Order regarding the distribution of assets from the Estate. App. 43–46, 93–94, 99–104. Specifically, Thain was ordered to pay Trudy \$6,377.83 from the Estate. App. 95. Thain did not make that payment to Trudy. App. 118. Therefore, Thain’s statement in his Verified Statement to Close Estate that he “fully administered the estate of the decedent” is flatly false. See App. 99. Thain did

not fully administer the Estate. See App. 118. He refused to pay to Trudy a sum of money, which he was ordered by the district court to pay as part of the final disposition of the Estate's assets. App. 95, 118. Disobeying the court's Order in this regard is simply not consistent with the personal representative's statement that he "fully administered the estate." Qualifying his statement by saying he made payment, settlement, and other disposition "to the extent [he] was able" does not free Thain from his obligation to obey the district court's Order. See App. 99; N.D.C.C. § 30.1-21-03(1)(a). Furthermore, the excuses for nonpayment contained in the accounting attached to the Verified Statement to Close Estate had already been considered by the district court and the North Dakota Supreme Court and found to be without merit. See App. 93–95; Cashmore, 2010 ND 159, ¶ 17, 787 N.W.2d 261.

[¶24] Because Thain's actions described in his Verified Statement to Close Estate did not comply with the district court's January, 2009 Order or its August, 2009 Order, and because Thain's statement that he "fully administered the estate" was verifiably false due to his failure to comply with the court's Orders, the Verified Statement to Close Estate did not close the Estate. See N.D.C.C. § 30.1-21-03(1)(a). Because the Estate was not closed, Trudy's Petition for Order to Show Cause was properly before the district court, and that court did not abuse its discretion by hearing that Petition, issuing an Order to Show Cause, or holding Thain Cashmore in contempt.

2. **The district court's Amended Order dated August 13, 2012 finding that the Estate had not been closed and finding Thain Cashmore in contempt was not error.**

[¶25] In Part IV.A.2 of their Brief of Appellants, the Appellants appear to reincorporate their arguments from Part IV.A.1 to contend that the district court erred in its Amended Order dated August 13, 2012 by finding that the Estate was not closed at the time of Trudy's Petition. Pl's Br. ¶¶ 29–30. To the extent that the Appellants argue that the district court erred in finding that the Estate was not closed, the court did not abuse its discretion, and the Appellees rely on their arguments above in Part IV.A.1 of this Brief.

[¶26] However, the Appellants also argue in Parts IV.A.2 and IV.A.3 of their Brief of Appellants that the district court erred in its Amended Order dated August 13, 2012 by finding Thain Cashmore in contempt. Pl's Br. ¶¶ 29–30. The Appellants' argument that the district court's finding of contempt was error is addressed below.

a. The district court's finding that Thain was in contempt was not error.

[¶27] Under N.D.C.C. § 27-10-01.3, "The court on . . . motion of a person aggrieved by contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related." N.D.C.C. § 27-10-01.3(1)(a). "Under N.D.C.C. § 27–10–01.3(1)(a), a district court may impose a remedial sanction for contempt only 'after notice and hearing.'" Holkesvig v. Welte, 2012 ND 14, ¶ 11, 809 N.W.2d 323. "A failure to follow the procedural dictates of N.D.C.C. § 27–10–01.3 is fatal to a court's order of contempt and the resulting sanction." Id. When one party seeks to have an opposing party held in contempt, the issuance of an order to show cause is not mandatory, but is permissive. Van Dyke v. Van Dyke, 538

N.W.2d 197, 202 (N.D. 1995) (emphasis added). Under North Dakota law, “notice and a hearing” is all that is required. See Holkesvig, 2012 ND 14, ¶ 11, 809 N.W.2d 323.

[¶28] In this case, it must be understood that Trudy’s Petition for Order to Show Cause requested two separate and distinct actions from the court. See App. 105–07. The introductory statement of Trudy’s Petition shows that Trudy was petitioning the court “for an Order to Show Cause to the Court why the Estate of Robert W. Cashmore has not been closed and why the Personal Representative, Thain M. Cashmore, should not be held in Contempt of Court.” App. 105 (emphasis added). This introductory sentence makes clear that the purpose behind the Petition was two-fold: asking the court to order Thain to show cause as to (1) why the Estate had not yet been closed and (2) why Thain should not be held in contempt of court. See App. 105. The Petition goes on to clearly state that the motivation behind the contempt aspect of the Petition was due to “the Personal Representative’s [failure] to make payment as ordered.” App. 106.

b. Thain received proper notice that contempt would be part of the subject matter at the hearing on Trudy’s Petition for Order to Show Cause.

[¶29] The Appellants argue that they did not receive sufficient notice that the contempt aspect of Trudy’s Petition would be part of the subject matter of the hearing set for the issues raised in Trudy’s Petition. Pl’s Br. ¶¶ 31–34. Specifically, Appellants point to the fact that the Order to Show Cause issued by the district court only ordered that Thain “show cause, if any you have, as to why the above estate has been closed.” App. 108–09. Appellants argue that,

because there was no mention of contempt in the court's Order to Show Cause, Thain did not receive proper notice of the hearing, and therefore the court's finding of contempt was improper. Pl's Br. ¶¶ 31–34; see App. 108-09.

[¶30] However, Thain did receive notice of hearing apart from that Order to Show Cause in a Notice of Hearing dated May 4, 2012, which the Appellants failed to include in their Appendix. Supp. App. 1. On May 4, 2012, the district court sent a Notice of Hearing to all of the parties stating that “the Order to Show Cause hearing in the above matter is rescheduled from May 7, 2012 to: Date: May 9, 2012.” Supp. App. 1. In this Notice of Hearing, the subject matter is not limited only to cause as to why the estate had not been closed. See Supp. App. 1. Therefore, that Notice of Hearing contemplated notice to Thain of both the estate closing aspect and the contempt aspect of Trudy's Petition for Order to Show Cause. See Supp. App. 1. Additionally, under North Dakota law, an order to show cause as to why a party is not in contempt is permissive and is not mandatory. See Van Dyke, 538 N.W.2d at 202. Therefore the district court was under no compulsion to issue an order to show cause as to the contempt subject matter. All that is required under North Dakota law is notice and a hearing. See Holkesvig, 2012 ND 14, ¶ 11, 809 N.W.2d 323.

[¶31] Moreover, even if that Notice of Hearing did not specifically contemplate notice of the contempt aspect of Trudy's Petition, Thain still had notice that the hearing would include the contempt subject matter because Thain's failure to pay Trudy, i.e. Thain's contempt for the district court's Order, was the singular issue giving rise to Trudy's Petition for Order to Show Cause as

to why the Estate of Robert Cashmore has not been closed. See App. 106. The district court even recognized that Trudy's "petition was clear in its argument that the PR's failure to comply with the Court's August 17, 2009, order denied closure of the estate." App. 140. The contents of Trudy's Petition make it abundantly clear that her Petition was predicated on the fact that Thain had not paid Trudy, in violation of the district court's Order. See App. 106. Therefore, the court's Order to Show Cause, which the Appellants claim did not give Thain adequate notice of the contempt subject matter, did in fact give Thain the requisite notice, because any discussion of why the Estate had not been closed would necessarily have to include a discussion of why Thain had not paid Trudy, i.e. why Thain was in contempt of the court's Order.

[¶32] The Appellants clearly had notice that contempt would be proper subject matter at the hearing. See App. 105–07, 108–09; Supp. App. 1. The fact that notice of the contempt subject matter was not explicitly spelled out for Thain in bold letters does not allow him to escape the court's finding of contempt, especially when the record makes it so clear that Thain's failure to comply with the court's Order was the sole impetus behind Trudy's Petition in the first place. App. 105–07, 140. Moreover, Thain received a fair hearing on the issue of his contempt, but failed to present any evidence or testimony that he was not in contempt. Hr'g Tr. 4–5, 35. The transcript of the May 9, 2012 Hearing shows that contempt was a primary subject of discussion, and the court's ruling on that matter is proof that sufficient evidence had been heard regarding Thain's contempt. Hr'g Tr. 4–5, 35; App. 139–41.

[¶33] The factual record is clear that Thain was in contempt of the court's January, 2009 Order and August, 2009 Order, and the procedural record shows that Thain received the notice and hearing to which he is entitled under North Dakota law. For the reasons stated above, Thain did receive notice and a hearing on Trudy's request that Thain be held in contempt, in accordance with North Dakota law, and the district court did not abuse its discretion by finding Thain in contempt.

3. Trudy's Petition for Order to Show Cause was a valid and timely objection to Thain's Verified Statement to Close Estate, and Thain was not deprived of an adequate opportunity to explain his refusal to pay the amount owed to Trudy.

[¶34] The Appellees confess that they are confused by the Appellants' argument in Part IV.A.4. of their Brief of Appellants. The Appellants' argument appears to be that Trudy's Petition for Order to Show Cause did not operate as a valid objection to Thain's filing of the Verified Statement within the six month statute of limitations found in N.D.C.C. § 30.1-21-05. Pl's Br. ¶¶ 35–38. Appellants appear to further argue that Trudy's dispute with Thain over not being paid should have been brought in the form of an action for breach of fiduciary duty under N.D.C.C. § 30.1-21-05 rather than a Petition for Order to Show Cause under N.D.C.C. § 30.1-21-03.1(1). Pl's Br. ¶¶ 36. Appellants suggest that Trudy's choice of bringing a Petition for Order to Show Cause under N.D.C.C. § 30.1-21-03.1(1) somehow prejudiced Thain by depriving him of an opportunity to explain to the court why he was unable to pay Trudy the money he was ordered to pay from the Estate. Pl's Br. ¶¶ 38. These arguments are without merit and are likely just a pretext for Thain to discuss his reasons for not paying

Trudy as he was ordered to do, but nevertheless the arguments are addressed below.

a. Trudy made a valid and timely objection to Thain's Verified Statement to Close Estate.

[¶35] The six-month statute of limitations for actions against a personal representative for breach of fiduciary duty is found in N.D.C.C. § 30.1-21-05, which states:

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

N.D.C.C. § 30.1-21-05.

[¶36] First, it should be noted that it is unclear if this statute of limitations establishes a timeframe for objecting to verified statements. The language of the statute refers only to claims against a personal representative for breach of fiduciary duty. See N.D.C.C. § 30.1-21-05. However, to the extent that the statute may require an objection to a verified statement within six months, Trudy's objection, in the form of her Petition for Order to Show Cause, was timely. Thain's Verified Statement to Close Estate was filed on September 22, 2011. App. 99. Trudy's Petition for Order to Show Cause was served and filed with the district court on March 21, 2012, less than six months after Thain's Verified Statement was filed. App. 105. Therefore, to the extent that N.D.C.C.

§ 30.1-21-05 is applicable in this case, Trudy's Petition was timely and was not barred by N.D.C.C. § 30.1-21-05.

[¶37] Appellants also argue that, even though the Petition was filed within the six month statute of limitation, Trudy's Petition was not an objection to the verified statement because it was a Petition for Order to Show Cause and not technically an "objection." Pl's Br. ¶¶ 36. Black's Law Dictionary defines "objection" as "[a] formal statement opposing something that has occurred, or is about to occur, in court and seeking the judge's immediate ruling on the point." Black's Law Dictionary 500 (3rd Pocket ed. 1996). The language contained in Trudy's Petition leaves no doubt that, by her Petition, Trudy was opposing Thain's verified statement. See App. 106. In her Petition, Trudy stated, "The Personal Representative has attempted to close the estate by filing a verified Statement to Close Estate, a procedure which is not allowed for estates being administered in supervised administration proceedings." App. 106 (emphasis in original). This statement was clearly made in opposition to Thain's Verified Statement to Close Estate, even though it was contained in a Petition for Order to Show Cause. See App. 106. Therefore, to the extent that N.D.C.C. § 30.1-21-05 applies to objections to verified statements, Trudy's objection was valid and timely made.

b. Thain was not deprived of an adequate opportunity to explain his refusal to pay the sums owed to Trudy.

[¶38] The Appellants appear to argue that the gist of Trudy's dispute with Thain over Thain's failure to pay Trudy is a breach of fiduciary duty, and that, because Trudy opted not to bring an action against Thain for breach of fiduciary

duty but instead brought a Petition for Order to Show Cause, Thain was not afforded an adequate opportunity to explain why he didn't pay Trudy the amounts owed her by the Estate. Pl's Br. ¶¶ 36–38. This argument is peculiar in that it does not assign error to the court, but instead assigns error to Trudy for not bringing the claim that Thain would have preferred her to bring. Pl's Br. ¶¶ 36–38 (“If Trudy would have timely and properly made the [breach of fiduciary duty] argument . . . Thain would have been able to provide the district court with evidence as to why the payment of the \$6,377.83 was not made.”).

[¶39] This argument has no basis in law, and was clearly made as a pretext to allow Thain to try to explain his reasons for not paying Trudy. See Pl's Br. ¶¶ 35–41. Fortunately, the district court and the North Dakota Supreme Court have already examined those reasons and found them to be without merit, so, thankfully, there is no reason to revisit them again now. See App. 93–95; Cashmore, 2010 ND 159, ¶ 17, 787 N.W.2d 261. The simple fact is that Trudy did not need to pursue a breach of fiduciary duty claim against Thain because she already had an Order and Judgment entitling her to receive payment from the Estate. App. 43–49, 93–95. Therefore she followed the provisions of N.D.C.C. § 30.1-21-03.1 and N.D.C.C. § 27-10-01.3 to require Thain to show cause as to why the Estate had not been closed and to hold him in contempt. App. 105–07. The idea that Trudy's course of action in that regard somehow deprived Thain of an opportunity to explain why he refused to pay Trudy is ludicrous.

[¶40] As stated above, Appellants have alleged no error on the part of the district court with regard to the arguments outlined above. Therefore, the district court did not abuse its discretion, and the district court's Amended Order, dated August 13, 2012 should be affirmed.

B. The district court did not abuse its discretion by denying Thain's Rule 60(b) Motion to Vacate Amended Order.

[¶41] Finally, Appellees wish to note that the Appellants also appealed the district court's Order Denying Rule 60(b) Motion to Vacate Amended Order dated December 5, 2012. App. 142. However, the Brief of Appellants contains no arguments to that effect. In fact, the Appellants did not even include the district court's denial of Thain's Rule 60(b) Motion to Vacate Amended Order in their Statement of the Issues. See Pl's Br. ¶ 1. Because no arguments were made in support of reversing the district court's Order Denying Rule 60(b) Motion to Vacate Amended Order dated December 5, 2012, the district court did not abuse its discretion and its Order Denying Rule 60(b) Motion to Vacate Amended Order dated December 5, 2012 should be affirmed.

V. CONCLUSION

[¶42] As set forth above, it is clear that the district court did not abuse its discretion by finding Thain Cashmore in contempt, nor did it abuse its discretion by denying Thain's Rule 60(b) Motion to Vacate Amended Order. For these reasons, the Appellees respectfully request that the Amended Order dated August 13, 2012 and the Order Denying Rule 60(b) Motion to Vacate Amended Order dated December 5, 2012 be affirmed.

[¶43] Dated this 3rd day of May, 2013.

PRINGLE & HERIGSTAD, P.C.

By 

Steven A. Lautt #07242

Carol K. Larson #4406

2525 Elk Drive

PO Box 1000

Minot, North Dakota 58702-1000

(701) 852-0381

Attorneys for Respondents-Appellees

CERTIFICATE OF SERVICE

[¶44] A copy of the foregoing document was e-mailed to the following on
May 3, 2013:

Kent Reiersen
Lisa Dyenneson
Attorneys at Law
PO Box 1206
Williston, ND 58802
kreiersen@crowleylaw.com

Clark J. Bormann
Attorney at Law
PO Box 995
Bismarck, ND 58505-0995
clarklaw@btinet.net

A handwritten signature in cursive script, appearing to read "Steven A. Lautt", written over a horizontal line.

Steven A. Lautt