

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

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. The District Court Abused Its Discretion by Finding Thain Cashmore, Personal Representative, in Contempt for Not Paying \$6,377.83 to Trudy Cashmore

1. Trudy's Petition Under N.D.C.C. § 30.1-21-03.1 Was Improperly Before the District Court as the Estate Was Closed When Trudy's Petition Was Filed, Yet Thain Appeared, Providing Substantial Evidence of the Closed Estate

[¶1] Thain *does not contend* that Trudy could not object to the Sworn Statement *or* allege a breach of duty, though it remains Thain's position these arguments are unsupported. Thain *does contend*, however, that Trudy's Petition pursuant to section 30.1-21-03.1, N.D.C.C. was not proper as the plain language of the section shows it is inapplicable to closed estates. *Br. Appellants*, ¶ 18 (*quoting N.D.C.C. § 30.1-21-03.1*).

[¶2] Though Trudy's Petition was improper, Thain filed a brief and appeared, pursuant to the Order to Show Cause, and provided substantial evidence the estate was closed at the time of Trudy's Petition, meaning Trudy's Petition was without merit. *App. 110–117*.

[¶3] Trudy asserts that this Court has already considered the reasons for Thain not paying Trudy and found them without merit. *See Br. Appellees*, ¶¶ 17, 23, 39. Trudy's argument seems to be that, because this Court previously affirmed the August 2009 order, Thain was required, without exception, to pay Trudy \$6,377.83.

a. The Estate Was Closed After This Court's 2010 Decision

[¶4] Thain believes Trudy's interpretation of this Court's prior opinion is in error as this Court dealt only with the procedure Thain utilized: whether it was *procedurally* proper for Thain to amend, *not* whether Thain must pay Trudy \$6,377.83. *Cashmore v. Cashmore*, 2010 ND 159, ¶¶ 9–17.

[¶5] Thain had filed the amended final account, in good faith based on the district court changes, the decreased cash value of Bourck’s loan, and estate vehicles selling for less than appraised value. See id. at ¶ 15. After the district court’s August 2009 order denying the motion, the second bullet point in said order—“That within ten (10) days of the date of this Order, the Estate shall pay to Trudy Cashmore \$6,377.83”—received no treatment from this Court in its opinion on appeal. *App.* 95; see Cashmore, at ¶¶ 1, 7.

[¶6] This Court held that an order under section 30.1-21-01(1) is final and cannot be amended as the “statutes clearly envision a final resolution of the estate” and “the estate proceedings are concluded.” Cashmore, at ¶¶ 13, 15. This Court knew the estate had no funds. See id. at ¶ 6. This Court did not force Thain to pay Trudy regardless of finances; rather, it held the appellants “failed to employ the appropriate available remedy,” without mention of how to move forward. Id. at ¶¶ 16–17, 25.

[¶7] “[T]he estate proceedings [were] concluded”, but Thain’s appointment was not specifically terminated. See N.D.C.C. § 30.1-21-01(1). The estate remained in a peculiar position: it had no funds, and Trudy was—and still is—holding more estate assets than entitled. To pay Trudy, the estate would need to sue Trudy for assets, liquidate them, and then pay. Without money, plus debt to the Trust, it did not make logical, rational, or financial sense to sue Trudy. To address these concerns, Thain filed the Sworn Statement to close the estate and terminate his appointment.

b. The Estate Was Closed with Thain’s Sworn Statement

[¶8] Under section 30.1-21-03 closure by Sworn Statement is allowed *in all circumstances* “[u]nless prohibited by order of the court and except for estates being administered in supervised administration proceedings.” N.D.C.C. § 30.1-21-03. The

record was devoid of any order prohibiting closure. *App.* 2–9. In Trudy’s Petition, she argued the Sworn Statement was ineffective as this was under supervised administration. *App.* 106. Trudy now notes it was “not a ‘supervised administration proceeding’ in the *technical sense*,” but “the Estate has so clearly been supervised” because of the number of decisions of the district court. *Br. Appellees*, ¶ 21.

[¶9] “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. Court involvement does make this supervised administration.

[¶10] Trudy acts as if an estate cannot be closed without all claims paid; however, many estates have inadequate funds. Trudy argues “qualifying his statement [in the Sworn Statement] by saying he made payment, settlement, and other disposition ‘to the extent [he] was able’ does not free Thain from his obligation,” but this is incorrect. *Br. of Appellee*, ¶ 23. Section 30.1-21-03(1)(a) specifically provides a means to file a closing statement with “any claims remain[ing] undischarged.” N.D.C.C. § 30.1-21-03(1)(a).

[¶11] In filing the Sworn Statement, Thain followed the requirements of section 30.1-21-03(1). *Br. Appellants*, ¶ 26 (*quoting* N.D.C.C. § 30.1-21-03). A plain reading of section 30.1-21-03(1)(a) shows Trudy’s assertion that the Sworn Statement “was facially deficient” is without merit. *Br. of Appellee*, ¶¶ 22–23. Because Trudy may have had a “claim[] remain[ing] undischarged,” the Sworn Statement included that Thain distributed the estate to the extent able and that the estate knew Trudy had excess, but it was

infeasible to retrieve. *App. 99–104*. Thain did not shirk his responsibilities; instead, he openly clarified everything with the Sworn Statement to show what had taken place.

[¶12] Trudy, like Thain, cites to editorial comments for the definition of “closing”: “The 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.” *Br. Appellees*, ¶ 12 (quoting *N.D.C.C. § 30.1-21-03 ed. bd. cmt.*). Trudy’s assertion that “[b]ecause 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” ignores the definition’s second part. *Br. Appellees*, ¶ 16. Thain recognized the August 2009 order was affirmed and also there was nothing to distribute without suing. Instead of suing, Thain filed the Sworn Statement with details showing why and how he wrapped up the affairs. *App. 99–104*. These are clearly “circumstances which support the conclusions that the affairs of the estate . . . *have been alleged to have been wound up.*” See *N.D.C.C. § 30.1-21-03 ed. bd. cmt.* Because the statute did not prohibit the Sworn Statement, and Thain properly filed it, the estate was closed before Trudy’s Petition.

2. The Court’s Order to Show Cause Did Not Provide Sufficient Notice to Thain that He Would Be in Contempt for Not Paying Trudy \$6,377.83

[¶13] Trudy argues that Trudy’s Petition seeks two separate actions. *Br. of Appellee*, ¶ 28. However, the Order to Show Cause clearly provided: “IT IS HEREBY ORDERED that you appear . . . and show cause, if any you have, *as to why the above estate has not been closed.*” *App. 108*.

THE COURT: So the only issue that should be here, based on your client’s position is that I didn’t get my money like the Court ordered it, and I want it.

MS. LARSON [COUNSEL FOR TRUDY]: Absolutely. . . .

THE COURT: For the sake of not showing too much ignorance on my part, Ms. Larson, my order to show cause doesn't address that. So Mr. Bormann will be right in his position that this hearing today would not be for that purpose.

Hr'g Tr. 17–18. It is clear from Thain's Brief in Opposition that his argument was solely focused on the closure of the estate *not* defenses for why Trudy was not paid \$6,377.83. *App. 110–117.* If Trudy wanted the "sole impetus" to be the August 2009 order, it should have been in the Order to Show Cause. *Br. of Appellee, ¶ 32.*

THE COURT: So that having been said, your petition was not really - - should not have been on why the Court, this case was not closed. It should have been on why [the order to pay \$6,377.83] wasn't complied with. . . .

Hr'g Tr. 16.

[¶14] Trudy argues that, because Thain was aware "the contempt subject matter" would be involved, Thain had adequate notice to be held in contempt of the August 2009 order. *Br. Appellees, ¶¶ 29–32.* The Order to Show Cause was only specific to the timely closing issue and did not provide adequate notice to Thain that he could be held in contempt of the August 2009 order.

3. Because Trudy's Argument Was Not Properly Before the District Court, Thain Was Not Provided Adequate Opportunity to Provide Evidence Why He Should Not Be Held in Contempt for Not Paying Trudy \$6,377.83

[¶15] Statute provides relief for claimants who believe the estate has been distributed subject to their claims, allowing six months from filing the "closing statement" to object. N.D.C.C. § 30.1-21-05. A petition under section 30.1-21-03.1 is *entirely separate and distinct* from relief under section 30.1-21-05.

[¶16] In 2010, this Court held that, if the amended final account was allowed, other provisions would be rendered “mere surplusage”. Cashmore, at ¶ 13. With Trudy’s Petition, Trudy believed she was objecting to the Sworn Statement and asserting her breach of duty claim against Thain within six months. *Br. Appellees*, ¶¶ 36–37. Using section 30.1-21-03.1 to seek relief in section 30.1-21-05 deems the latter section mere surplusage.

[¶17] Trudy notes that Thain’s arguments “are likely just a pretext for Thain to discuss his reasons for not paying Trudy as he was ordered to do.” *Br. Appellees*, ¶ 34. This shows that Trudy recognizes Thain was *not* given the opportunity to provide the reasons for not paying additional money. Trudy points out exactly what Thain is urging: if Thain may be held in contempt, he must be provided adequate notice and opportunity to argue his defenses. See Holkesvig v. Welte, 2012 ND 14, ¶ 11. Thain was not provided adequate opportunity to defend why he should not be held in contempt of the August 2009 order.

II. CONCLUSION

[¶18] Trudy’s Petition was brought, and the Order to Show Cause was issued, under section 30.1-21-03.1, N.D.C.C., requiring Thain to appear and give cause as to why the estate had not been closed. Thain complied by filing a brief, appearing at the hearing, and providing substantial evidence the estate was closed, meaning Trudy’s Petition was without merit. However, without adequate notice and hearing, Thain was held in contempt for violating the August 2009 order. As even Trudy has recognized, Thain was not given the opportunity to explain why the estate did not pay Trudy an additional \$6,377.83. The simple fact is the estate could not pay Trudy with inadequate funds.

[¶19] For the foregoing reasons, Thain Cashmore and Bourck Cashmore respectfully request that (1) the district court's Amended Order finding Thain, as personal representative, in contempt and ordering Thain, as personal representative, to pay Trudy \$6,377.83 with interest and Trudy's fees and costs in the amount of \$1,775.00 be reversed and vacated; (2) the district court's Order Denying Rule 60(b) Motion to Vacate Amended Order be reversed and vacated; and (3) the Court order the district court to accept and approve the closing of the Robert Cashmore Estate with the Sworn Statement as already filed with its supporting documentation by Thain, as personal representative, and terminate Thain's appointment as personal representative of the Robert Cashmore Estate.

[¶20] DATED this 20th day of May, 2013.

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CERTIFICATE OF SERVICE

[¶21] I, Kent Reiersen, certify that on May 20, 2013 a true and correct copy of
the Reply Brief of Appellants was served by e-mail on

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