

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 APPELLANTS

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I. STATEMENT OF THE ISSUES

[¶1] The district court abused its discretion by finding Thain Cashmore, personal representative, in contempt for not paying \$6,377.83 to Trudy Cashmore.

II. STATEMENT OF THE CASE

[¶2] In December of 2002, Thain Cashmore filed an Application for Informal Probate of Will and Appointment of a Personal Representative. *App. of Appellants 10–12*. The informal probate was opened, and Thain Cashmore was appointed as personal representative (hereinafter “Thain” or “personal representative”). *App. 13–14; App. 15–16*. During the probate proceedings Trudy Cashmore contested many issues.

[¶3] A Judgment incorporating the district court’s January 2009 Order for Judgment approving the final account and proposed plan for distribution was entered in March of 2009. *App. 43–46; App. 47–75*. Thain then filed a Motion to Approve an Amended Final Report and Account and Proposed Distribution seeking to effectuate the enumerated changes the district court provided in its original order and judgment. *App. 76; App. 77–92*. In August of 2009, the district court denied Thain’s motion to amend. *App. 93–95*. In its opinion filed on September 21, 2010, this Court affirmed the district court’s ruling on the motion to amend. Cashmore v. Cashmore, 2010 ND 159, ¶ 25, 787 N.W.2d 261; *see also App. 98 (judgment of the North Dakota Supreme Court)*.

[¶4] On September 22, 2011, Thain filed a Verified Statement to Close the Estate (“Sworn Statement”) pursuant to section 30.1-21-03, N.D.C.C. *App. 99–100*. With the Sworn Statement, Thain attached documents showing the financial balance of the estate as based on the numbers approved by the district court in the final report. *App. 101–104*. On March 21, 2012, Trudy Cashmore filed a Petition for Order to Show Cause

(“Petition”) pursuant to section 30.1-21-03.1, N.D.C.C., asking the district court to issue a show cause order to require Thain to show why the estate had not been closed and why Thain should not be held in contempt of court for not closing the estate within three years of Robert Cashmore’s death. *App. 105–107*. The district court entered its Order to Show Cause on March 28, 2012, requiring Thain to show cause, if any, as to why the estate was not closed. *App. 108–109*. Thain filed a Brief in Opposition to Petition for Order to Show Cause, and Thain appeared at the hearing on May 9, 2012 as required, showing that the estate was properly closed prior to the filing of Trudy’s Petition and provided reasons why the estate was not closed within three years of Robert Cashmore’s death. *App. 110–117; Hr’g Tr.* On August 13, 2012, the district court entered an Order finding Thain in contempt of court for failure to pay Trudy \$6,377.83. *App. 118–119*. An Amended Order incorporating an Affidavit of Attorney’s Fees was entered on August 15, 2012, requiring Thain to pay \$1,775.00 for fees and costs. *App. 120–121; App. 122–123*.

[¶5] Thain filed a Rule 60(b) Motion to Vacate Amended Order with an accompanying brief on August 24, 2012. *App. 124–125; App. 126–135*. Trudy filed a Brief in Opposition to Motion to Vacate Amended Order. *App. 136–138*. No hearing was held on the motion. *App. 9*. On December 7, 2012, the district court filed its Order Denying Rule 60(b) Motion to Vacate Amended Order. *App. 139–141*. Thain Cashmore, Personal Representative of the Estate of Robert W. Cashmore, and Bourck Cashmore and Thain Cashmore, individually and as Trustees of the Robert Cashmore Trust, have appealed the Amended Order, filed August 15, 2012, *and* the Order Denying Rule 60(b) Motion to Vacate Amended Order, filed December 7, 2012. *App. 142–143*.

III. STATEMENT OF FACTS

[¶6] Robert W. Cashmore died on May 22, 2002. *App. 43*. Appellants Thain and Bourck Cashmore are Robert’s adult children from his first marriage. *App. 17*. Trudy Cashmore was married to Robert at the time of his death, and Trudy and their two adult children, Tricia and Kendra, are appellees to this action (hereinafter “Trudy”). *App. 17*.

[¶7] Thain Cashmore filed an application for informal probate and appointment as personal representative in December of 2002. *App. 10–12*. The district court issued an order granting the informal probate application, appointing Thain as personal representative of the estate. *App. 13–14*. Letters testamentary of informal probate were issued on the same date. *App. 15–16*. Since inception, Trudy has contested numerous issues, most of which were resolved by the district court in July of 2007. *App. 17–37*.

[¶8] Thain filed a Motion to Approve Final Report and Account and Proposed Distribution in March of 2008. *App. 38*. The Final Report and Account (“final account”) was filed in early April of 2008, showing a balance of around \$70,000.00 in the estate. *App. 39–42*. A hearing was held in August of 2008 on the final account. *App. 6*. Months later in January of 2009, the district court entered its Findings of Fact, Conclusions of Law, and Order for Judgment: “The Final Account and proposed plan for distribution is approved with the following changes” *App. 45*. A Judgment was later entered in March of 2009, incorporating the order from January of 2009. *App. 47–75*.

[¶9] In April of 2009, Thain filed a Motion to Approve Amended Final Report and Account and Proposed Distribution with an Amended Final Report and Account (“amended final report”). *App. 76; App. 77–92*. The amended final report reflected the changes enumerated in the district court’s previous order, showing a balance of \$0.00 in

the estate. *App.* 77–92. After a hearing on the motion, the district court entered an order in August of 2009 that, in part, denied the motion to approve the amended final report

ACCORDINGLY, IT IS ADJUDGED, ORDERED, AND DECREED:

- That the “*Motion for Approval of Amended Final Report and Account and Proposed Distributions*,” dated April 2, 2009 is **DENIED**;
- That within ten (10) days of the date of this Order, the Estate shall pay to Trudy Cashmore \$6,377.83;
- That additional attorney fees in the amount of \$1,500 shall be allowed under Section D.1. of the “*Final Report and Account and Proposed Distributions*,” dated March 27, 2008; and
- That additional personal representative fees in the amount of \$1,250 shall be allowed under Section D.2. of the “*Final Report and Account and Proposed Distributions*,” dated March 27, 2008.

App. 93–95.

[¶10] The order was jointly appealed to this Court by 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, in October of 2009. *App.* 96–97. Thain and Bourck in that appeal alleged that the district court abused its discretion in (1) denying the motion to approve the amended final report, and (2) allowing additional personal representative’s and attorney’s fees in an amount less than requested. Cashmore, 2010 ND 159 at ¶¶ 9, 18. In this Court’s opinion filed September 21, 2010, this Court affirmed the district court in concluding that “the district court did not abuse its discretion in denying the motion to approve the amended final report” and that “Thain and Bourck Cashmore failed to meet their burden to affirmatively establish that the district court abused its discretion in determining a reasonable amount of additional personal representative’s fees and attorney’s fees.” Id. at ¶¶ 17, 22.

[¶11] On September 22, 2011—one year and one day after this Court’s opinion was filed—Thain, as personal representative, the Sworn Statement. *App. 99–104*. The Sworn Statement, among other things, made it clear that Thain had administered the estate “to the extent [he] was able,” making specific mention to attached documents showing that Trudy was entitled to monies of the estate yet Trudy had received monies/assets in excess of what she was entitled. *App. 99*. Thain, in the Sworn Statement, showed that he was aware of this overcompensation, but “there are no remaining funds available to attempt to pursue the same, and such an effort would undoubtedly exceed in fees and costs the amounts, if any, which could be recovered.” *App. 99*. In lieu of suing Trudy to pay Trudy, incurring additional, unnecessary fees and expenses of the estate, as well as using the court’s time and resources, Thain acted in the best interest of the estate and closed the estate with the Sworn Statement. *App. 99*.

[¶12] On March 31, 2012, Trudy filed her Petition pursuant to section 30.1-21-03.1, N.D.C.C., asking the district court to issue a show cause order to require Thain to show why the estate had not been closed and why Thain should not be held in contempt of court for not closing the estate within three years of Robert Cashmore’s death. *App. 105–107*. Based on the Petition, the district court entered an Order to Show Cause on March 28, 2012.

The attorney for Trudy Cashmore has filed a Petition, pursuant to 30.1-21-03.1 of the Uniform Probate Code [sic], for an Order to Show Cause as to why the Estate of Robert Cashmore has not been closed.

IT IS HEREBY ORDERED that you appear in the District Courtroom, Ward County Courthouse, Minot, North Dakota, on May 7, 2012, at 4:00 p.m. and show cause, if any you have, as to why the above estate has not been closed. The Court may award attorney’s fees and costs in favor of the Petitioner if it finds that the Personal Representative or attorney

employed by the Personal Representative has failed to show cause why the estate has not been closed within three years from the date of death of the decedent unless extended by the Court. Those listed below are hereby advised of their right to participate in the hearing proceedings.

App. 108–109. On April 12, 2012, Thain filed a Brief in Opposition to Petition for Order to Show Cause asserting that (1) the estate was closed, and Trudy, by filing her Petition, re-opened the estate after it was properly closed, (2) Trudy’s claim that Thain and/or his counsel should be sanctioned for failure to close the estate within three years of Robert’s death was without merit, (3) Trudy’s Petition was frivolous, made without reasonable cause, in bad faith, and untrue, and (4) the hearing should be cancelled for lack of cause. *App. 110–117.*

[¶13] A hearing was held on May 9, 2012 where counsel for the personal representative, counsel for the trust, and counsel for Trudy appeared. *App. 8; Hr’g Tr. 1.* At the hearing, Trudy’s main argument was that “there’s really only one issue,” and the issue was whether the estate had paid \$6,377.83 to Trudy within ten days of August 17, 2009. *Hr’g Tr. 5, 7–8, 17–18.* Thain alerted the district court that whether Trudy had been paid the \$6,377.83 was “not an issue in this show cause hearing,” and that there were “only two issues that this order to show cause ha[d] been set for,” which did not include the payment of the \$6,377.83. *Hr’g Tr. 11–12, 36.* Thain argued and presented proof that the estate *could be closed* by the filing of the Sworn Statement, and Thain argued that the estate *was closed* by the filing of the Sworn Statement. *Hr’g Tr. 19–25, 37–38.*

[¶14] On August 13, 2012, the district court issued an Order based on the show cause hearing, providing, in part

The Personal Representative has filed a verified Statement to Close the Estate. Trudy Cashmore has filed a Petition for an Order to Show Cause for Contempt based upon the failure of the Estate to pay her the \$6,377.83 to which she is entitled. A hearing was held on May 9, 2012.

The Court finds that the Personal Representative's failure to comply with the Court's Order, dated August 17, 2009, is Contempt of Court. N.D.C.C. Ch. 27-10 allows for the Court to impose remedial sanctions against the Personal Representative for his contempt of court. These remedial sanctions can include payment of the aggrieved party's costs and expenses, imprisonment, and a fine.

App. 118–119. The order gave Thain “10 days from the date of this Order to pay to Trudy Cashmore the amount of \$6,377.83 . . . [and] interest on the award at the statutory rate of 7 % per annum dating from September 1, 2009, to the date of payment.” *App. 119.* The original order also allowed for the recovery of attorney's fees, so an Amended Order was filed on August 15, 2012, incorporating \$1,775.00 on the Affidavit of Attorney's Fees and Costs. *App. 120–121; App. 122–123.* Thain paid these amounts under protest by borrowing money from the Robert W. Cashmore Irrevocable Trust and Bourck Dewey Cashmore. *App. 139.*

[¶15] On August 24, 2012, Thain filed a Rule 60(b) Motion to Vacate Amended Order alleging that (1) Trudy's Petition was filed under N.D.C.C. § 30.1-21-03 [sic], claiming Thain should be in contempt for failure to close the estate within three years, (2) Trudy cited to N.D.C.C. § 30.1-21-03.1 in claiming grounds for attorney's fees if Thain did not show why the estate was not closed within three years; (3) the Order to Show Cause required Thain to show cause why the estate was not closed, (4) Thain was found in contempt for something that was *not the basis of the Petition, the Order to Show Cause or the hearing*, (5) Thain did not receive due notice—a statutory requirement—that he was being ordered to “show cause” that Trudy had not been paid \$6,377.83, and (6) the

district court made no findings or conclusions regarding whether Thain should be in contempt for failure to close within three years—the basis of the Petition. *App. 124–125 (emphasis added)*. Thain filed a Brief in Support of Rule 60(b) Motion to Vacate Amended Order providing substantial support for his allegations in the motion, particularly in regard to the necessity that the court provide adequate notice and opportunity to be heard to an individual who may be found in contempt and sanctioned with remedial sanctions. *App. 126–135*. Thain also provided additional support for his reasoning and decision to close the estate in lieu of incurring more needless fees and expenses and utilizing time and resources to sue Trudy in order to pay her. *App. 126–135*. Trudy filed a Brief in Opposition to Motion to Vacate Amended Order on September 10, 2012. *App. 136–138*.

[¶16] On December 7, 2012, the district court entered its Order Denying Rule 60(b) Motion to Vacate Amended Order, providing, in part

The PR argues that he failed to receive proper notice of the reason for his alleged contempt. Failure to close the estate within three years of the decedent's death versus failure to follow the Court's Order and pay Trudy Cashmore. The 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.

The PR further argues that his failure to act on the Court's August 17, 2009, order was not done intentionally, willfully, or without excuse. The PR argues that the Court cannot find him in Contempt of Court for his failure to pay Trudy Cashmore, as ordered by the Court, because the Estate does not have the money to pay Trudy Cashmore. The PR did, nonetheless, tell the Court that the money was there in 2009 when the Court made its order. That order was confirmed by the Supreme Court. See Estate of Robert W. Cashmore, 2010 ND 159, 787 N.W.2d 261. The motivations behind a person's actions cannot normally be delineated by direct evidence and can usually only be established with circumstantial certainty. The Court is, however, convinced by clear evidence, that in this

case, the non-compliance with the Court's 2009 order was intentional, willful and without excuse.

Finally, the PR argues that the closing of the estate by a Verified Statement, filed on September 21, 2011, can only be improper if the estate is a "supervised administration proceeding," which it is not, or if prohibited by court order. In this case, the Court finds that the order of this Court, dated August 17, 2009, prevented the closure of this estate by a Verified Statement until such time as that August 17, 2009, order was carried out.

The Court is not convinced and does not find that the PR should be relieved of the Court's August 13, 2012, order for reasons of mistake, inadvertence, surprise, or excusable neglect. The Court finds no other reason that justifies the relief requested by the PR in its Rule 60 (b) Motion to Vacate. The motion was timely, has been liberally construed, and has been interpreted to accomplish justice.

App. 139–141.

IV. 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

[¶17] "[This Court] will not overturn a finding of contempt unless there is a clear abuse of . . . discretion." Millang v. Hahn, 1998 ND 152, ¶ 7, 582 N.W.2d 665, 666–67 (citing Endersbe v. Endersbe, 555 N.W.2d 580, 581 (N.D. 1996)).

When reviewing a contempt sentence, the ultimate determination of whether a contempt charge exists is within the lower court's discretion. City of Grand Forks v. Dohman, 552 N.W.2d 69, 70 (N.D.1996); Mehl v. Mehl, 545 N.W.2d 777, 780 (N.D.1996) (citing Ronngren v. Beste, 483 N.W.2d 191, 195 (N.D.1992)). A finding of contempt will not be overturned unless there is a clear abuse of this discretion. Knoop v. Knoop, 542 N.W.2d 114, 116 (N.D.1996); Spilovoy v. Spilovoy, 488 N.W.2d 873, 875 (N.D.1992); Ronngren, 483 N.W.2d at 195 (quoting Bergstrom v. Bergstrom, 320 N.W.2d 119, 121 (N.D.1982)). A trial court abuses its discretion when "it misinterprets or misapplies the law[]" or acts in an arbitrary, unreasonable, or unconscionable manner. Bachmeier v. Wallwork Truck Centers, 544 N.W.2d 122, 125 (N.D.1996) (quoting

City of Fargo v. Hector, 534 N.W.2d 821, 822 (N.D.1995)). Dohman, 552 N.W.2d at 70-71 (stating the abuse of discretion standard).

Endersbe, 555 N.W.2d at 581 (alteration in original).

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 at the Time Trudy's Petition Was Filed

[¶18] The plain language of section 30.1-21-03.1, N.D.C.C., in its entirety provides as follows:

1. If the personal representative has not filed with the court a verified statement to close the estate, or as part of the supervised administration proceedings in accordance with this chapter, within three years from the date of death of the decedent, any devisee, heir, distributee, or claimant may petition the court, formally or by any informal request, or the court on its own motion may order, *that the personal representative and the attorney employed by the personal representative be required to show cause to the court why the estate has not been closed*. The court shall order the personal representative and the attorney employed by the personal representative to show cause to the court at a hearing scheduled within ninety days *why the estate has not been closed*. The court shall serve notice upon all heirs, devisees, claimants, distributees, and beneficiaries of the estate of the order to show cause, the date of the hearing, and of their right to participate in the hearing proceedings.

2. Within twenty days of receipt of the order to show cause, the personal representative or the attorney employed by the personal representative shall provide the court with a report containing a *timeframe for the anticipated closure of the estate*; a detailed explanation as to *why the estate has not been closed*; and a detailed accounting of all disbursements made by the estate, including specific information as to all fees and other disbursements made to the personal representative, and to any attorney, auditor, investment adviser, or other specialized agent or assistant employed to do work for the estate.

3. After the order to show cause hearing, the court shall issue an order establishing a *timetable for the closing of the estate* based upon the information provided in the report and the evidence provided during the hearing. The court may award attorney's fees and costs in favor of a petitioner if the court finds that the personal representative or the attorney employed by the personal representative has failed to show cause why the estate has not been closed within three years from the date of death of the

decedent unless extended by the court. The court may file a complaint with the disciplinary board against the attorney.

N.D.C.C. § 30.1-21-03.1 (emphasis added). This provision was cited by Trudy in her Petition

COMES NOW, Trudy Cashmore, by and through her attorney, Carol K. Larson, and petitions 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. The Petitioner seeks an Order from the Court ordering the Personal Representative and the attorney employed by the Personal Representative to show cause to the Court at a hearing scheduled within 90 days why the estate has not been closed, *pursuant to NDCC § 30.1-21-03.1*.

App. 105 (emphasis added). The district court also cited this provision in its Order to Show Cause

The attorney for Trudy Cashmore has filed a Petition, *pursuant to 30.1-21-03.1 of the Uniform Probate Code [sic]*, for an Order to Show Cause as to why the Estate of Robert Cashmore has not been closed.

IT IS HEREBY ORDERED that you appear . . . and show cause, if any you have, as to why the above estate has not been closed. The Court may award attorney's fees and costs in favor of the Petitioner if it finds that the Personal Representative or attorney employed by the Personal Representative has failed to show cause why the estate has not been closed within three years from the date of death of the decedent unless extended by the Court.

App. 108 (emphasis added).

[¶19] The language of the statute gives certain individuals the ability to petition the court against a “personal representative [who] has not filed with the court a verified statement to close the estate . . . *within three years from the date of death of the decedent.*” N.D.C.C. § 30.1-21-03.1(1) (emphasis added). The overall plain reading of this section shows it only applies to estates that are not closed, regardless of the date of

death of the decedent: the three years is merely a “start date” for when individuals provided for in the section can petition the court. See id. By statute, the personal representative is required to appear at the hearing and “provide the court with a report containing a timeframe for the anticipated closure of the estate; a detailed explanation as to why the estate has not been closed, and a detailed accounting of all disbursements made by the estate.” Id. § 30.1-21-03.1(2). The court then “issue[s] an order establishing a timetable for the closing of the estate based upon the information provided in the report and the evidence provided during the hearing.” Id. § 30.1-21-03.1(3). Clearly, section 30.1-21-03.1, N.D.C.C., does not provide a procedural route for relief once an estate is already closed.

a. The Estate Was Closed When Trudy’s Petition Was Filed

[¶20] For purposes of probate law, the word “closed” differs from the word “termination.” “The Code uses ‘termination’ to refer to events which end a personal representative’s authority. See sections 30.1-17-08, et seq. 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.*” Id. § 30.1-21-03 ed. bd. cmt. (emphasis added). In the North Dakota Century Code, the closing of estates is dealt with under chapter 30.1-21, while the termination of personal representative appointments is dealt with under sections 30.1-17-08 through 30.1-17-12. Id. ch. 30.1-21, §§ 30.1-17-08 to - 12.

[¶21] Under chapter 30.1-21, N.D.C.C., an estate can be closed in more than one way. Particular to these facts, an estate can be closed using formal proceedings to terminate the administration

A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and, after receiving satisfactory evidence of payment of any estate tax due, directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

Id. § 30.1-21-01(1). This was the approach initially used in this Cashmore probate: a motion to approve the final report and account and proposed distribution was filed by the personal representative in March of 2008, and a final report was filed in April of 2008. *App.* 38; *App.* 39–42. A hearing on the motion was held in August of 2008, and thereafter in January of 2009, an order approving the final report with enumerated adjustments was entered, followed by a judgment incorporating said order in March of 2009. *App.* 43–46; *App.* 47–75.

[¶22] The personal representative made a motion to approve an *amended* final report in April of 2009. *App.* 76; *App.* 77–92. After a hearing on the motion in June of 2009, the district court entered an order in August of 2009 denying the amended final report

ACCORDINGLY, IT IS ADJUDGED, ORDERED, AND DECREED:

- That the “*Motion for Approval of Amended Final Report and Account and Proposed Distributions*,” dated April 2, 2009 is **DENIED**;
- That within ten (10) days of the date of this Order, the Estate shall pay to Trudy Cashmore \$6,377.83;
- That additional attorney fees in the amount of \$1,500 shall be allowed under Section D.1. of the “*Final Report and Account and Proposed Distributions*,” dated March 27, 2008; and

- That additional personal representative fees in the amount of \$1,250 shall be allowed under Section D.2. of the “*Final Report and Account and Proposed Distributions*,” dated March 27, 2008.

App. 95. This order denying the motion to approve the amended final report was appealed to this Court. *App.* 96–97

[¶23] In its opinion filed in September of 2010, this Court found that the district court had not abused its discretion in denying the motion to approve the amended final report. Cashmore, 2010 ND 159 at ¶ 7. In coming to this conclusion, the Court discussed the effect of orders entered under section 30.1-21-01(1), N.D.C.C.

[Pursuant to N.D.C.C. § 30.1-21-01(1),] [j]udgment was entered resolving the remaining disputes between the parties and approving distribution of all estate property. Thain and Bourck Cashmore do not point to anything in the record demonstrating they advised the court other issues would be raised or further proceedings were anticipated. The district court entered a final judgment, and Leslie is inapposite.

Nor do we agree with Thain and Bourck Cashmore's interpretation of N.D.C.C. § 30.1-21-01(1). Although the statute notes the court may issue “an order or orders” resolving the petition, we do not read this language as authorizing attempts to change the distribution ordered in a prior final judgment approving a final accounting and distribution. *The relevant statutes clearly envision a final resolution of the estate.* For example, N.D.C.C. § 30.1-16-05 directs that, “[u]nless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under section 30.1-21-01.” Similarly, the Editorial Board Comment to N.D.C.C. § 30.1-21-02 notes that “Section 30.1-21-01 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate.” The finality and res judicata effect of an order closing an estate under N.D.C.C. § 30.1-21-01 are noted in the Editorial Board Comment to N.D.C.C. § 30.1-01-03:

Any action under this section is subject to usual rules of res judicata; thus, if a forged will has been informally probated, an heir discovers the forgery, and then there is a formal proceeding under section 30.1-21-01 of which the heir is given notice, followed by an order of complete

settlement of the estate, the heir could not bring a subsequent action under section 30.1-01-03 but would be bound by the litigation in which the issue could have been raised.

See also In re Estate of Ketterling, 515 N.W.2d 158, 164 (N.D.1994). Furthermore, “[a]n order closing an estate as provided in section 30.1-21-01 . . . terminates an appointment of a personal representative.” N.D.C.C. § 30.1-17-10(2). The Editorial Board Comment to N.D.C.C. § 30.1-21-03 clarifies:

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. If the affairs of the personal representative are reviewed and adjudicated under either sections 30.1-21-01 or 30.1-21-02, the judicial conclusion that the estate is wound up serves also to terminate the personal representative's authority.

In addition, N.D.C.C. ch. 30.1-21 expressly provides a procedure for subsequent administration if additional property of the estate is discovered after the estate has been closed. See N.D.C.C. § 30.1-21-08. This provision would be rendered mere surplusage if, as Thain and Bourck Cashmore assert, the language “order or orders” in N.D.C.C. § 30.1-21-01(1) authorizes any interested party to file a petition to approve an amended final report after a prior final report has been approved and a final judgment or order entered.

We do not believe it was the legislature's intent to create a procedure allowing successive petitions for approval of amended final accountings under N.D.C.C. § 30.1-21-01(1). Rather, we construe the legislature's use of the phrase “order or orders” as recognizing that a district court presented with a petition for an order of complete settlement of an estate is not limited to resolving all issues in a single order, but, “on appropriate conditions,” may bifurcate the issues and enter multiple orders, *culminating in a final judgment or order closing the estate*. See N.D.C.C. § 30.1-21-01(1). The statute authorizes only multiple orders, not successive petitions. *Once 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 the parties are not authorized to file a petition to approve an amended final accounting under the statute.

Id. at ¶¶ 12–14 (emphasis added). As explained by the Court, an order approving a final accounting and distribution under section 30.1-21-01(1), N.D.C.C., “concludes” the estate proceedings. Id. at ¶ 14. Therefore, it appears the order of the district court approving the final accounting closed the estate. Id.; see also N.D.C.C. § 30.1-21-03 ed. bd. cmt. (“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.*” (emphasis added)).

[¶24] According to statute, “[a]n order closing an estate as provided in section 30.1-21-01 . . . terminates an appointment of a personal representative.” N.D.C.C. § 30.1-17-10(2); see also Cashmore, 2010 ND 159 at ¶ 13 (quoting N.D.C.C. § 30.1-17-10(2)). “However, a personal representative is not discharged merely by the filing or approval of a final account. Rather, a formal order of discharge is required.” 31 AM. JUR. 2D *Executors & Administrators* § 251; see also N.D.C.C. § 30.1-21-01(1) (“After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and, after receiving satisfactory evidence of payment of any estate tax due, directing or approving distribution of the estate *and discharging the personal representative from further claim or demand of any interested person.*” (emphasis added)). Here, the district court’s order from January of 2009 provided that “[t]he Final Account and proposed plan for distribution is approved with the following changes,” but the order did not specifically discharge—terminate the appointment of—the personal representative. See App. 45.

[¶25] Arguably, the district court’s order in January of 2009 “closed” the estate. See Cashmore, 2010 ND 159 at ¶ 14 (“Once 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 . . .”). However, to dispel any concerns as to whether the estate was closed and his appointment as personal representative terminated, Thain filed the Sworn Statement on September 22, 2011—one year after this Court’s judgment was entered on the appeal. *App.* 99–104.

[¶26] The Sworn Statement was filed pursuant to section 30.1-21-03, N.D.C.C.,

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). The extensive record in this probate is devoid of any order that prohibits the closing of the estate by filing a sworn statement. See id.

[¶27] In addition, this probate was not being administered under “supervised administration proceedings.” See id.; see also N.D.C.C. ch. 30.1-16 (providing the requirements and characteristics of a probate under “supervised administration,” including a petition for supervised administration being filed and a personal representative being restricted to order of the court prior to exercising his powers). In the Sworn Statement, Thain provided, among other things, that

3. I have fully administered the estate of the decedent by making payment, settlement or other disposition of all claims which were presented, expenses of administration and estate, inheritance and other death taxes *to the extent I was able. Attached are documents* showing the assets inventoried and appraised, the modification to values of those assets as approved by the court, the payment from those assets of obligations of the estate, and the distribution of those assets. *To the extent assets were distributed to or payments were made in excess of those ultimately approved by the Court, there are no remaining funds available to attempt to pursue the same, and such an effort would undoubtedly exceed in fees and costs the amounts, if any, which could be recovered.*

App. 99 (emphasis added). The estate was closed upon the filing of the Sworn Statement. See N.D.C.C. § 30.1-21-03(1) (“[A] personal representative may close an estate by filing with the court a verified statement”). Without an order prohibiting the filing of the Sworn Statement or this probate being under supervised administration, it was not error for Thain to close the estate by filing the Sworn Statement.

[¶28] Thain does not contend his appointment was terminated upon the filing of the Sworn Statement, but the estate was closed on that date. *Id.* § 30.1-21-03(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.”). No objections to the Sworn Statement were ever made known to Thain or his attorney. *Hr’g Tr. 10*. Because the estate was closed prior to Trudy’s Petition she filed pursuant to section 30.1-21-03.1, N.D.C.C., Trudy’s Petition was improperly before the court, making the district court’s ruling at the hearing improper.

2. Thain Appeared at the Hearing on the Order to Show Cause and Provided Substantial Evidence that the Estate Was Closed and Why the Estate Was Not Closed Within Three Years of the Decedent’s Death

[¶29] Section 30.1-21-03.1, N.D.C.C., requires that

Within twenty days of receipt of the order to show cause, the personal representative or the attorney employed by the personal representative shall provide the court with a report containing a timeframe for the anticipated closure of the estate; a detailed explanation as to why the estate has not been closed; and a detailed accounting of all disbursements made by the estate, including specific information as to all fees and other disbursements made to the personal representative, and to any attorney, auditor, investment adviser, or other specialized agent or assistant employed to do work for the estate.

N.D.C.C. § 30.1-21-03.1(2). Thain filed a Brief in Opposition to Petition for Order to Show Cause. *App. 110–117*. Instead of providing the timeframe for *anticipated* closure and explanation as to why the estate was *not closed*, the brief, among other things, (1) provided substantial evidence that the estate was, in fact, closed at the time of the petition, (2) detailed the lack of merit in Trudy’s claim under section 30.1-21-03.1(1), N.D.C.C., because the estate was actually closed, and (3) referred the court to the

accounting completed and attached to the filed Sworn Statement. *App.* 110–117. In addition to the brief, Thain appeared through counsel at the hearing on the order to show cause in May of 2012. *Hr’g Tr.* 1.

[¶30] At the hearing, Trudy tacitly acknowledged it would have been impossible for the estate to be closed within three years of the decedent’s death as this Court did not even file its ruling on the final order until September of 2010—eight years after Mr. Robert Cashmore’s death. *Hr’g Tr.* 36. Thain argued before the district court that (1) he filed a Sworn Statement, which can and did close the estate, (2) Trudy and her counsel received the Sworn Statement, and (3) neither Thain nor his counsel received an objection from Trudy regarding the filing of the Sworn Statement. *Hr’g Tr.* 10–11, 20, 26, 28. In order to escape being held in contempt, the Order to Show Cause required Thain to appear and give reasons, if any he had, as to why the estate was not closed. *App.* 108. Thain appeared and showed the district court that he had, in fact, closed the estate—the alleged offense—meaning the finding of contempt was entirely unwarranted and an abuse of discretion.

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

[¶31] “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) (emphasis added). This Court has long-recognized the difference between remedial and punitive sanctions:

“A remedial sanction is one which ‘includes a sanction that is conditioned upon performance or nonperformance of an act required by court order.’ N.D.C.C. § 27–10–01.1(4). Remedial sanctions can be payment of money, forfeitures, or imprisonment. N.D.C.C. § 27–10–01.4(1). A prison sentence is remedial only if it is conditional and the ‘contemnors carry “the keys of their prison in their own pockets. . . .”’ Punitive sanctions, however, are unconditional. Thus, a punitive sanction ‘is a sanction of imprisonment if the sentence is for a definite period of time . . .’ or a sentence which ‘is not conditioned upon performance or nonperformance of an act’ N.D.C.C. § 27–10–01.1(3). The most important factor which makes a sanction punitive is its unconditional nature; if the contemnor cannot purge the contempt by performance, the charge is punitive.

When imposing contempt under N.D.C.C. ch. 27–10, a court must first consider whether a remedial or punitive sanction is applicable and then apply the appropriate procedures for imposing the sanction.”

Negaard v. Negaard, 2005 ND 96, ¶ 15, 696 N.W.2d 498, 502–03 (quoting Peters–Riemers v. Riemers, 2003 ND 96, ¶ 20, 663 N.W.2d 657).

[¶32] A remedial sanction authorized under chapter 27-10 may only be imposed “after notice and hearing.” N.D.C.C. § 27-10-01.3(1)(a). This notice can be provided in the form of an order to show cause when the act is not directly in the view of the court: “[W]hen an act punishable as contempt is not committed in the immediate view and presence of the court, the court, upon being satisfied of the commission of the offense, may: Order the accused to show cause at a specified time and place why the accused should not be punished for the alleged offense.” Id. § 27-10-07(1).

If the court has not personally observed the essential elements of the offense, or if the accused offers an excuse relating to matters outside the knowledge of the court, due process *requires* that the accused be afforded *notice and a full opportunity to explain and defend*. Lepera v. Snider, 240 N.W.2d 862 (N.D. 1976); N.D.C.C. § 27-10-07; N.D.R.Crim.P. 42(b). Any doubt as to whether the contempt is direct or indirect should be resolved in favor of complying with the procedures for indirect contempt because the summary procedures for direct contempt are less favored than

the procedural protections required for indirect contempt. See Taylor v. Hayes, 418 U.S. 488 (1974).

Baier v. Hampton, 417 N.W.2d 801, 806 (N.D. 1987) (emphasis added); see also Hartman v. Hartman, 417 N.W.2d 173 (N.D. 1987) (citing Baier, 417 N.W.2d at 805–806). “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. Holkesvig v. Welte, 2012 ND 14, ¶ 11, 809 N.W.2d 323, 327 (emphasis added) (citing Lawrence v. Delkamp, 2006 ND 257, ¶¶ 7–12, 725 N.W.2d 211; Millang, 1998 ND 152 at ¶ 18; Endersbe, 555 N.W.2d at 582; Thorlaksen v. Thorlaksen, 453 N.W.2d 770, 775 (N.D. 1990); Baier, 417 N.W.2d at 806; cf. Dietz v. Dietz, 2007 ND 84, ¶ 21, 733 N.W.2d 225; Van Dyke v. Van Dyke, 538 N.W.2d 197, 203 (N.D. 1995)).

[¶33] The Petition was brought under section 30.1-21-03.1, N.D.C.C. *App. 105–107*. Thain was being urged to show “why the estate has not been closed pursuant to NDCC § 30.1-21-03.1,” which did not require mention of the \$6,377.83. *App. 105*. In addition, the Order to Show Cause certainly did not provide notice that Thain would need to provide evidence regarding the \$6,377.83. *See App. 108–109*. The district court acknowledged these notice issues at the hearing itself.

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 (emphasis added). Additionally, in the hearing itself the district court pointed out that Trudy’s petition or motion should have been on why the order to pay \$6,377.83 was not complied with if that is what the hearing was about

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. Is that more along the same lines?

Hr’g Tr. 16. Directly contradicting these two assertions by the district court at the hearing, the district court noted in its order for contempt that “Trudy Cashmore has filed a Petition for an Order to Show Cause for Contempt based upon the failure of the Estate to pay her the \$6,377.83 to which she is entitled.” *App. 120.*

[¶34] At the hearing, Trudy argued that “[t]he sole issue that we believe is - - the Court ordered, this Court ordered on August 17th, 2009, after several hearings, ordered a final payment to Trudy Cashmore of \$6,377.83.” *Hr’g Tr. 7.* If the *sole issue* was to determine whether Trudy was paid, it should have been at the forefront in Trudy’s Petition, or, more importantly, even mentioned in the district court’s Order to Show Cause. Conversely, the plain reading of the Petition and the plain reading of the Order to Show Cause do not provide notice that the *sole issue* would be payment of \$6,377.83. Pairing these plain readings that the hearing was set to explain why the estate was not closed within three years with the confusion of the issues at the hearing, the district court abused its discretion in finding Thain in contempt as Thain did not receive the adequate notice that is required as a procedural safeguard for contempt orders. See Holkesvig, 2012 ND 14 at ¶ 11 (“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.” (emphasis added)).

4. Because Trudy's Breach of Fiduciary Duty Argument Regarding the \$6,377.83 Was Not Properly Before the Trial Court, Thain Was Not Provided Adequate Opportunity to Provide Evidence As to Why He Should Not Be Held in Contempt for Not Paying \$6,377.83 to Trudy Cashmore

[¶35] At the hearing, Trudy made the argument that Thain filing the Sworn Statement to close the estate was an improper procedure and that she had “file[d] the objection to that [Sworn Statement] within the six months.” *Hr’g Tr.* 7. In trying to make an objection to the Sworn Statement, it appears that Trudy was referring to a procedure afforded under section 30.1-21-05, N.D.C.C., which provides

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. “Under this section, [a claimant whose claim has not been barred,] has six months to prosecute an action against the personal representative if the latter breached any duty to the claimant.” *Id.* § 30.1-21-05 ed. bd. cmt.

[¶36] Trudy’s assertion that she filed an objection to the filing of the Sworn Statement is incorrect: Trudy filed a petition to show cause as to why the estate was not closed under section 30.1-21-03.1 *not* an objection to the closing by sworn statement under section 30.1-21-05. *See App.* 105–107. These sections of the North Dakota Century Code are two separate and distinct procedures for relief sought in a probate. In addition, Trudy noted at the hearing that she would not have objected to the filing of the Sworn Statement if “he [the personal representative] had actually paid the people that the

Court had ordered him to pay.” *Hr’g Tr. 10*. Clearly, Trudy’s claim for relief is based on an alleged breach of fiduciary duty.

[¶37] Affirming this understanding, the district court even asked counsel for the personal representative “What would a person do if they didn’t get the monies they were entitled to by an estate? What’s their option?” *Hr’g Tr. 38*. Counsel for Thain explained to the court that, based on a judgment, the sheriff could serve the personal representative and levy on estate assets. *Hr’g Tr. 39*. The underlying judgment that Thain’s counsel was referring to is based on a breach of fiduciary duty claim against the personal representative, such as a claim for relief under section 30.1-21-05. Section 30.1-21-03.1, N.D.C.C.—the section Trudy’s Petition was filed under and the hearing was set for—does not provide for this type of relief and/or judgment.

[¶38] As explained, the breach of fiduciary duty is a claim for relief that can be brought within six months after filing the sworn statement. See N.D.C.C. § 30.1-21-05. Trudy did not timely make this argument as six months has passed since the Sworn Statement was filed. If Trudy would have timely and properly made the argument and the district court had provided Thain with adequate notice and an opportunity to be heard, Thain would have been able to provide the district court with evidence as to why the payment of the \$6,377.38 was not made.

[¶39] This Court found that a procedural error was made by Thain by failing to make a motion to reopen to amend the final account *before* it was approved in an order by the district court. See Cashmore, 2010 ND 159 at ¶ 16. After the Court affirmed the district court’s order that disallowed the final report to be amended, Thain utilized the final report as it was approved to wrap up the estate: the numbers from the approved

final report were filed with the Sworn Statement. *App. 101–104*. In filing the Sworn Statement, Thain made it clear that he distributed the monies and disposed of claims “to the extent [he] was able.” *App. 99*. Specific reference was made to the attached documents, which showed in detail that Trudy was entitled to certain monies from the estate *but* Trudy had already received monies/assets in excess of those she was entitled to. *App. 99*. In addition, the documents filed with the Sworn Statement show that the Robert Cashmore Trust—from which monies were borrowed by the estate to pay for expenses—is still owed money by the estate. *App. 102, 104*. Trudy was not the only one “due” money from the insolvent estate.

[¶40] In filing the Sworn Statement, Thain was showing the court and any interested parties that (1) he was aware of claims, payments, or distributions regarding the estate; (2) he disposed of those to the extent he was able; (3) he recognized that some distributions or payments were made to Trudy in excess of what she was entitled to, but that the estate was without funds to attempt or pursue the same; and (4) he completed a full accounting based on the final report that was approved by the district court in January of 2009. *App. 99–100*. Essentially, Thain was alleviating the court system of further pointless litigation as it is almost guaranteed—based on the facts in the history of this probate proceeding—that Trudy would contest the suit brought against her to recover the overcompensation she received.

[¶41] Thain acknowledged that, though the estate may owe a distribution to Trudy, Trudy already received distributions in excess from, and she actually owed payments to, the estate. Thain laid these issues aside to finally put this almost-decade-long feud to bed. Instead of utilizing more assets and money the estate already lacked, as

well as utilize court resources, to sue Trudy to obtain estate assets in order to distribute money right back to her, the Sworn Statement was properly filed to close the estate and end the dispute. The district court abused its discretion in finding Thain in contempt as the issue was not properly before the court, and Thain was not given an adequate opportunity to defend the claim as procedurally required for findings of contempt.

V. CONCLUSION

[¶42] Trudy's Petition and the district court's corresponding Order to Show Cause were inappropriate under section 30.1-21-03.1, N.D.C.C., because the estate was closed at the time the Petition was filed; however, to ensure he would not be found in contempt of court, Thain appeared and provided substantial evidence that the estate was already effectively closed. Thain was provided neither adequate notice as to the real issue of the hearing—Trudy's breach of fiduciary duty claim—nor adequate opportunity to present a defense as to why Trudy's breach of fiduciary duty claim is without merit. Without adequate notice and adequate opportunity to defend, the contempt ruling was an abuse of discretion by the district court.

[¶43] 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.

[¶44] DATED this 3rd day of April, 2013.

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CERTIFICATE OF SERVICE

[¶45] I, Kent Reiersen, one of the attorneys of the law firm of Crowley Fleck PLLP, hereby certify that on this 3rd day of April, 2013, a true and correct copy of the Brief of Appellants was served upon the following persons by the means designated below:

☐ U.S. Mail
☐ FedEx/UPS
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