

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

AUG 22 2014

In the Matter of the Estate of
Arline H. Hogen, Deceased

STATE OF NORTH DAKOTA

Steven C. Hogen, Petitioner and Appellee,
and Cross-Appellant

Supreme Court No. 20140119

v

Rodney Hogen, Respondent and Appellant
and Cross-Appellee

District Court No. 09-07-P-00100

BRIEF OF RESPONDENT AND APPELLANT AND CROSS-APPELLEE
and Addendum

APPEAL FROM MULTIPLE PROBATE ORDERS

**CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE JOHN C. IRBY**

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ISSUES ON APPEAL

1. Is a devisee subject to a claimed right of retainer without an action?
2. Does a personal representative, who fails to exercise his statutory right to possession of farm lands, have a right to claim a retainer, or any other claim or cause of action, for post-death crops [or rentals] against a person who is in lawful possession of the farm lands as a tenant in common owner?
3. Did the District Court have the right to alter a devisee's CRP contract rights, and then impose the right to retainer upon the altered contract?
4. Does the District Court err when it determined a devisee was subject to an implied contract that is in derogation of devisee's rights as a tenant in common owner of farm lands?
5. Does either N.D.C.C. § 30.1-19-03(2) or N.D.C.C. § 30.1-21-06 bar the Personal Representative from his claim of a right to retainer against inherited real estate stemming from post-death administrative fees?
6. Is the District's findings as to the amount of unpaid rentals, crops and CRP clearly erroneous?
7. Did District Court abuse its discretion when it determined the estate was required to pay attorney fees arising out of a claimed of right to retainer – a claim to retainer that only benefits the personal representative as an individual?
8. Did the District Court abuse its discretion by awarding an unreasonable amount of attorney fees and expert fees in light of what was at stake in the matter?
9. Was the claim for over \$300,000.00 in attorney fees and expert fees timely?
10. Did the District Court abuse its discretion by awarding unreasonable personal

representative fees?

11. Did the District Court abuse its discretion when it did not appoint a special administrator?

STATEMENT OF THE CASE

Rodney Hogen [“hereafter “RODNEY”], one of the two devisees under his mother’s will, is forced to appeal from various probate orders because his brother Steven Hogen [“STEVEN”], STEVEN’S attorneys, and the District Court did not understand that upon the death of Arline Hogen, RODNEY and STEVEN became the tenant in common owners of all of the farm lands once owned by their parents. RODNEY asserts the Personal Representative did not take possession of his devised real property, and RODNEY may have a duty to account to his co-tenant brother for post-death crops [or rentals], but RODNEY had no duty to account to or pay the Personal Representative.

The issues presented relate to RODNEY’S ownership rights as a tenant in common of inherited farm lands. Neither STEVEN, nor his attorneys, understood RODNEY’S ownership right in inherited property. STEVEN, purporting to act as Personal Representative, claimed a right of retainer to post-death crops [or farm rentals] without establishing the ESTATE’S possession [or need so to do].

Almost three (3) years after death [March 19, 2010], STEVEN, as Personal Representative, filed a tardy Inventory and Appraisement, a Final Account and Report, and a Petition for its approval. App., pgs. 22-65. STEVEN also petitioned for an unequal distribution of land claiming RODNEY had owed monies to his mother and her estate for events from 2003 to 2009 [pre-death 2003-2006 and post-death 2007-2009 crops and rental

payments]. App., 22-31. Objecting to the procedure, RODNEY also denied liability to the ESTATE, sought (a) removal of STEVEN as Personal Representative and his legal counsel, (b) supervised administration, and (c) either an equal distribution, or partition. App., ps. 67-76.

On August 5, 2010, the District Court determined, under N.D.C.C. § 30.1-20-03, a Personal Representative may merely assert a right to retainer, without any pleading or separate action, and ordered RODNEY to submit his defenses and denials. App., pgs. 77-79. Obeying the Order, Rodney filed his Answer Arising Out of Order On Procedure as to the claimed retainer on September 1, 2010. App, pgs. 80-107.

In February, 2011, RODNEY sought summary judgment claiming that STEVEN'S pre-death claims were barred, and that STEVEN did not show an administrative need, nor demand for post-death rents. App., pp. 122-124. As to the post-death crops and farm rentals, the District Court denied summary judgment because it accepted STEVEN'S argument that RODNEY has no ownership rights to the farmland until the District Court approves a distribution to him. App. pp. 139-140.

On March 7, 2012, the District Court issued its Rule 16 Order requiring STEVEN to complete his accounting of his right to retainer within sixty (60) days of March 2, 2012. Like all other statutory or court-ordered times to act, STEVEN failed to meet the deadline, and secretly received a two week extension to May 15, 2012. Order, Docket #143; App., ps. 144-145. RODNEY, after timely taking STEVEN'S deposition [Plaintiff's Exhibit 71; Docket #318], reported to the court that STEVEN had testified under oath that he had no documents to support various categories of STEVEN'S claims of retainer. App., ps. 144-168.

Without authority, and knowing the District Court had earlier ordered a March of 2013 trial date, on February 15, 2013, STEVEN filed an amended final account, and an amended petition seeking distribution to him of 66.218712% and to RODNEY 33.781288% of the interest in the real estate owned Arline Hogen [“ARLINE”] at the time of her death, based upon a claimed retainer of \$247,261.04 [originally \$97,536.51; App., p. 64]. App., ps. 169-180; 181-187; 188-194.

The District Court conducted a hearing on STEVEN’S claimed retainer on various days in March and on July 13, 2014. After hearing, and after STEVEN’S motion to amend findings, the District Court properly determined that STEVEN had no right to a retainer for pre-death matters. However, the District Court concluded that RODNEY owed the ESTATE \$123,387.44 “for farming the Estate’s property.” App., ps. 264; 274.

Following the decision as to the amount of retainer “for farming the Estate’s property”, the District Court approved the Personal Representative’s attorney fees [to include Bradley Business Advisors, LLC, service fees] in the total amount of \$333,272.23 because “the PR pursued funds that were owed to the estate, and refused to give up on it...”. App., ps. 296-299; specifically, 298. The District Court also approved a Personal Representative’s fee of \$27,500. App., p. 298. All fees were to be paid out of estate assets.

On March 6, 2014, the District Court approved STEVEN’S Second Amended Final Report and Account [App., ps. 285-291; over RODNEY’S objections, App., ps. 292-295] by issuance of its order, and also, issued a N.D.R.Civ.P. 54(b) certification as to the issues involved in this appeal. App., ps. 300-301.

On April 3, 2014, RODNEY timely appealed from multiple probate orders. On April

16, 2014, the Personal Representative, but not STEVEN as an individual, cross-appealed.

STATEMENT OF FACTS

1. ARLINE died testate on March 23, 2007. Her will was admitted to probate on April 23, 2007. Under the terms of her Will, all of her real and personal property were devised to her two sons, RODNEY and STEVEN, equally. App., ps. 16-18.

2. Upon ARLINE'S death, RODNEY and STEVEN became owners as tenants in common of all farm lands that ARLINE owned. During her lifetime, ARLINE owned the subject farm lands as tenant in common with the Curtiss A. Hogen Trust ["TRUST"]. ARLINE'S death caused the beneficial interest in and to the subject farmlands to immediately vest in RODNEY and STEVEN [also co-trustees of the TRUST].

3. STEVEN was appointed Personal Representative of his mother's estate on April 23, 2007. App., p. 17. Notice to Creditors was published in May, 2007. App., ps. 20-21. The time for filing claims for pre-death matters [three (3) months after date of first publication; N.D.C.C. § 30.1-19-03; statutory deadline of August 7, 2007] against the ESTATE had expired; no timely claim was filed against that portion of decedent's estate that was devised to RODNEY.

4. From billing records proved by the Personal Representative's attorney, the ESTATE was ready to be closed by July, 2007 ["draft Final Report and Account; draft Personal Representative's Sworn Statement to Close Estate"; App., p. 245]. An inventory was prepared, and revised at that time, but not served or filed until March 19, 2010 – almost three (3) years later. App., p. 245. Within this 2010 Inventory the Personal Representative first identifies his belief that RODNEY is indebted to the ESTATE for farm rental or crop

shares for years 2003 through 2009. The District Court properly determined that RODNEY did not owe the ESTATE for pre-death crop years – issues for crop years 2003-2006 are not addressed in this Brief.

5. In crop years 2007 and 2008, RODNEY farmed the Cass County lands and the Barnes County lands, believing himself bound to the same terms that he had with his mother [and TRUST] before her death. RODNEY'S cash rental payments and CRP payments were \$7,875.00 for both 2007 and 2008, and each year payment was made to the TRUST. The Barnes County farm lands [gross 320 acres involving one quarter section and two 80 acre parcels subject to "highways, easements and rights of way"] consist of 226.8 acres of tillable land; 81.3 acres of CRP land, and 14.92 non-tillable acres. App., ps. 62; 227. The 226.8 acres of tillable land, when added to the 81.3 CRP acres, approximate 308.07 tillable acres of Barnes County lands that are identified in the first Inventory. App., p. 62. In 2007 and 2008, RODNEY'S rental of Barnes County farm land was at the rate of \$30.00 per tillable acre, together one-third (1/3rd) share of the annual CRP payment. If calculated with precise precision, these rents produce a total annual rental of \$6,804.00 for tillable lands [before reduction for expenses], and \$1,071.00 for CRP lands [a total of \$7,875.00], and had the ESTATE been entitled to the rents and CRP, the ESTATE'S one-half (½) share would be \$3,937.50 for each year.

6. In 2007 and 2008, RODNEY paid the amount of \$7,875.00 each year to the TRUST [deposits of 01/07/08 {\$7,875.45} and 12/19/08 {\$7,875.00} in the TRUST'S checking account; Plaintiff's Exhibit #117, pt. 2; Docket #282, pages 24 and 48 of 78]. Because RODNEY deposited his checks for Barnes County lands in the TRUST'S account,

the District Court did not credit such annual payments [\$7,875.00] to the ESTATE in 2007 and 2008.

7. For 2007 and 2008, the District Court also failed to subtract 81.3 acres of CRP acres when determining the annual rental of Barnes County tillable lands. The court merely multiplied 308.1 times \$30.00 for a total rental of \$9,243.00. App., p. 269. As to the CRP lands, the court ignored the payments to the TRUST, and the TRUST'S interest in the CRP lands, and determined it equitable that the ESTATE receive the full Barnes County payment [\$1,071.00] each year. App., p 274.

8. In 2007, the court also failed to subtract 81.3 acres of Barnes County CRP acres when determining RODNEY'S average input for Cass County crop share lands – CRP lands do not have annual crop input costs. Dividing 2007 input crop costs of \$44,164 by 736.24 crop acres [$817.54 - 81.3 = 736.24$; Plaintiff's Exhibit #126C; Docket #294] results in the claimed crop input of cost of \$59.99 per acre with the ESTATE'S 1/6th share being \$10.00/acre [not \$9.00/acre determined by the Court]. Assuming *arguendo*, the ESTATE is entitled to Barnes County rent, with an ESTATE share of Cass County input costs being \$10.00 per acre for 2007, RODNEY is entitled to an offset of \$3,931 ($393.1 \text{ acres} \times \$10/\text{acre}$) toward Barnes County rents. When Barnes County rent is properly calculated [and the TRUST'S interest honored], RODNEY is only \$6.50 shy of payment in full [$\$3,937.50 - \$3,931.00 = \$6.50$] for the Barnes County land in 2007.

9. For crop year 2008, the court again failed to subtract the 81.3 acres of CRP in its calculations. Using the same formula for the 2008 Barnes County rentals [Docket #294], input costs of \$45,981 divided by 736.24 crop acres produces a \$62.45 per acre cost,

and a \$10.41/acre ESTATE share. Multiplying \$10.41 times 393.1 acres results in RODNEY being able to offset \$4,091.51 in 2008. In 2008, RODNEY'S right of offset *exceeds* the ESTATE'S claimed Barnes County rental by \$154.01 [$\$4,091.51 - \$3,937.50 = \154.01 excess payment].

10. The court is clearly erroneous when it says that the ESTATE was shorted its share of crops in 2007 and 2008. Inexplicably, the lower court based its numbers upon an multiple peril insurance *estimation*. When using RODNEY'S established sales of crop, the ESTATE and TRUST collectively received exactly one-third (1/3rd) of the bushels set forth in the MPCCI bushels report. App., p. 199. When using actual sales – not an estimate – there is no shortage of crops in either year. The lower court further errs for 2008 when it fails to recognize that STEVEN/ESTATE sold \$6,640.79 plus \$6,688.16 in crops attributed to 2008 – not just \$6,640.79. App., ps. 199; 270. The lower court offers no explanation why RODNEY is subject to a retainer for monies in STEVEN'S hands.

11. The lower court's failure to appreciate Barnes County had 226.8 tillable crop acres also affect its calculations for interest for 2008-2011 crop years, and the rentals and CRP payments claimed due in 2009-2011 crop years.

12. From the date of appointment, and through the crop years 2007-2009, the Personal Representative did not demand possession of the farm lands, and did not inform RODNEY [nor co-tenant STEVEN] of a need of possession for farm lands [nor the rentals] to pay creditor claims or administration expenses. In October, 2009, after a prior verbal lease, STEVEN informed RODNEY to pay the 2009 rentals to the ESTATE because the ESTATE had not been closed. App., p. 206. RODNEY has fully accounted to STEVEN for

2009-2010 crop years, but STEVEN refuses to cash the \$4,940.25 check. App., ps. 229-233.

13. Neither the Personal Representative's 2010 tardy Inventory, nor the Final Report and Account [App., ps. 59; 54] displayed a need of the 2007-2009 farm rentals for either creditors or administration purposes. The Personal Representative did not claim an administrative need for possession of the real property until crop year 2010. In 2010, RODNEY did not farm the Barnes County lands. RODNEY allowed the Personal Representative to rent the tillable acres in Barnes County to a third party, with STEVEN and RODNEY receiving one-fourth (1/4) of the rentals each, through their beneficial interest arising out of the TRUST.

14. As to Cass County lands in 2010-2013, RODNEY always maintained his possession as a tenant in common, and farmed the land himself. Any lease agreement proposed by the Personal Representative for Cass County lands was rejected by RODNEY. App., ps. 209-228. The Personal Representative has never taken possession of the Cass County farm lands, nor has he ever brought an action for possession.

15. On March 22, 2010, Ohnstad Twichell, P. C. submitted a bill for \$28,553.00 in fees and \$515.00 in expenses, and showed a prepaid balance of \$650.00. At the time, the docket for the ESTATE consisted of only seventeen (17) docket entries. App., p. 1. Other than the Inventory and Appraisal requiring some effort, each of then-filed docket entries were matters of form not requiring much effort to draft – the documents are essentially fill-in-the-blank computer forms created long ago by all self-respecting law firms. The bulk of the estate was real estate, and the law firm's billing statements establish the estate was in a position to be closed in July, 2007 – documents had been so drafted. App., p. 245.

The bulk of the awarded attorney fees stems from STEVEN'S assertion that he, as an individual, is entitled to more than one-half (½) of the land by claiming that RODNEY was indebted to the Estate after (a) a re-write of the verbal farm contract fully executed, and (b) using County averages as a base for sale of crops [rather than ARLINE'S and STEVEN'S actual sales of her/his own crops [to include reductions based upon storage fees and necessary dockage(s)]].

LAW AND ARGUMENT

1. The ESTATE'S right of retainer never existed as pursued by STEVEN.

Standard of Review: Issues of law are fully reviewable by this Court.

Three (3) years after ARLINE'S death, the Personal Representative, and his legal counsel, wrongfully attempted to invoke N.D.C.C. § 30.1-20-03 [entitled "Right of retainer"] so that STEVEN would be distributed more farm lands than RODNEY. By claiming the right to retainer, STEVEN first sought to obtain – for himself – an unequal distribution of the Cass County farm lands. For example, STEVEN sought full distribution to him of what the decedent had owned in the NW¼ of Section 34-140-54, Cass County, North Dakota [ARLINE owned an undivided one-half interest; the TRUST owned the other undivided one-half interest]. App., p. 27. Six years after their mother's death and *contrary to her Will*, STEVEN proposed a distribution wherein he individually would receive 66.781288% and RODNEY would receive 33.781288% of their mother's former interest in all farm lands in both Barnes County and Cass County, North Dakota. App, p. 172-179.

RODNEY submits that neither N.D.C.C. § 30.1-20-03, nor other provisions of the Uniform Probate Code, would allow STEVEN, claiming a retainer, to take RODNEY'S

interest in inherited real property from him, and then distribute that real property to STEVEN. RODNEY'S interest in real property, received under the Will of his mother, vested immediately upon her death. N.D.C.C. § 30.1-12-01.

The common law of North Dakota suggests an indebtedness owed by an heir of an intestate constitutes a transferable, equitable lien against a distributee's share of the intestate estate. Stenson v. H.S. Halvorson Co., 147 N.W. 800 (N.D. 1913); and Aberle v. Merkel, 291 N.W. 913 (N.D. 1940).

When the deceased dies testate, the general common law rule is that a debt owed a testator, who failed to mention the debt in a will, is not subject to the right of retainer. See, Stanton v. Stanton, 279 N.W. 336, 338-340 (Neb. 1938). When the decedent dies leaving a will, the executor's remedy to recover the indebtedness was not through an equitable retainer against the land, but rather through an ordinary action at law. *Id.*, at 341. North Dakota's present statutory scheme seems to follow the general common law rule [clearly expressed in Stanton v. Stanton, *supra*.] as to devised real property. By statute, a debt owing to a decedent is specifically charged against the intestate's share. N.D.C.C. § 30.1-04-11. There is no comparable statute concerning the share of devisee. By statute, a personal representative is only given the right of possession of real property and the power to "maintain an action to recover possession." N.D.C.C. § 30.1-18-09.

The present issue concerning the claimed right of retainer relates only to RODNEY'S inherited real property because RODNEY has never received a distribution of any personal property. As to the pre-death matters, the District Court determined that RODNEY did not owe any monies to ARLINE at the time of her death. This finding is not clearly erroneous

for RODNEY’S testimony supports the lower court’s finding. The Personal Representative’s claim that RODNEY owed \$97,536.51 [App., p. 64] was correctly determined to be invalid – RODNEY did not owe all the money.

RODNEY asserts that the Personal Representative has no right of retainer against his devised real property for claimed post-death crops and farm rentals. In North Dakota, a Personal Representative’s right of retainer is limited to “noncontingent indebtedness”, and a successor has all defenses that would be available in a direct proceeding for recovery of the debt. N.D.C.C. § 30.1-20-03.

RODNEY asserts defenses to the Personal Representative’s claimed retainer that arise because RODNEY [and also STEVEN] became a tenant in common owner of all the farm lands the day his mother died; the District Court erred when it rejected RODNEY’S defenses. RODNEY asserts the District Court erred as a matter of law in not recognizing his immediate ownership interest in the farm lands and in its failure to accept his defenses to STEVEN’S claim of retainer. The errors of the District Court involve the following:

- a. The District Court should have determined that the ESTATE had no right to 2007-2009 crops and rentals because the ESTATE made no demand, had no administrative need, and did not have possession of the land(s). The District Court should have determined that the ESTATE had no right to 2010-2013 crops because the Personal Representative did not have possession of the lands, and RODNEY exercised his rights as a tenant in common owner.**

In North Dakota, real and personal property passes to devisees upon death – not upon

distribution. See N.D.C.C. § 30.1-12-01, Feickert v. Frounfelter, 468 N.W.2d 131 (N.D. 1991); In re Estate of Wicklund, 2012 ND 29, ¶ 17, 812 N.W.2d 359; Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 9, 829 N.W.2d 453. The devisees' devolvement is subject to the Personal Representative's limited authority to possess the real property for administration purposes. See, N.D.C.C. § 30.1-12-01; N.D.C.C. § 30.1-18-09. See also, Belakion v. Hilstad, 35 N.W.2d 637, 641-642 (N.D. 1949); and Shephard v. Widhalm, 2012 MT 276, 290 P.3d 712.

Any income from farm rentals, due at or after death, belong to RODNEY and STEVEN under the Uniform Principal and Income Act (1997). See, N.D.C.C. § 59-04.2-06 and N.D.C.C. § 59-04.2-07(1). In other words, upon ARLINE'S death all income from the farm lands [whether as crop shares or farm rentals] immediately passed to RODNEY and STEVEN as tenants in common. RODNEY'S possession of the farms, his cropping of his land [owned by him as a tenant in common] and issues relating to farm are measured by RODNEY and STEVEN'S rights as tenants in common of a fee simple interest - rather than as devisees under the Will. For crop years 2007, 2008, and 2009, the Personal Representative made no demand of RODNEY that the Personal Representative needed the farm property for administration purposes; both the Inventory and the 2010 Final Report and Account show that ESTATE did not have the need to possess any farm real estate for administration purposes. App., ps. 54-58; 59-65. In North Dakota, since title to real estate vests at time of death in the devisee – who are entitled to possession and all rights incident thereto – the owners are unaffected by N.D.C.C. § 30.1-18-09 until the personal representative exercises his right under the statute, and actually takes possession of the real

estate. See, Belakon v. Hilstad, *supra*. N.D.C.C. § 30.1-18-09 does not change the common law rule. Shephard v. Widhalm, *supra*.

RODNEY cannot be indebted to the ESTATE for crop rentals, or crops, that he owns [subject only to his other tenant in common's similar interest] when the Personal Representative never took possession of the real estate, and never asserted administrative need until 2010. The District Court erred in determining the ESTATE was entitled to a retainer for the income that RODNEY owns.

The true basis of the right of retainer is that a distributee has possession of property belonging to the estate. In re Berk's Estate, 196 Cal.App.2d 278, 16 Cal.Rpt. 492 (1961). Post-death, RODNEY has his property and income in hand, subject only to the rights of his tenant in common – it is not the ESTATE'S property. As a tenant in common, RODNEY may have duties to his tenant in common for an accounting. Since the Personal Representative did not demand possession of the farm lands, nor did he subject the farm lands to administration, there is no basis to apply the doctrine of retainer to post-death crops and farm rentals. RODNEY did not have a debtor-creditor relationship to the Personal Representative for the 2007-2009 farm income.

- b. The District Court cannot alter RODNEY'S CRP contract to create a right of retainer. When determining the right of retainer, the District Court should not have created an implied contract in derogation of RODNEY'S rights as in tenant in common of the Cass County farm land for crop year 2010-2013.**

The District Court erred when it when it determined that RODNEY was not entitled

to the payments he received from the government for CRP when determining the amount of the claimed retainer. The amount RODNEY received from the government was based upon an existing contract – entered into with ARLINE and the government prior to death. Generally, courts have no right to alter the terms of an existing contract. Bitler's Tower Service, Inc. v. Guardian, 486 N.W.2d 141, 144 (N.D. 1991). Payments made by the government to RODNEY, under an existing contract, cannot be considered “noncontingent” when a court must alter the terms of an existing contract to create the debt. What RODNEY receives from the government through his contract with the government is his property. The ESTATE has no ownership interest in RODNEY’S government payments.

Further, because the District Court believed that the ESTATE continued to own the real property after ARLINE’S death, the District Court found an implied contract between RODNEY and the ESTATE because RODNEY farmed Cass County lands during the 2010 -2013 crop years. RODNEY asserts that District Court cannot create an implied contract between he and the ESTATE just because RODNEY farmed the Cass County farm lands in 2010 through 2013. Again, upon death RODNEY became a tenant in common with STEVEN of the Cass County lands [through both his mother’s Will and his father’s estate plan]. RODNEY, as a tenant in common “who occupies more than his proportionate share of the common property and who has not agreed to pay therefore, and who has not ousted his cotenant, is not liable to such cotenant for rent or for use and occupancy, although he may be liable if there is an express or implied agreement to pay rent.” Parceluk v. Knutson, 139 N.W.2d 864, 873 (N.D. 1966). There is no statute in North Dakota that makes a personal representative a tenant in common with the devisees. A personal representative has no claim

to income from real estate unless he takes possession of the inherited property. Belakon v. Hilstad, *supra*. Without the Personal Representative first taking possession, RODNEY'S rights and duties concerning the Cass County farmlands should have been measured solely by his right(s) as a tenant in common – with STEVEN, not the ESTATE.

RODNEY did not oust the Personal Representative, nor STEVEN, from the Cass County farm lands, but simply denied his liability to the ESTATE to pay rent. The District Court did not make a finding of an ouster, nor did it make a finding the ESTATE was ever in possession of the Cass County lands. Without an ouster [or without ESTATE possession], there is no implied agreement to pay rental to the ESTATE. See, Stevens v. Pels, 191 Iowa 176, 175 N.W. 303, 306 (1919). At common law, one co-tenant had no right of action against his co-tenants for amounts arising out of his own labor, but only if he received more than his fair share from a third party. See, Johnson v. Johnson, 164 N.W. 327 (N.D. 1917). If RODNEY is subject to an implied agreement for his farming of lands, that implied agreement is with his tenant in common, STEVEN – not the ESTATE.

Without the ESTATE'S possession, the implied contract is illusory and cannot exist – there is no consideration flowing to RODNEY; consideration is a requisite. N.D.C.C. § 9-01-02.

- c. The District Court should have determined the Personal Representative's claim for post-death farm rentals, CRP or crop sales are barred by N.D.C.C. § 30.1-19-03(2) and STEVEN'S attack on RODNEY'S inherited real estate is barred under N.D.C.C. § 30.1-21-06.**

The Personal Representative's [or STEVEN'S] post-death claims against

RODNEY'S interest in his inherited "estate" were barred three (3) months after the claims arise. N.D.C.C. § 30.1-19-03(2). The word "claims", as defined in N.D.C.C. § 30.1-01-06(7), includes "liabilities of the estate". The word "estate", as defined in N.D.C.C. § 30.1-01-06(15), necessarily includes "the property" of RODNEY who is a "person whose affairs are subject to" N.D.C.C. Title 30.1.

When claiming retainer, STEVEN did not seek to hold RODNEY personally responsible for alleged post-death crops or post-death farm rentals. STEVEN, individually or as Personal Representative, did not bring a civil "action" to recover unpaid farm rents. The ESTATE did not bring an "action" to obtain possession of the farm lands that were farmed by RODNEY. N.D.C.C. § 30.1-18-09. Rather, STEVEN, as Personal Representative, sought to take RODNEY'S inherited land at date-of-death prices – land that had already devolved – to satisfy STEVEN'S claim that RODNEY did not pay the ESTATE what it should, without establishing an administrative need in March 2010 – the earliest time that STEVEN can suggest a claim was made for alleged unpaid rentals.

In May 2009, tenants in common RODNEY and STEVEN agreed to farm rentals relating to the 2009 crop year. In October 2009, when STEVEN did not execute the appropriate deed of distribution as to the farm lands, STEVEN demanded that RODNEY pay the full 2009 farm rental to him as Personal Representative – a demand that doubled what RODNEY thought he would be paying. The Personal Representative cannot create a creditor-debtor relationship for farm income between the ESTATE and RODNEY when there is no showing that the farm rentals were needed for administration expenses.

RODNEY as a "devisee" or "heir", is entitled to the protection of N.D.C.C. § 30.1-

19-03(2) against the demands of the Personal Representative, if more than three (3) months pass from the time it arises. For each crop year, the Personal Representative's claim would arise at the beginning of the crop year – the time the Personal Representative should have taken possession of the lands – with each crop year also presenting a new claim. If a Personal Representative's petition to approve his final account can be equated to a claims procedure, then the earliest "claim" for 2007-2009 crop years happened in March of 2010 – more than three (3) months after the claim for each crop year arose – and the claims for crops or rentals were barred by N.D.C.C. § 30.1-19-03. The earliest "claim" made by the Personal Representative for 2010-2012 Cass County crops was February 2013 – certainly more than three (3) months from the time that the Personal Representative should have taken possession of the Cass County farm lands for any of those crop years.

Neither STEVEN, nor the Personal Representative, can now lay claim to RODNEY'S inherited real property – which devolved at time of death – because RODNEY is entitled to the protection of N.D.C.C. § 30.1-21-06. RODNEY's fee simple interest in the real estate does not depend upon him receiving a deed of distribution. Shephard v. Widhalm, *supra*, ¶ 26. RODNEY'S ownership interest in the real property vested at time of death. N.D.C.C. § 30.1-12-01. Because fee simple ownership of the real estate vests at the time of the testator's death, a personal representative's claim period [under N.D.C.C. § 30.1-19-03(1) – to determine if real estate needs to be sold to pay claims arising before death] ended in August, 2007, three (3) months after publication of the notice to creditors.

Construing the statutes together, the Personal Representative was given a maximum of three (3) years from ARLINE'S death to determine it is necessary to sell RODNEY'S

vested fee simple interest *for matters arising after death.*¹ When that three year period expires, the ESTATE cannot lay claim to RODNEY'S vested fee simple interest later distributed through the probated will.

2. The District's Findings as to unpaid rentals, crops and CRP is clearly erroneous.

Standard of Review: Clearly erroneous.

RODNEY incorporates by reference paragraphs 4 through 11 of the Findings of Fact in this Brief. Although RODNEY believes that this Court should reverse the District Court's finding the ESTATE'S has a right to a retainer, as a matter of law, RODNEY further asserts the amount of alleged debt found by the District is clearly erroneous.

The District Court clearly erred because it failed to subtract 81.3 acres of CRP when determining the rental due for Barnes County, and the average per acre cost of production. The District Court is clearly erroneous when it does not credit RODNEY with an additional 2008 payment of \$6,688.18 that is in STEVEN'S hands.

If the District Court's findings on the right of retainer cannot be reversed as matter of law, they should be reversed because the amount of determined indebtedness is clearly erroneous. The lower court should never have allowed STEVEN to testify as to matters beyond his personal knowledge [N.D.R.Ev. 602], nor allowed hearsay documents without adequate foundation [N.D.R.Ev. 802], nor should it have accepted so-called expert testimony only used to confirm inaccurate calculations by an incompetent witness [N.D.R.Ev. 701]

¹ For matters arising before death, it is three (3) months after first publication of the notice to creditors; a publication date controlled by the Personal Representative. N.D.C.C. § 30.1-19-03(1).

3. The District Court abused its discretion when awarding attorney fees arising out of STEVEN'S pursuit of the right of the retainer.

Standard of Review: Abuse of Discretion.

The disputes involving the right of retainer involved only the distribution of the estate. In March of 2010, and after unilaterally reforming RODNEY'S farm obligations to STEVEN'S liking without mutual consent, STEVEN attempted to receive distribution of more than one-half of the farm land. In 2013, STEVEN'S goal was to be distributed almost two-thirds (2/3rd) of the real estate. STEVEN'S distribution goal – "You keep the rents, I'll keep the land!" – was never possible. See, Stevens v. Pels, *supra*, p. 310. Neither the Personal Representative, nor ESTATE itself, is aggrieved or prejudiced with respect to how an estate is distributed. See, In re Estate of Benso, Polcyn v. Benso, 165 Kan. 709, 710, 199 P.2d 523 (1948). A personal representative should not take sides in disputes regarding distribution of the estate. See, Matter of Estate of Wise, 20 Kan. App. 2d 624, 627-28, 890 P.2d 744, 746-47 (1995); Ferrell v. Basnight, 257 N.C. 643, 127 S.E.2d 219, 222 (1962); and Bigger v. Arnold, 728 S.E. 2d 437, 438-439 (N.C. Ct. of App. 2012).

In March of 2010, with all estate creditors and administration costs paid, the Personal Representative had no reason to enter the dispute over how the ESTATE would be distributed. The fiduciary duties imposed upon STEVEN, as the appointed personal representative, would not allow him to advocate his own interest at the expense of the ESTATE. In his attempt to obtain a greater distribution of the real property, STEVEN disregarded the ESTATE to promote his own interest as a single devisee. Under these circumstances, STEVEN should have been denied his claimed attorney fees incurred to

establish the alleged retainer. See, Estate of Rohrich, 496 N.W.2d 566 (N.D. 1993); In re Estate of Wicklund, 214 ND 64, 844 N.W.2d 565.

The District Court abused its discretion when determining that STEVEN'S actions was done in good faith. App., p. 297. STEVEN'S actions were done to benefit himself at the expense of RODNEY. The District Court determined that this was a "unique probate case" justifying over \$300,00 in attorney and expert fees as reasonable. App., p. 298. The only reason this probate case was "unique" was that neither STEVEN, nor his attorneys, nor even the District Court understood that, upon their mother's death, RODNEY and STEVEN became the fee simple owners of the land – and the ESTATE owns nothing.

In awarding attorney fees, the District Court determined that the "PR pursued funds that were owed to the estate..". That was never the scope of the proceedings below, and the statement establishes that the District Court refuses to recognizes RODNEY'S ownership rights in land existing at the moment of death.

The District Court's error and abuse of discretion when determining that STEVEN'S attorney fees are to paid out of the ESTATE are further discussed as follows:

a. STEVEN did not show his legal fees benefitted the estate as a whole.

STEVEN bears the burden of proof that the attorney fees he requests are reasonable, benefits the estate as a whole, and were not incurred primarily for the benefit of him personally. Oliver v. City of Larimore, 540 N.W.2d 630, 633 (N.D. 1995); N.D.C.C. § 30.1-18-20.

STEVEN'S pursuit of the claimed right of retainer against his brother was always for his own personal interest, and not for benefit of the estate as a whole. In March 2010, only

STEVEN, individually, could have benefitted by the pursuit of greater farm income for 2003-2009 [through the claimed right or retainer] at the expense of RODNEY.

In March of 2010, the ESTATE, by itself, would not benefit from any further payments made by RODNEY because all income was distributable to the two (2) devisees equally, as a matter of law. N.D.C.C. Chap. 59-04.2. The ESTATE, itself, could not benefit by any new payment(s) by RODNEY [under the claimed right of retainer] because in March, 2010, all administrative costs and attorney fees had been paid, and the estate did not need to keep any claimed income from 2003-2009 to pay anyone – all debts, including the attorney's fees had been fully paid. The claimed right of retainer for \$97,536.51 was interjected into this probate only to enrich STEVEN at the expense of his brother. STEVEN'S claim for pre-death indebtedness failed – the court properly determined it not to exist.

With all attorney fees, creditor claims and administrative costs already paid in March of 2010, the provisions of N.D.C.C. Chap. 59-04.2 entitled "Uniform Principal and Income Act (1997)", prevented the ESTATE to share in the income STEVEN then sought through the claimed right to retainer. Under N.D.C.C. § 59-04.2-4(2) & (4), beneficiaries STEVEN and RODNEY would each have the right to all income remaining after legitimate estate expense(s) were paid. With no outstanding estate expenses in March of 2010, STEVEN'S claim of greater farm income for 2003 to 2009 could not/would not benefit the ESTATE. The ESTATE would have had to distribute the income equally.

STEVEN'S assertion of the need to administer the farm lands from 2010 to 2013 was made so that he could have a war chest to promote his own interests, or worse, the interests of his lawyers. There was no benefit to the ESTATE to keep the ESTATE open after May

of 2010 to pursue the claimed right of retainer against RODNEY [which judicially failed as to all pre-death claims]. At that time, all administrative expenses had been paid. At that time, all attorney fees had been paid; it was not necessary for the ESTATE to pursue anything. The ESTATE should have been left out of the fray concerning the distribution of ESTATE.

When approving attorney fees, the District Court abused its discretion to allow Ohnstad Twichell, P.C., to violate N.D.R. Prof. Conduct Rule 1.5 relating to unreasonable fees - it will never be reasonable to assert the existence of “unliquidated claims” without basis or documentation, nor to seek hundreds of thousands of dollars for legal services when the client – *under penalty of perjury* – can only claim \$48,768.25 [if fully successful], nor to fail to communicate the “basis, rate, or amount of the fee”. There is no evidence of advisement that the law firm would charge approximately six (6) times the amount distributed to STEVEN [if fully successful]. In re Disciplinary Action Against Hellerud, 2006 ND 105, ¶ 5, 714 N.W.2d 38; In re Disciplinary Action Against Hoffman, 2013 ND 137, ¶ 11, 834 N.W.2d 636.

b. The District Court’s conclusion that STEVEN acted in good faith is not supported by the record or other factual findings.

The District Court’s determination that the “actions taken by the PR were all done in good faith” is not supported by the record. App., p. 297. The District Court does not elaborate on what acts establish his conclusion of “good faith”. It appears that the District Court’s conclusion is based his mistaken belief that the “PR pursued funds that were owed to the estate...”. App., p. 298.

STEVEN'S litigation concerning the claimed right of retainer was made so that STEVEN would take the lion's share of the real estate, at the expense of RODNEY, and contrary to the Will. STEVEN was appointed the Personal Representative of the ESTATE and as such, occupies the role of a "fiduciary" [N.D.C.C. § 59-04.2-01(3)] with "fiduciary duties" fixed by statute, to include "administer(ing the) estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the .. will clearly manifest an intention that the fiduciary shall or may favor one or more the beneficiaries." See specifically, N.D.C.C. § 59-04.2-02(2). The Will did not give advantage to either son, so the Personal Representative cannot do anything but equally divide all assets and debt, if determined to exist.

A personal representative who fails to exercise his statutory right to possession has no cause of action against a person who was always in lawful possession of the lands, and importantly, was entitled to farm his own lands. RODNEY has never acted to "oust" anyone, or anything, having a common tenancy.

In 2010, the ESTATE should have been closed and distributed equally. In 2010 through 2013, STEVEN could have pursued his own individual rights [as a tenant in common] if he was unhappy with his fellow tenant's use of their common lands.

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith. UPC comments to N.D.C.C. § 30.1-18-20. Litigation prosecuted by STEVEN that promotes STEVEN'S personal interest would not be in good faith.

STEVEN shows lack of good faith by subjecting the ESTATE to litigation with no

possibility of benefit, while incurring hundreds of thousands of dollars of attorneys fees/witness fees unsupported by a single document at the onset [and three years later, STEVEN still did not have such a document].

No one can reasonably expend \$300,000(+) to gain the right to claim less than \$50,000. Dissipation of the ESTATE by STEVEN, and his lawyer, should not have been tolerated.

c. STEVEN'S claim for attorney fees is too late.

The District Court's Order of November 15, 2013 [Docket ID # 468], did not involve mere matters of procedure, but involved matters of substance. The issue of attorney fees before the District Court stemmed from RODNEY'S objection to the Personal Representative's Petition for Approval of Final Account for Determination of Testacy Status and for Settlement of Estate dated March 19, 2010 - STEVEN'S only pleading properly before the lower court. App., p. 261. The Personal Representative claimed in ¶s 4 and 5 of his March 19, 2010, Petition "(a)ll debts of the decedent and of the estate, and all expenses of administration thus far incurred, and all taxes that have attached to or accrued against the estate have been paid" and "Petitioner has filed a Final Account hereto attached and the estate is in a condition to be paid." App., page 22. The Final Account identified \$45,962.92 in attorney fees that the Personal Representative paid to the date of the Final Account with an additional \$2,500.00 in the trust account. App. 57. The issues before this District Court, as framed by those pleadings, are whether those fees [\$45,962.92 and \$2,500.00 in the trust account] were properly charged as an administrative expense, or did they state charges for which STEVEN had individual responsibility. Neither Ohnstad Twichell, P.C., nor

STEVEN objected to the Personal Representative's Petition of March 19, 2010. Neither STEVEN, nor Ohnstad Twichell P.C., objected to the final account of the Personal Representative. Their objection should have been made before the proposed May 26, 2010, hearing. Without their timely objection, any issue concerning attorney fees occurring after March 19, 2010, necessarily affects distribution, and is untimely under N.D.C.C. § 30.1-20-06(2) [and also, N.D.C.C. § 30.1-12-08].

The lower court's Order of November 15, 2013, allows an untimely attack on RODNEY'S inherited property by his brother to pay for attorney fees that STEVEN should be required pay in his individual capacity, if ethically allowed – the fees, if they exist, were incurred only to benefit STEVEN. There is no provision in any known “pleading” asking for payment of over \$300,000 of attorney fees and expenses to the Ohnstad Twichell, P.C. Not even STEVEN'S first amended petition of February 15, 2013, identified any new issue concerning the amount of attorney fees at risk. App., ps. 169-197.

4. The Personal Representative fees are unreasonable.

Standard of Review: Abuse of discretion.

The District Court abused its discretion when it awarded personal representative fees on a percentage basis, without an account for time, and without a showing that STEVEN'S efforts benefitted the ESTATE.

STEVEN never posed any objection to the \$12,016.92 fee already paid to him on or before March 19, 2010, when he testified “(u)nder penalties for perjury” and declared or affirmed that he had been paid a “Personal Representative Fee @ 1½% of gross estate of \$890,833.27 before deducting Personal Representative Fee) (in the amount of) \$12,016.92”.

App., ps. 57-58. Nor did STEVEN ever request an extension of time to submit evidence of his efforts on behalf of the ESTATE, so anything filed on November 15, 2013, was untimely, and should be rejected.

STEVEN never accounted for the payment of the \$12,016.92, nor has he identified the basis for previously asserting a fee at the rate of 1½% of the gross estate as being a reasonable fee “under penalty of perjury”. The District Court abused its discretion when awarding STEVEN a fee equal to 4% of the gross estate when STEVEN made no explanation as to how he benefitted the ESTATE itself. Actions that benefit STEVEN alone do not justify a greater personal representative fee.

RODNEY acknowledges that N.D.C.C. § 30.1-18-09 provides for “reasonable compensation for the personal representative’s services.” RODNEY respectfully submits that a personal representative has no right to claim a percentage of the action without any accounting of time or effort that actually provided benefit to the estate. What is clear is that the so-called Summary of Adjustments (for) Coverage Years: 2004 - 2012 [expanded description in Docket Entry #151], and the original Inventory and Appraisement dated March 19, 2010 [Docket Entry #18] evidence significant past waste of time and effort by STEVEN providing no benefit to the ESTATE as there were no “unliquidated claim(s)” as alleged to exist as of the date of death. This significant fact of *pre-death non-debt* has been judicially determined; such should have been always known to STEVEN— neither he, nor his attorney, has the right to re-write executed contracts. STEVEN did not settle and distribute the estate as expeditiously and efficiently as is consistent with the best interests of the ESTATE, nor did he timely and accurately inventory and determine fair market value of the decedent’s

property – violations of statutory duty recognized by case law. See specifically, N.D.C.C. § 30.1-18-03(1), N.D.C.C. § 30.1-18-06(1), and Matter of Estate of Thomas, 532 N.W.2d 676, 687 (N.D. 1995).

5. STEVEN should have been removed as personal representative.

Standard of Review: Abuse of discretion.

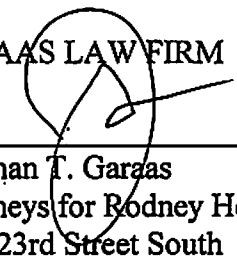
RODNEY should not have to wait three (3) years to obtain an inventory of his mother's estate. RODNEY should not have been exposed to an accounting of March 19, 2010, that states that \$12,016.92 fees were paid to STEVEN and a subsequent accounting of February 15, 2013, stating that the sum was not paid, but is in the checking account. App. ps. 57; 184. RODNEY should not have to wait over seven (7) years to obtain the deed of distribution that confirms his vested interest as a tenant in common to inherited land. Failure to remove STEVEN as personal representative wrongfully exposed RODNEY, and the ESTATE, to claims for unreasonable fees and expenses so that STEVEN could pursue an unequal distribution of land. The District Court abused its discretion in rejecting RODNEY'S petition for removal and special administration.

CONCLUSION

For the reasons stated herein , this Court should reject STEVEN'S claim of a right to retainer against RODNEY, reverse the lower court's order of attorney fees, personal representative fees and expert fee [or expenses] incurred by STEVEN [after December 23, 2009] in pursuit of his claim of the right to retainer. This Court should reverse the lower court's denial of his petition for removal of STEVEN as personal representative and remand the case back for further proceedings.

Respectfully submitted this 22nd day of August, 2014.

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ADDENDUM OF STATUTES

North Dakota Century Code provisions:

§ 30.1-01-02. (1-102) Purposes--Rule of construction.

1. This title shall be liberally construed and applied to promote its underlying purposes and policies.
2. The underlying purposes and policies of this title are:
 - a. To simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons.
 - b. To discover and make effective the intent of a decedent in distribution of the decedent's property.
 - c. To promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors.
 - d. To facilitate the use and enforcement of certain trusts.
 - e. To make uniform the law among the various jurisdictions.

§ 30.1-01-06. (1-201) General definitions.

Subject to additional definitions contained in the subsequent chapters which are applicable to specific chapters, and unless the context otherwise requires, in this title:

* * *

7. "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

* * *

14. "Distributee" means any person who has received property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will to the extent of the devised assets.

15. "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this title as originally constituted and as it exists from time to time during administration.

* * *

53. "Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this title.

* * *

§ 30.1-12-01. (3-101) Devolution of estate at death--Restrictions.

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to the person's property, are subject to the restrictions and limitations contained in this title to facilitate the prompt settlement of estates. Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to the decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property, and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

§ 30.1-12-04. (3-104) Claims against decedent--Necessity of administration.

No proceeding to enforce a claim against the estate of a decedent or the decedent's successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the

estate are governed by the procedure prescribed by chapters 30.1-12 through 30.1-23. After distribution, a creditor whose claim has not been barred may recover from the distributees as provided in section 30.1-21-04 or from a former personal representative individually liable as provided in section 30.1-21-05. This section has no application to a proceeding by a secured creditor of the decedent to enforce the secured creditor's right to the secured creditor's security except as to any deficiency judgment which might be sought therein.

§ 30.1-12-05. (3-105) Proceedings affecting devolution and administration--Jurisdiction of subject matter.

Persons interested in decedents' estates may apply to the court for determination in the informal proceedings provided in chapters 30.1-12 through 30.1-23 and may petition the court for orders in formal proceedings within the court's jurisdiction, including those described in chapters 30.1-12 through 30.1-23. The court has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended, and distributed, including actions to determine title to property alleged to belong to the estate and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.

§ 30.1-12-07. (3-107) Scope of proceedings--Proceedings independent--Exception.

Unless supervised administration as described in chapter 30.1-16 is involved, each proceeding before the court is independent of any other proceeding involving the same estate. Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of chapters 30.1-12 through 30.1-23, no petition is defective because it fails to embrace all matters which might then be the subject of a final order, proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives, and a proceeding for appointment of personal representative is concluded by an order making or declining the appointment.

§ 30.1-12-08. (3-108) Probate, testacy, and appointment proceedings--Ultimate time limit.

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

1. If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceedings.
2. Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person.
3. A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.
4. An informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceeding concerning the succession or estate administration has occurred within the three-year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in section 30.1-18-09 beyond that necessary to confirm title to the assets in the successors to the estate and claims other than expenses of administration may not be presented against the estate.
5. A formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under subsection 1 or 2, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this title which relate to the date of death.

§ 30.1-16-02. (3-502) Supervised administration--Petition--Order.

A petition for supervised administration may be filed by any interested person or by a

personal representative at any time or the request for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the court shall order supervised administration of a decedent's estate:

1. If the decedent's will directs supervised administration, it shall be ordered unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration.
2. If the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate.
3. In other cases if the court finds that supervised administration is necessary under the circumstances.

§ 30.1-18-03. (3-703) General duties--Relation and liability to persons interested in estate--Standing to sue.

1. A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this title, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred upon the personal representative by this title, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.
2. A personal representative may not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will authorizes a personal representative to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, authorizes the personal representative to distribute apparently intestate assets to the heirs of the decedent if, at the

time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning the personal representative's appointment or fitness to continue, or a supervised administration proceeding. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described in this title.

3. Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at the decedent's death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as the decedent had immediately prior to death.

§ 30.1-18-06. (3-706) Duty of personal representative--Inventory and appraisement.

1. Within six months after appointment, or nine months after the death of the decedent, whichever is later, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of the decedent's death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

2. The personal representative may file the original of the inventory with the court and send a copy of the inventory only to interested persons who request it. If the personal representative elects not to file the inventory with the court, the personal representative must mail a copy of the inventory to each of the heirs in an intestate estate, or to each of the devisees if a will has been probated, and to any other interested persons who request it.

§ 30.1-18-09. (3-709) Duty of personal representative--Possession of estate.

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall

pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine the title thereto.

§ 30.1-18-15. (3-715) Transactions authorized for personal representatives--Exceptions.

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 30.1-20-02, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

* * *

1. Retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or which are otherwise improper for trust investment.

* * *

9. Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration.

* * *

18. Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate.

* * *

20. Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

21. Employ persons, including attorneys, auditors, investment advisers, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of the personal representative's administrative duties, and act, without independent investigation, upon their recommendations. Instead of acting personally, the personal representative may employ one or more agents to perform any act of administration, whether or not discretionary.

22. Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties.

* * *

27. Satisfy and settle claims and distribute the estate as provided in this title.

§ 30.1-18-19. (3-719) Compensation of personal representative.

A personal representative is entitled to reasonable compensation for the personal representative's services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce the personal representative's right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

§ 30.1-18-20. (3-720) Expenses in estate litigation.

If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, the personal representative or nominee is entitled to receive from the estate necessary expenses and disbursements, including reasonable attorney's fees incurred.

§ 30.1-18-21. (3-721) Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.

After notice to all interested persons, or on petition of an interested person, or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative, including any attorney, auditor, investment adviser, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for that person's own services, including services rendered as attorney, may be reviewed by the court. If the amount of attorney's fees is based upon the value of the decedent's estate, the fee agreement must be in writing and mailed to all parties who are heirs of the estate pursuant to the last will and testament of the decedent. If the decedent died intestate, notice must be provided to all heirs of the estate in accordance with chapter 30.1-03. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

§ 30.1-19-03. (3-803) Limitations on presentation of claims.

1. All claims against a decedent's estate which arose before the death of the decedent, including claims of the state or any political subdivision, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, the heirs and devisees of the decedent, and nonprobate transferees unless presented as follows:

a. Within three months after the date of the first publication and mailing of notice to creditors if notice is given in compliance with section 30.1-19-01; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

b. Within three years after the decedent's death, if notice to creditors has not been published and mailed.

2. All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

a. A claim based on a contract with the personal representative, within four months after performance by the personal representative is due.

b. Any other claim, within three months after it arises.

3. Nothing in this section affects or prevents:

a. Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate.

b. To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which the decedent or personal representative is protected by liability insurance.

§ 30.1-20-03. (3-903) Right of retainer.

The amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest. But, the successor has the

benefit of any defense which would be available to the successor in a direct proceeding for recovery of the debt.

§ 30.1-20-06. (3-906) Distribution in kind--Valuation--Method.

1. Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

* * *

2. After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset the distributee is to receive, if not waived earlier in writing, terminates if the distributee fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

§ 59-04.2-04. (201) Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

1. A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in sections 59-04.2-06 through 59-04.2-29 which apply to trustees and the rules in subsection 5. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

2. A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in sections 59-04.2-06 through 59-04.2-29 which apply to trustees and by:

- a. Including in net income all income from property used to discharge liabilities.
- b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys,

accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction.

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

3. A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under subsection 2 or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

4. A fiduciary shall distribute the net income remaining after distributions required by subsection 3 in the manner described in section 59-04.2-05 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

5. A fiduciary may not reduce principal or income receipts from property described in subsection 1 because of a payment described in section 59-04.2-24 or 59-04.2-25 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

AUG 22 2014

STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of
Arline H. Hogen, Deceased

Supreme Court No. 20140119

Steven C. Hogen, Petitioner and Appellee
and Cross-Appellant

District Court No. 09-07-P-00100

v

AFFIDAVIT OF MAILING

Rodney Hogen, Respondent and Appellant
and Cross-Appellee

State of North Dakota
County of Cass

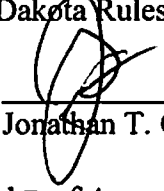
Jonathan T. Garaas, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the day of 22nd day of August, 2014, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: BRIEF OF RESPONDENT AND APPELLANT AND APPENDIX TO BRIEF OF RESPONDENT AND APPELLANT.

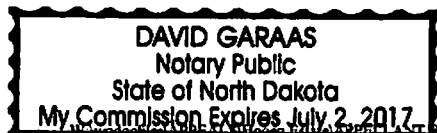
The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Mr. Michael Nelson
Ohnstad Twichell
P.O. Box 458
West Fargo, ND 58078-0458

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


Jonathan T. Garaas

Subscribed and sworn to before me this 22nd day of August, 2014.




Notary Public