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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the **Estate of Ann Biel Brandt**, deceased.

Kathleen Bouchard, as personal representative of the Estate of Ann Biel Brandt and in her individual capacity as an interested person, Petitioner and Appellee, vs. Thomas Biel and Marilyn Knudson, Respondents and Appellants.	**SUPREME COURT NO. 20180160** Civil No. 12-2014-PR-00190

ON APPEAL FROM CASE NO. 12-2014-PR-00190, COUNTY OF DIVIDE, STATE OF NORTH DAKOTA NORTHWEST JUDICIAL DISTRICT, THE HONORABLE JOSHUA B. RUSTAD PRESIDING

BRIEF OF APPELLEE ESTATE OF ANN BIEL BRANDT

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STATEMENT OF THE CASE

[¶1] This is an appeal from the final inventory, accounting, and closure of the Estate of Ann Biel Brandt (the "Estate"). This matter was assigned to the Divide County district court, the honorable Joshua Rustad presiding, when Kathleen C. Bouchard ("Kathy") filed a Petition for Formal Probate, Adjudication of Intestacy, Determination of Heirs, and Appointment of a Personal Representative on September 10, 2014. (Dkt. # 1). The basic issue before the Court is whether the district court, the honorable Joshua Rustad presiding, erroneously approved the final accounting, distribution, and closure of the Estate. Appellants have raised issue with the district court's allowance of personal representative Kathleen C. Bouchard ("Kathy") submitting petitions *pro se* as an interested party, with the district court's conclusion that the Ann Biel Brandt Legacy Trust (the "Legacy Trust") was void from the outset, with the valuation assigned by the district court to certain mineral interests and related litigation rights, with the district court's decision to direct Kathy, as personal representative, not to settle certain claims of the Estate at the time of a settlement offer, with the district court's finding that the final distribution was in accordance with Ann's testamentary intent, with the district court's approval of certain creditor claims of Kathy, with the district court's approval of the Estate's attorneys' fees, and with the district court's decision not to reimburse Appellants' attorneys fees.

[¶2] As diverse as these issues may at first appear, the basic dispute is simple; Appellants believe that none of Ann's real property is Estate property, but rather is property of the Legacy Trust, that the value of certain mineral rights and associated legal claims presented in a civil action pending before the honorable Judge Paul Jacobson (the "Civil Action") was overstated by the district court, and that the final distribution of assets was inequitable.

Ultimately, Appellants believe the district court abused its discretion in distributing the Estate assets.

STATEMENT OF THE FACTS

[¶3] Ann Biel Brandt ("Ann") died on May 17, 2014, at the age of 93. (App. 0012). Kathleen C. Bouchard ("Kathy") was appointed personal representative of the Estate of Ann Biel Brandt (the "Estate") over the objections of Kathy's siblings, Marilyn Knudson ("Marilyn") and Thomas Biel ("Tom"). (App. 0034; 0121-26). Kathy, Marilyn, and Tom are the three heirs of Ann and the three beneficiaries of Ann's Estate. (App. 0213). As the record makes clear, the probate of the Estate has been contentious from the beginning.

A. Creation of Life Estate, Lease of the Minerals by Les and Becky, and Filing of False Death Certificate

[¶4] In 1996, Ann and her then husband Robert Brandt granted a warranty deed, reserving life estates to grantors, in favor of Leslie T. Knudson ("Les") and Rebecca K. Knudson ("Becky") for the surface acres and minerals on certain property located in Section 2, Township 162 North, Range 95 West, 5th P.M. (Dkt. #39). Les is Ann's grandson and Marilyn's son. Robert Brandt died in 2007, which left Ann with the sole present possessory interest in the mineral acres. (App. 0423). In 2009, Les and Becky entered into a mineral lease with LoneTree Energy & Associates ("LoneTree") without Ann's knowledge or consent. (App. 0228). Shortly thereafter, a death certificate for a different Ann Brandt was recorded by LoneTree, which appeared to clear title to Les and Becky and resulted in lease and bonus payments beginning to be made to Les and Becky. Ann was never paid anything for the lease or the use of the use of the minerals. (App. 0228).

B. Creation of the Legacy Trust

[¶5] In 2013, Kathy discovered the improperly recorded death certificate and took action to correct this, including notifying Hess of the impropriety of payments, which caused Hess to suspend payments. (App. 0231). In November of 2013, Marilyn and Tom, through their attorneys at Pearce & Durick, created the Ann Biel Brandt Legacy Trust (the "Legacy Trust") via their attorney-in-fact status. (App. 0425). Ann did not have anything to do with the creation of the Legacy Trust. (Id.). Marilyn and Tom transferred all real property of Ann to the Legacy Trust, (App. 0425-26). Shortly thereafter, Ann passed away. (App. 0426).

C. Kathy's Appointment As Personal Representative

[¶6] After Ann's death, Kathy, Marilyn, and Tom were unable to agree to appointment of a personal representative after the two candidates named in Ann's will both declined to serve as personal representative (App. 0030-40, 0046-47, 0052-53). After an unsuccessful attempt to mediate between the beneficiaries, Tom and Kathy each requested to be named personal representative. (App. 0130-40, 0174-75). In August 2015, a hearing was held to determine the personal representative (08/14/2015 Transcript). Ultimately, the district court determined that Kathy ought to serve as personal representative and ordered the same. (App. 0213-16).

D. Kathy Works To Resolve Ann's Claims to Mineral Payments

[¶7] After Kathy's discovery of and actions to address the false death certificate, Hess and LoneTree initially offered the Estate $48,000.00. (Dkt. # 46, #120, Ex.B; Appellants' Brief, ¶ 25). Tom and Marilyn initially proposed settling matters by taking the $48,000.00 from Hess and receiving a $127,614.11 "receivable" from Les and Becky. (Appellants' Brief, ¶ 26). The receivable was to be split into shares, with Marilyn forgiving her share

and Tom taking Kathy's share in exchange for cash (Id.). This offer was apparently contingent on Tom being appointed personal representative.

[¶8] After Kathy was appointed personal representative, the Estate initiated the Civil Action with the intent of preserving Ann's rights and recover amounts due to Ann. ("Complaint", App. 0266). The Estate did not file the Civil Action, although it was later filed and assigned to the honorable Judge Paul Jacobson, and maintained open communication regarding settlement. (App. 0290). After serving the Civil Action, the Estate received an offer of $82,308.60 to settle all claims. (App. 0346). The beneficiaries were split on whether to accept the offer, which led the Estate to ask the district court for direction on whether to accept the offer at that time. (Dkt. #108). The district court directed that the Estate should not accept the then current settlement offer. (Dkt. #286).

E. Kathy Requests the District Court Determine Title To Property And Value of Property

[¶9] In June 2016, Kathy, individually, as an interested person, petitioned the district court to determine title to the real property that Marilyn and Tom insisted did not belong to the Estate and to value Ann's mineral rights and associated claims for purposes of the probate. (Dkt. #124, #144).

[¶10] The district court held a hearing and heard from Kathy individually, as well as counsel for Tom and Marilyn, counsel for the Estate did not argue on behalf of Kathy individually. (See 10/21/2016 Transcript). Kathy, individually, argued the Legacy Trust was void and the real property at issue belonged to the Estate. (Id. 29:18-33:25). As Appellants have acknowledged, Kathy did not propose trying the Civil Action in the probate, but rather valuing the property rights at issue in the Civil Action and assigning

them to Marilyn and Tom as Tom had initially suggested doing. (Id. 29:15-29:18; 35:20-35:23).

[¶11] The district court found that Marilyn and Tom created the Legacy Trust for their benefit and not for the sole benefit of Ann as was required by Marilyn and Tom's Durable Powers of Attorney. (App. 0428-29). The district court determined that Marilyn and Tom exceeded their authority in creating the Legacy Trust and transferring Ann's property to the Trust. (App. 0434). The district court found the creation of the Legacy Trust to be void from the beginning, or *ab inito*. (App. 0434). The district court ordered the personal representative to file its findings and orders with applicable county recorders in order to address any title issues created by invalid deeds from the void from the beginning Legacy Trust. (App. 0438). The district court also determined the value for purposes of probate to be $197,117.11 (App. 0445). The district court then ordered the property rights and associated claims to be distributed to Marilyn and Tom in equal shares and for Marilyn and Tom to substitute as plaintiffs in the Civil Action. (App. 0446). Marilyn and Tom refused to substitute as plaintiffs in the Civil Action and Judge Jacobson did not order them to do so (App. 0519).

F. Final Inventory and Distribution

[¶12] In January 2018, the Estate filed an Amended Petition to Allow Amended Final Inventory and Accounting, Settlement of Estate, and for Discharge of Personal Representative. (the "Final Inventory and Accounting") (App. 0507-0540; Dkt. #329). Pursuant to the Final Inventory and Accounting, Marilyn and Tom received credit for the real property already distributed, valued at $130,554.56, and received equalizing cash in the amount of $86,651.91, each, for a total of $217,206.47 for each of Marilyn and Tom.

(App. 0536-38). Kathy received $217,206.47 in cash. (App. 0539). Each distribution was subject to a $20,000.00 hold back for litigation on appeal. (App. 0536-39). Marilyn and Tom objected to the final inventory and accounting. (App. 0541-57). After hearing, the district court ordered distribution of assets in accordance with the Final Inventory and Accounting. (App. 0566-71). Appellants then appealed.

LAW AND ARGUMENT

I. The District Court Did Not Err In Allowing Kathy To Petition As An Interested Party.

[¶13] Appellants have argued that the district court erred by deciding petitions submitted by Kathy in her individual capacity, without the assistance of counsel, outside of the scope of her role as personal representative (Appellants' Brief, ¶ 48). However, the district court did not err in allowing Kathy to proceed as an interested party. Appellants' claim is based on two statutes: N.D.C.C. §§ 30.1-18-03(1) and 30.1-18-13, which Appellants believe prohibit a personal representative from petitioning the court in a formal supervised probate pursuant to N.D.C.C. § 30.1-12-05. (Appellants' Brief, ¶ 49). N.D.C.C. § 30.1-18-03(1) provides that a personal representative is a fiduciary bound to act in the Estate's best interest. N.D.C.C. § 30.1-18-13 provides that any "sale or encumbrance" to the personal representative or:

> any transaction which is affected by a substantial conflict of interest on the part of the personal representative is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:
>
> (1) the will or a contract entered into by the decedent expressly authorized the transaction; or
>
> (2) the transaction is approved by the court after notice to interested persons.

N.D.C.C. § 30.1-18-13. Thus, Sections 30.1-18-03(1) and 30.1-18-13 recognize the general

fiduciary rule applicable to a personal representative and recognize that certain transactions are voidable if entered into by a personal represented without prior authorization by the decedent by will or contract or by prior court approval. Nowhere does either statute state that a personal representative is no longer an "interested party".

[¶14] The petitions at issue were brought by Kathy individually pursuant to N.D.C.C. 30.1-12-05, which states:

> 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.

N.D.C.C. §30.1-12-05; (Dkt. # 146, #126). The ability of an interested party to petition the court in a formal supervised probate is also supported by N.D.C.C. § 30.1-16-05, which states that "a supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or the motion of any interested party." It is difficult to understand how Kathy could be construed as having violated a fiduciary duty by petitioning the court to consider her viewpoint on a given subject. Kathy did not take any action relating to the petitions at issue without the court hearing from the interested parties and deciding how to direct Kathy to act for the benefit of the Estate. Further, Appellants have not pointed to, and Appellee is not aware of, any law or rule actually prohibiting such a petition. Simply

put, Kathy did not breach any duty owed as personal representative and Appellants' argument is misplaced.

II. The District Court Did Not Err By Ruling On the Petition To Determine Rights In Estate Or By Not Directing the Estate to Accept Settlement In Response To Petition To Determine Rights In Estate.

[¶15] Appellants have asserted that the district court ought not to have directed the Estate to refrain from settling the Civil Action at the time the Petition to Determine Rights in Estate was filed. (Appellants' Brief, ¶ 61). Appellants characterize the Court's Order as essentially an advisory opinion that the Estate's litigation strategy was correct and pre-approving any future action. (Appellants' Brief, ¶¶ 61-62).

[¶16] The district court did not err in issuing its order directing the Estate not to accept settlement at that time. North Dakota Century Code § 32-23-04 allows a personal representative to request direction "to do or refrain from doing any particular act in their fiduciary capacity" and "to determine any question arising in the administration of the estate or trust." The standard of review applicable to a district court's decision to grant declaratory relief is abuse of discretion. Perault v. State, 2017 ND 167, ¶ 7, 898 N.W.2d 452. Declaratory judgments are to be administered liberally. N.D.C.C. § 32-23-12.

[¶17] At the time the Petition for Determination of Rights in Estate was filed, a concrete question existed as to whether the Estate, and whether the personal representative, as a fiduciary of the Estate, ought to accept an offer of settlement of the Civil Action totaling $82,308.60 ("Petition for Determination of Rights in Estate", App. 0233-37). Thus, the question of whether to accept settlement was a question that arose in the administration of the Estate, and the personal representative wished to be directed by the Court as to what action to take. This action was not meant to "pre-approve" all future actions, but rather was intended to ensure that the personal representative's decision with respect to the Civil

Action was reviewed by the district court. This type of review neatly fits within the purpose of a formal, supervised probate; all parties are protected by the district court playing its role as overseer of proceedings and by the district court's guidance on important questions. Although Appellants believe the district court ought to have directed the settlement be accepted, Appellants have not presented sufficient evidence to overcome the high bar against overturning the district courts on matters within their discretion.

[¶18] Appellants have also failed to explain what harm, if any, they have suffered by this alleged error. Kathy has continued to approach the litigation with care, recognizing the close familial relations involved in the case, and has not taken any action other than preserve valuable interests for the benefit of the Estate and all beneficiaries, including Marilyn and Tom. Had Kathy not commenced the suit, certain causes of action may have been barred on statute of limitations grounds.

[¶19] For all of the forgoing reasons, this Court ought to affirm the district court's decision with respect to the Petition to Determine Rights in Estate.

III. The District Court Did Not Err in Finding the Legacy Trust Void *Ab Initio*.

[¶20] Appellants argue that the court lacked authority to determine that the Legacy Trust was void *ab inito* because the district court lacked jurisdiction over the Legacy Trust and Marilyn and Tom as trustees. (Appellants' Brief, ¶ 56). Contrary to Appellants' arguments, the district court had jurisdiction, the district court's findings of fact with respect to Legacy Trust are not clearly erroneous, and the district court did not abuse its discretion in declaring the Legacy Trust void *ab inito*. See In re Estate of Eagon, 2017 ND 243, ¶¶ 11, 16, 902 N.W.2d 751 (explaining standards for clear error and abuse of discretion review).

[¶21] It is important to note that the court was overseeing a formal, supervised probate, which is defined in N.D.C.C. § 30.1-16-01 as follows:

> Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative, or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this chapter, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

N.D.C.C. § 30.1-16-01. Moreover, N.D.C.C. § 30.1-02-02 specifically gives courts hearing probate matters jurisdiction over probate and testamentary matters, including trusts. Further, the probate code provides rules on notice to interested parties, which specifically allow for notice of hearings to be given by mail or, in some cases, publication. See N.D.C.C. § 30.1-12-06; N.D.C.C. § 30.1-03-01.

[¶22] In this case, it is undisputed that Appellants and the Legacy Trust were given notice of the petitions at issue. (Notice of Hearing on Petition for Orders to Determine Title to Property and on Petition for Orders to Determine Value of Property, Dkt, #162.). It is also undisputed that Appellants and counsel for Appellants are the same individuals and attorneys who made up the Legacy Trust's trustees and counsel. Moreover, this Court has previously found lower court determinations of the existence of a trust to be appropriate in a probate action. In re Estate of Binder, 366 N.W.2d 454, 457 (N.D. 1985) ("in the instant case the county court has complete authority to determine the existence of a trust"). Simply put, Appellants' argument with respect to jurisdiction over the Legacy Trust is a red herring.

[¶23] Appellants also argue that the district court clearly erred in voiding the Legacy Trust because it did so based on a "misconstruction of the Power of Attorney" and erroneous fact findings regarding the circumstances at issue. (Appellants' Brief, ¶ 59). Because Appellants take issue with the district court's findings of fact and discretion the applicable standards are clear error (with regard to facts) and abuse of discretion (with regard to finding the Legacy Trust void) In re Estate of Eagon, 2017 ND 243, ¶¶ 11, 16, 902 N.W.2d 751 (explaining standards for clear error and abuse of discretion review).

[¶24] Appellants are unable to meet these lofty standards. Appellants' Brief does not support these accusations in any detail and does explain or allege any specific factual error in the district court's finding that the Legacy Trust was not established for Ann's own benefit. (See Order to Determine Title, App. 0428-29; see also Appellants' Brief, ¶¶59-62). Appellants have failed to meet their burden with respect to showing that the district court committed clear error in finding the Legacy Trust was not created for the Ann's sole benefit, and have failed to meet their burden in showing the district court abused its discretion in finding the Legacy Trust Void *ab inito*.

[¶25] Appellants also take issue with the allegedly insufficient evidence available to the district court, but neglect to mention that Appellants never requested an evidentiary hearing and never raised this issue below. See, e.g., Morris v. Moller, 2012 ND 74, ¶8, 815 N.W.2d 266 ("It is well established that arguments not raised before the district court cannot be raised for the first time on appeal."). (see also "Brief and Affidavit in Support of Petition for Orders to Determine Title to Property", App. 0279-96). Further, Appellants have previously signed deeds stating that the Legacy Trust was terminated, and have never

explained why they would do so if the Trust still existed ("Order to Determine Title", ¶ 16, App. 0427).

[¶26] Appellants fall well short of the high bar imposed when asking this Court to overrule the district court on factual questions and discretionary issues with respect to the district court's ruling on the Legacy Trust. Therefore, this Court should affirm the district court's decision that the Legacy Trust is void *ab initio*.

IV. The District Court's Orders Determining Value to Property Are Not Clearly Erroneous.

[¶27] Appellants take issue with the district court's determination of the value of the property rights and associated claims relating to the mineral interests Ann held during her life. (Appellants' Brief, ¶ 51-62). In short, Appellants believe the district court lacked jurisdiction to value the minerals and claims and overestimated the value of the minerals and claims. (Id.). The standard of review for a court's determination of the value of estate property is clear error. In re Estate of Luken, 551 N.W.2d 794, 799 (N.D. 1996). Appellants have failed to demonstrate that the district court's findings of fact with respect to the value of the Estate property are clearly erroneous.

A. The District Court Did Not Improperly Assume Jurisdiction Over Matters Outside Of Its Purview.

[¶28] Appellants have asserted that the district court assumed jurisdiction over and effectively decided the merits of the Civil Action. (Appellants' Brief, ¶ 51). Appellants argue that Judge Rustad could have tried the Civil Action from start to finish if the Civil Action had been brought in his court or a motion to consolidate was granted. (Appellants' Brief, ¶¶ 52-57). Appellants go into great detail arguing about rules of service and personal jurisdiction, but these arguments are misplaced. Contrary to Appellants' claims, the district court did not assume jurisdiction over the Civil Action; rather, the district court did two

things: (1) addressed the existence of the Legacy Trust; and (2) determined the value of certain estate property for purposes of distribution. (See "Orders Determining Title", App. 0423, "Orders Determining Value", App. 0440). The district court had jurisdiction over all matters relating to the probate of the Estate and interested parties may petition the court for determinations of how decedents' estate are "to be administered, expended, and distributed, including actions to determine title to property alleged to belong to the estate." N.D.C.C. § 30.1-12-05. The district court's valuation of the claims at issue was done on petition of an interested party and directly related to estate administration and distribution. Thus, the district court's order on valuation falls directly within the scope of Section 30.1-12-05.

B. The District Court's Findings of Fact As To Value Are Not Clearly Erroneous.

[¶29] Appellants also take issue with the district court's valuation of the claims at issue in the Civil Action. (Appellants' Brief, ¶¶ 59-60). However, as the district court noted, the parties clearly intended that Ann receive all value from the mineral rights during her life. (Order Determining Title, App. 0432-33). In its finding that the deed by its terms reserved mineral rights to Ann for her lifetime, the district court cited Les Knudson's own admission to that effect in its order. (App. 0432-33). The court also knew Appellants' prior proposed value of the claims at issue, as well as the prior settlement offers relating to those claims. (App. 0179, 0235).

[¶30] Appellants assert that the value of the Civil Action assigned for distribution is too speculative and cannot be relied upon. (Appellants' Brief, ¶ 60). Appellants note that in Estate of Ridl, 455 N.W.2d 188, 194-95 (N.D. 1990), this Court found that a district court had erred in ordering a personal representative to pay penalties for late taxes when the IRS had not assessed any such penalties at that time. However, Ridl is inapposite.

[¶31] Here, unlike Ridl, the amount in question in an asset of the Estate and not a debit to be paid by the Estate. It is true that the ultimate recovery in suit is unknown, but the court had substantial information available to it when deciding the value of this asset for purposes of probate and distribution. For instance, the court knew the value that Appellants had initially placed on the litigation (App. 0179). The court knew the value of the settlement offers that had been made to date (App. 0235). The court knew of Appellants' desire to guide the outcome of the case. The court heard from both parties as to this issue. (App. 0179). Ultimately, the court determined the value of the claims for purposes of the probate. Appellants have failed to show that the court's valuation was clearly erroneous under the circumstances.

[¶32] Frankly, Appellants have been disingenuous with respect to these mineral rights from day one. Initially, Appellants proposed that Appellants would receive these rights as part of their distribution and valued them at $127,600.00 (App. 0179). Appellants then shifted and began calling the entire Civil Action frivolous despite substantial initial settlement offers being made. (See, e.g., "Brief in Support of Response to Petition for Determination of Rights in Estate ¶ 4, App. 0256) ("Before Bouchard initiated the civil case, Biel and Knudson expressed in a letter to Bouchard's attorney their belief that pursuing claims against Hess and Leslie and Rebecca Knudson was not in the best interests of the Estate and demanded Bouchard abandon her efforts to pursue those claims and accept Hess' offer to resolve the matter"). On Appeal, Appellants appear to allege that the claims themselves are not frivolous, but that the Estate ought to have pursued them more vigorously and ought to have obtained final judgments on all claims. (Appellants' Brief, ¶ 60). Appellants have caused substantial harm to the Estate and have continually delayed

closing the Estate with the apparent goal of limiting the liability of Les and Becky to the Estate. The purpose of valuing and distributing the property rights underlying the litigation was to give Appellants what they wanted; the right to control the outcome and, if Appellants so choose, to limit the liability of Les and Becky. Appellants continual delay tactics and constant changing of their story with respect to the Civil Action left the Estate with few viable options. Appellants now seek to hold the Estate responsible for a situation that Appellants themselves intentionally created.

[¶33] Appellants also allege that the Title and Value Orders are not based on sufficient evidence and rely excessively on oral argument. (Appellants' Brief, ¶ 58). This is incorrect. First, Appellants seek to apply a standard (summary judgment) that has nothing to do with the probate action. (Appellants' Brief, ¶ 57). Appellants argument with regard to the applicability of the summary judgment standard misses the fact that the district court was acting for purposes of probate and was not purporting to bind any non-parties and fails to account for the fact that the district court was acting in accordance with specific probate statutes, including N.D.C.C. §§ 30.1-12-05 and 30.1-16-01. See N.D.C.C. 30.1-02-04 (explaining that probate statutes override the rules of civil procedure where applicable). Second, Appellants never requested an evidentiary hearing or raised this argument below. Morris v. Moller, 2012 ND 74, ¶8, 815 N.W.2d 266 ("It is well established that arguments not raised before the district court cannot be raised for the first time on appeal."). Appellants have failed to meet their burden of showing the district court's findings of fact with respect to the value of the rights at issue in the Civil Action are clearly erroneous. Therefore, this Court should affirm the district court's determination of value.

V. The District Court Did Not Abuse Its Discretion In Approving the Final Accounting and Distribution From the Estate

[¶34] Appellants allege that the district court abused its discretion in approving the final accounting and distribution from the Estate. (Appellants' Brief, ¶63). As Appellants acknowledge, the standard of review applicable is abuse of discretion. Estate of Johnson, 2017 ND 162, ¶ 18, 897 N.W.2d 921. (Appellants' Brief, ¶63). Appellants argue that the lofty bar presented by the abuse of discretion standard is satisfied here because the final accounting and distribution are "arbitrary, unreasonable, and unconscionable". (Appellants' Brief, ¶ 63).

[¶35] Appellants also argue that the real property distributed to Marilyn and Tom belongs to the Legacy Trust and that the value of the Civil Action may not be distributed because it is still speculative; each argument is wholly contingent upon Appellants' succeeding in other portions of their argument being advanced to this Court. (Appellants' Brief, ¶ 64).

[¶36] Ultimately, Appellants conclude that no reasonable person could conclude that the residuary estate was split equitably in accordance with N.D.C.C. § 30.1-20-06. (Appellants' Brief, ¶ 65). This conclusion appears to be based on Appellants' belief that the real property they were distributed properly belonged to the Legacy Trust and that the value of the real property and the value of the property rights underlying the Civil Action were erroneously assessed by the court. (Id.). The value of estate property is a question of fact reviewed on an clearly erroneous standard. In re Estate of Luken, 551 N.W.2d 794, 799 (N.D. 1996). Appellants have provided no support for real estate values being inaccurate and have taken issue with the Court's ruling on the value of the property rights at issue in the Civil Action, but have failed to meet the applicable bar, especially in light of the fact that Appellants themselves had previously valued the rights at issue in the Civil

Action at over $127,000.00 and that a valuable settlement offer had been made with respect to the Civil Action. (App. 0179, 0346). Because Appellants have failed to meet their burden of showing the district court abused its discretion in the final accounting and distribution of the Estate, this Court should affirm the decision of the district court.

VI. The District Court Did not Abuse Its Discretion in Approving Kathy's Claims.

[¶37] Appellants argue that Claims 1-5G against the Estate made by Kathy ought not to have been paid by the Estate. (Appellants' Brief, ¶¶ 66-71) on the basis that Kathy was not an Estate creditor, that she was not entitled to reimbursement for actions Kathy took prior to Ann's death, and that attorneys' fees relating to Kathy's appointment are not reimbursable. (Id.).

[¶38] Kathy's Claims 1-4 are for un-reimbursed out-of-pocket expenses incurred by Kathy during Ann's life. (App 0055-0100). Claims 1-4 were for the following amounts: (1) $2,283.63; (2) $2,571.06; (3) $873.28; (4) $1,272.45. App. pp. 0055, 0070, 0087, 0099. Claim 5 was for $3,732.36 of costs incurred after Ann's death for retaining the Vogel Law Firm ("Vogel") and beginning the probate process. (App. 0121-22). Claim 5A was for $2,401.98 of attorneys' fees and costs relating to commencement of probate proceedings. (App. 0137-43). Claim 5B is for attorneys' fees and costs in the amount of $4,044.00 incurred prior to Kathy's appointment as personal representative (App. 0144-47). Claim 5C is for attorneys' fees and costs in the amount of $84.00. (App. 0148-51). Claim 5D is a claim for 2,587.46 of attorneys' fees, costs, and out of pocket expenses incurred by Kathy as part of opening the probate and determining a personal representative. (App. 0152-67). Specifically, $1,568.00 of the $2,587.36 was for attorneys' fees and the remainder was for travel to and from Kathy's home in Washington to North Dakota. (App. 0154). Claim 5E was for $7,025.00 of attorneys' fees and $25.00 of expenses relating to provision of legal

services. (App. 0170). Claim 5F is for attorneys fees and costs in the amount of $6,342.00 (App. 0189). Claim 5G is for attorneys' fees and costs in the amount of $13,408.49, as well as 763.72 of travel costs incurred by Kathy traveling to hearings regarding the estate in the amount of $14,172.21 (App. 0195-0212).

[¶39] With respect to Kathy's claims, regardless of whether Kathy was a "creditor" of the Estate or not, the Court was entitled to use its equity powers to authorize reimbursement of expenses. See, .e.g., Matter of Estate of Raketti, 340 N.W.2d 894, 901-02 (N.D. 1983) ("ordinarily, one who performs services for another without an express agreement as to compensation is entitled to the reasonable value of his services."); In re Estate of Lutz, 2000 ND 226, ¶ 12, 620 N.W.2d 589 (explaining that the question of whether services are of such a nature as to imply a contract to pay for services is a question of fact subject to a clearly erroneous standard of review). The record makes clear that the district court found that the court was convinced that Kathy provided services that were of such a nature that compensation was appropriate under the circumstances. (Order Confirming Payment of Claims 1-5G, App. 0456-58). Appellants bear the burden of demonstrating the court's determination that these claims were valid is clearly erroneous. Estate of Lutz, 2000 ND 226, ¶ 12, 620 N.W.2d 589. Appellants have failed to meet their burden and, as a result, this Court ought to affirm the decision of the district court with respect to the payment of Claims 1-5G.

[¶40] With respect to attorneys' fees relating to Kathy's appointment, it is well established that powers of a personal representative relate back in time prior to appointment, N.D.C.C. § 30.1-18-01, and appointment of a personal representative is clearly of benefit to the Estate. See in re Estate of Flaherty, 484 NW.2d 515, 518 (N.D.

1992) (explaining the standard for benefit to the Estate). The district court is in the best position to evaluate whether fees are proper and whether they were for the benefit of the Estate. Here, the court found these fees were for the benefit of the Estate. (App. 0457-58). Appellants have failed to show the court's finding that the fees benefitted the Estate is clearly erroneous.

VII. The District Court did not Abuse Its Discretion By Approving The Estate's Attorneys' Fees.

[¶41] Appellants argue that district court erred by approving reimbursement of Estate attorneys' fees that Appellants claim benefited Kathy individually and not the Estate. (Appellants' Brief, ¶ 72). In North Dakota, personal representatives are entitled to reimbursement of attorneys' fees by statute. N.D.C.C. § 30.1-18-20. This Court has made clear that attorneys' fees to be paid out of the Estate include fees for a "successful or unsuccessful personal representative who engages in good faith proceedings" and that "an estate as an entity is benefited when genuine controversies as to the validity or construction of a will are litigated and finally determined." See in re Estate of Flaherty, 484 NW.2d 515, 518 (N.D. 1992). Further, "the purpose and public policy underlying these statutes is to allow the personal representative, as a fiduciary acting on behalf of persons interested in an estate, to in good faith pursue appropriate legal proceedings without unfairly compelling the representative to risk personal financial loss by underwriting the expenses of those proceedings." Id. The applicable standard of review for a district court's approval of attorney's fees abuse of discretion. Estate of Johnson, 2017 ND 162, ¶ 18, 897 N.W.2d 921.

[¶42] Appellants take issue with the format of the invoices of the Estate's attorneys, but fail to mention that this argument was never raised at any point below. (Appellants' Brief,

¶ 74). This argument cannot be considered for the first time on appeal. See, e.g., Morris v. Moller, 2012 ND 74, ¶8, 815 N.W.2d 266 ("It is well established that arguments not raised before the district court cannot be raised for the first time on appeal."). Moreover, "a trial court is considered an expert in determining the amount of attorney fees". Van Beek v. Umber, 2010 ND 47, ¶ 5, 780 N.W.2d 52. As the record makes clear, the court did not abuse its discretion in approving the Estate's fees; this case has been contentious and has required a great deal of work to keep moving towards the ultimate goal of equitable distribution of Estate assets. (See "Order Confirming Expenditures for Vogel Legal Services", App. 0465-71).

[¶43] Appellants have alleged that "most of the fees" should have been disallowed because they were for services supporting Kathleen's personal interests. (Appellants' Brief, ¶ 75). Appellants offer no proof with respect to this accusation whatsoever. (Appellants' Brief, ¶¶ 75-77). The closest Appellants come to offering proof on this point is to allege that an appearance by counsel for the Estate at a hearing involving a separate petition brought by Kathy individually ought not to have been reimbursable even though Appellants admit counsel for the Estate appeared on behalf of the Estate and did not argue on behalf of Kathy individually. (Appellants' Brief, ¶ 76). None of the Estate's fees benefitted Kathy individually at the expense of the Estate and the district court did not abuse its discretion in allowing the fees. And the Court, in its discretion, agreed. ("Order Confirming Expenditures for Vogel Legal Services", App. 0465-71).

[¶44] Appellants have alleged that "Kathleen's attorney did not prosecute the Civil Action in good faith." (Appellants' Brief, ¶ 77). Assuming Appellants are referring to the attorneys for the Estate, then this accusation is, at best, inaccurate, and, at worst,

intentionally misleading. Appellants continue to take diametrically opposing positions with respect to the Civil Action, sometimes insisting that the Civil Action is entirely frivolous, absurd, and fraudulent, while other times asserting that the Estate ought to have already tried the case, obtained a judgment and paid the beneficiaries in full. Compare Appellants' Brief ¶ 26 with ¶ 77 of Appellants' Brief (on the one hand discussing a more than $127,000.00 value and on the other hand accusing the Estate of dumping a valueless lawsuit on Appellants). The only commonality in the varying positions of Appellants is that Appellants' story matches the outcome Appellants are seeking at that given moment.

[¶45] The truth of the matter with respect to the Civil Action is that Appellants first suggested that they take the Civil Action as part of Appellants' share of the Estate. (See Brief in Support of Withdrawal of Waiver of Right of Appointment and Nomination of Personal Representative and Request for Appointment as Personal Representative of the Estate of Ann Biel Brandt", App. 0179). Appellants have also made clear that they do not want the Estate to litigate against Les and Becky, and would rather absorb some of the loss for them (Id.). Contrary to Appellant's claims, the Estate has proceeded with caution with respect to the Civil Action precisely because it involves sensitive family matters and because Appellants had indicated they wanted to receive the property rights at issue as part of their distribution and otherwise control the course of litigation. The only thing done in bad faith with respect to the litigation is Appellant's accusation that the Estate did not prosecute the case in good faith.

[¶46] Appellants have also claimed that attorneys' fees for responding to the petition to remove Kathy as personal representative were not reimbursable because Appellants claim the Removal Petition was brought in a good faith effort to correct maladministration.

(Appellants' Brief, ¶ 78). Appellants cite Kjorvestad's Estates, 287 N.W.2d 465, 469 (N.D. 1980), for the proposition that if charges are brought against a personal representative in good faith and are well grounded, then the personal representative is not entitled to reimbursement. (Appellants' Brief, ¶ 78). What Appellants failed to mention is that this is an issue for the district court. Kjorvestad's Estates, 287 N.W.2.d at 469 ("Conversely, if charges are brought against the executor in bad faith and are groundless, the executor should be able to recover the cost of his expenses from the estate in defending against these charges"). Thus, the district court had to weigh the appropriateness of fees on an abuse of discretion standard and determine whether to allow any reimbursement, and if so, to which party. In re Estate of Rohrich, 496 N.W.2d 556, 573 (N.D. 1993). The district court did just that. (See Order Confirming Payment of Claims 1-5G, App. 0456). Appellants have failed to meet their burden and are unable to show the court abused its discretion in awarding these fees.

[¶47] Appellants have also claimed that real estate and stock appraisals were improper on the basis that the real estate "is not Estate property" and the stock is not publically traded. (Appellants' Brief, ¶ 79). These arguments are meritless. The argument with respect to the real estate is entirely contingent on another argument of Appellants and the argument on the stock is simply without any basis in law or fact. The fact that a company is privately held does not make an appraisal meritless; even if the company ultimately offers a better share price than the appraised price.

VIII. The District Court Did Not Abuse Its Discretion By Denying Reimbursement Of Appellants' Attorneys' Fees.

[¶48] Appellants argue that the district court abused its discretion in declining to award attorneys' fees to Appellants for responding to Kathy's interested person petitions and for

"attempting to correct the course of administration". (Appellants' Brief, ¶ 80). Appellants admit that a claim is frivolous only under rare circumstances. (Appellants' Brief, ¶ 80) ("A claim is frivolous 'if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor.'" Quoting N.D.C.C. § 28-26-01(2)). Further, the standard of review of a court's decision on whether a claim is frivolous is abuse of discretion. See, e.g., Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 47, 861 N.W.2d 490 ("the district court has discretion to decide whether a claim is frivolous.").

[¶49] Appellants claim that Kathy's interested party petitions are "frivolous" and that, under N.D.C.C. § 28-26-01(2), Appellants are entitled to an award of attorneys' fees. (Appellants' Brief, ¶ 81). Appellants' claims rely on the same arguments Appellants advanced with respect to the Petitions themselves, i.e. that N.D.C.C. § 30.1-12-05 does not allow a personal representative to petition the court in a formal, supervised probate and that the Petitions themselves are frivolous. (Compare ¶¶ 48-50 of Appellants' Brief with ¶¶ 80-82 of Appellants' Brief). Appellee submits that Appellants' analysis on that issue is incorrect and Appellants cannot meet the high bar required to show that a claim is so obviously incorrect that no reasonable person could have believed the claim would have prevailed or that the court abused its discretion in failing to award Appellants attorneys' fees.

[¶50] Appellants also argue that they are entitled to equitable attorneys' fees for legal services benefitting the estate as a whole. Claims of this nature are reviewed for an abuse of discretion. Estate of Haas, 2002 ND 82, ¶ 21, 642 N.W.2d 713. Appellants have failed to point to any error of any kind or any worthwhile "correction of the course of

administration" provided by Appellants, let alone establish that the district court abused its discretion by not awarding Appellants attorneys' fees under the circumstances. Appellants' claims are contingent on this Court agreeing with Appellants on all of Appellants' arguments, agreeing with Appellants that not only were Appellant's arguments the better arguments, but that the various arguments of Kathy individually and of the Estate were either frivolous or so poor that the Court abused its discretion by not only failing to rule for Appellants, but also by failing to award Appellants attorneys' fees. The facts simply do not bear this out.

IX. Appellants' Accusations Of Bias Against Judge Rustad Are Unfounded.

[¶51] Appellants have alleged that, should any matters be remanded to the district court, the case ought to be reassigned to a different judge. (Appellants' Brief, ¶ 87). Appellants claim that Judge Rustad has exhibited prejudice against Appellants throughout these proceedings. (Appellants' Brief, ¶ 88). But Appellants have not pointed to a single fact supporting this claim. (Appellants' Brief, ¶¶ 88-89). Rather, Appellants have pointed to their dissatisfaction with certain Orders of the court and outcomes that Appellants find unsatisfactory. This is not, and simply cannot be, the standard from re-assigning a case probate action of this nature from the judge with all of the experience and personal knowledge of the case and the record to be removed and labeled as prejudiced.

[¶52] As this Court is aware, the district court "has particular insight that cannot be replicated by a replacement". See T.F. James Co. v. Vakoch, 2001 ND 112, ¶ 19, 628 N.W.2d 298. This Court has also recognized that in cases such as this the "voluminous nature of the record, the sheer number of proceedings, and the experiences of the presiding judge favor retention rather than reassignment." Id.

[¶53] Appellants have confused dissatisfaction with certain outcomes with bias or prejudice against a particular party. Appellants have made no accusation and can point to no facts in support of the claim that Judge Rustad has ever made a decision based on his prejudice against Appellants; no such facts exist.

CONCLUSION

[¶54] For all of the foregoing reasons, Appellee the Estate of Ann Biel Brandt respectfully requests that this Court affirm the Orders of the district court.

Respectfully submitted November 12, 2018.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the matter of the **Estate of Ann Biel Brandt**, Deceased Thomas Biel and Marilyn Knudson, Respondents and Appellants, vs. Kathleen Bouchard, as personal representative of the Estate of Ann Biel Brandt and in her individual capacity as an interested person, Petitioner and Appellee.	**SUPREME COURT NO. 20180160** Civil No. 12-2014-PR-00190

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF CASS)

[¶1] Karen M. Haugen, being first duly sworn, deposes and states that she is over the age of eighteen years and not a party to the above-entitled mater. That on the 12th day of November, 2018, she filed and served the following documents:

BRIEF OF APPELLEE ESTATE OF ANN BIEL BRANDT; AND, AFFIDAVIT OF SERVICE

electronically with the Clerk of the North Dakota Supreme Court by email to:

supclerkofcourt@ndcourts.gov

and she also served the following individuals by email:

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Karen M. Haugen

Karen M. Haugen

Subscribed and sworn to before me this 12th day of November, 2018.

JEAN M. PETERSON
Notary Public
State of North Dakota
My Commission Expires April 19, 2020

Jean M. Peterson

Notary Public