20180160
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
December 3, 2018
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, v. Thomas Biel and Marilyn Knudson, Respondents and Appellants.	Supreme Court No. 20180160 Divide County No. 12-2014-PR-00190

APPELLANTS' REPLY BRIEF

Appeal from the Orders Determining Title dated February 9, 2017;
Orders Determining Value dated February 10, 2017;
Order Granting Petition to Determine Rights dated February 9, 2017;
Order Confirming Payment of Claims 1-5G dated February 10, 2017;
Order Confirming Expenditures Listed dated February 10, 2017;
Order Confirming Expenditures for Vogel Legal Services dated February 10, 2017; and
Order to Allow Amended Final Inventory and Accounting, Settle Estate
and Confirm Distribution dated April 13, 2018
Case No. 12-2014-PR-00190
County of Divide, Northwest Judicial District
The Honorable Joshua B. Rustad

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REPLY

[¶1] Kathleen's attorney abandoned his claim that his role is limited to representing Kathleen in her fiduciary capacity as personal representative by submitting a brief defending the orders obtained by Kathleen the non-fiduciary "interested person." No explanation is offered for why Kathleen's attorney can defend on appeal orders he could not seek below. The abandonment of the pretense that Kathleen's attorney represents the best interests of all devisees is consistent with what the record shows actually happened, i.e., that throughout the proceedings, both Kathleen and her attorney worked to further Kathleen's interests over Tom and Marilyn's interests by requesting a final distribution under which Kathleen receives all cash and the primary "asset" Tom and Marilyn receive is the inflated "value" of the Civil Action. That unequal and inequitable distribution must be reversed.

FACTS

[¶2] Kathleen ignores and mischaracterizes the relevant facts. All inaccurate "factual" statements cannot be addressed due to word limits. However, the truth is in the record which shows that Kathleen's characterization of herself as the reasonable party attempting to give Tom and Marilyn what they wanted in the face of unreasonable, inconsistent demands is unsupportable.

[¶3] Kathleen's misstatements about Tom and Marilyn's positions on the Estate's claims related to Ann's life estate warrant a detailed response. Perhaps the most blatant untruth is Kathleen's claim that Tom suggested having the Probate Court "value" the Civil Action and distribute it to him and Marilyn. (Appellee Brief, ¶10). Kathleen supports that assertion by citing two of *Kathleen's* statements from oral argument—first, "The litigation

can be awarded to my siblings and then if they don't want to have inter-family litigation, and I understand, then they can do with it what they want[,]" and second, "[A]s to the litigation, if they want to drive it in the way that they want, then they should own it first, so we can put values on the litigation and distribute it to them." (Id.; 10/21/2016 Trans.29:15-29:18, 35:20-35:23). Kathleen's argument cannot be reasonably construed as showing Tom suggested having the Probate Court "value" the Civil Action. To the contrary, the record shows that Kathleen first proposed that "solution" during oral argument and that Tom and Marilyn consistently opposed Kathleen's efforts to distribute the Civil Action to them. (App.547-550; Dkt.#293, ¶¶6-19; 10/21/2016 Trans.29:12-29:18, 46:07-47:18; 11/14/2016 Trans.19:22-20:12; 11/03/2017 Trans.04:20-7:14, 12:03-12:08; 02/26/2018 Trans.08:24-14:05).

[¶4] The record also shows that Tom and Marilyn consistently advocated for settling the Estate's claims and distributing the proceeds equally. Kathleen correctly states that Tom and Marilyn initially proposed accepting Hess' $48,000.00 offer and a $127,614.11 "receivable" from Les and Becky with Marilyn forgiving her share and Tom taking Kathleen's share in exchange for cash. (Appellee's Brief, ¶7). Kathleen then claims, without citing the record, that the offer was contingent on Tom being personal representative. (Id.). That is untrue. After Kathleen was appointed, Tom and Marilyn renewed in writing the offer to use the "receivable" as a settlement tool and asked Kathleen to accept Hess' offer and refrain from initiating litigation. (Dkt.#120, Ex.C, p.2). Kathleen rejected the offer, initiated the Civil Action, and, with no basis for doing so, repeatedly demanded that *Jerome and Marilyn* send her a $127,614.11 check. (App.230-232, 288, ¶22, 304, ¶22(a); 11/14/2016 Trans.42:03-42:06; 43:16-43:24). After Kathleen initiated

the Civil Action, Hess and Les and Becky made the $82,308.60 joint settlement offer. (Dkt.#110). Tom and Marilyn wanted to accept. (Id.). Kathleen refused.

[¶5] Kathleen argues, without support, that Tom and Marilyn's goal in settling was protecting Les and Becky rather than maximizing the Estate's recovery. (Appellee's Brief, ¶¶32, 45). Kathleen's argument is illogical because the settlements Tom and Marilyn wanted to accept required Les and Becky to pay more than the Estate was likely to recover in litigation. (Dkt.#50, #110, #120, Ex.C). Tom and Marilyn wanted to settle because they believed, based on their attorneys' advice, that Kathleen's theory that Ann was entitled to all mineral income under Rolla v. Tank, 2013 ND 175, 837 N.W.2d 907, and N.D.C.C. §§ 47-10-24 and 47-10-25 is frivolous and that a North Dakota court would likely conclude that under the Mineral Title Standards, the Estate's damages were limited to interest on the bonus and royalties, i.e. far less than the settlement offers. (Appellant's Brief, ¶¶26-29; Dkt.#201). Conspicuously absent from Kathleen's brief is any defense of her legal theory.

[¶6] The record shows that Kathleen ignored Tom and Marilyn's wishes, and, over their objections, initiated the Civil Action, rejected multiple settlement offers, and "distributed" the Civil Action to them. In the face of that record, Kathleen now suggests she was simply giving Tom and Marilyn what they wanted, and that any dissatisfaction is their fault because their "continual delay tactics and constant changing of their story with respect to the Civil Action left the Estate with few viable options." (Appellee's Brief, ¶32).

[¶7] Kathleen had several reasonable, viable options. She had opportunities, both before and after initiating the Civil Action, to accept settlement offers guaranteeing significant recovery. If Kathleen truly believed the Civil Action was worth more than the settlement offers, she had the option to prosecute the action in good faith. Tom and

Marilyn's position that Kathleen should have prepared the case for trial after refusing to settle is not inconsistent with the position that Kathleen should have accepted the settlement offers. It is common-sense lawyering that to provide competent representation after initiating a lawsuit, an attorney must make reasonable efforts to prepare the case for trial unless and until a settlement is reached.

[¶8] Instead of pursuing those reasonable, viable options, Kathleen pursed the unreasonable option of letting settlement offers expire without response, completing no trial preparation, and "distributing" the Civil Action to Tom and Marilyn at a $197,117.11 "value" far exceeding the $145,811.45 in total mineral income accrued during Ann's lifetime. (App.346, 444-446). Then, after "distributing" the Civil Action to Tom and Marilyn, Kathleen asked the Probate Court to direct her to dismiss the Civil Action before Tom and Marilyn had the opportunity to appeal. (Dkt.#346-347). As personal representative, Kathleen had complete control over the Estate's claims. Her attempts to mischaracterize her handling of those claims and to blame Tom and Marilyn for her unilateral actions must be rejected, and the unequal and inequitable final distribution she obtained by using the Civil Action to her advantage must be reversed.

ARGUMENT

1. Kathleen violated her fiduciary duties.

[¶9] That a personal representative owes fiduciary duties in all estate-related actions is so elementary it should require no citation to authority. See N.D.C.C. § 30.1-18-03(1). Kathleen attempts to obscure the fact that her "interested person" petitions violated that black-letter law by ignoring their content and reframing the issue as whether a personal representative can petition the court "to consider her viewpoint on a given subject."

(Appellee's Brief, ¶¶13-14). Kathleen's "interested person" petitions did not merely request consideration of her viewpoint. They requested relief that furthered Kathleen's interests at Tom and Marilyn's expense in clear violation of Kathleen's fiduciary duty to protect Tom and Marilyn's best interests.

2. The Title Orders, Value Orders, and final distribution are reversible on multiple grounds.

[¶10] The Probate Court should not have decided the merits of claims pending before the Civil Court. Kathleen relies on N.D.C.C. § 30.1-02-02 and Estate of Binder, 366 N.W.2d 454 (N.D.1985) to argue her "interested person" petitions gave the Probate Court jurisdiction to determine the validity of the Legacy Trust. (Appellee's Brief, ¶¶21-22). Binder is inapposite because it is a pre-unification case where the issue was whether the relevant jurisdictional statutes gave the now non-existent county courts jurisdiction to determine the existence of a trust *when the claim and the parties were otherwise properly before the county court.* 366 N.W.2d at 456-58. Section 30.1-02-02 is inapposite because it vests subject matter jurisdiction in the "district court." Neither Binder nor N.D.C.C. § 30.1-02-02 authorized the Probate Court to assume jurisdiction over claims pending before the Civil Court.

[¶11] The only authority Kathleen cites supporting her argument that the Probate Court could "value" the Civil Action, "distribute" the Civil Action as an Estate asset, and order Tom and Marilyn substituted as plaintiffs is N.D.C.C. § 30.1-12-05. (Appellee's Brief, ¶¶28-33). That statute cannot be reasonably construed as allowing the Probate Court to take those extraordinary actions.

[¶12] Kathleen does not (and could not) cite record evidence showing the Probate Court's fact findings have evidentiary support. Instead, she argues Tom and Marilyn failed

to preserve the issue because they did not request an evidentiary hearing or raise the issue below. (Appellee's Brief, ¶¶25, 33). Kathleen cites no authority holding that a party must request an evidentiary hearing before challenging unsupported factual findings. (Id.). Further, many of the "facts" were presented for the first time in Kathleen's proposed Title and Value Orders. (App.423-451; Dkt.#271-272; 10/21/2016 Trans.). At that point, Tom and Marilyn should have been able to assume the court would not sign proposed orders with fact findings lacking evidentiary support. Further, after the Probate Court signed Kathleen's orders, Tom and Marilyn did argue the fact findings were erroneous. (2/26/2018 Trans.12:04-12:22).

[¶13] Kathleen acknowledges the final distribution is inextricably linked to the Title and Value Orders. (Appellee's Brief, ¶¶35-36). Because those orders are reversible for multiple reasons, the final distribution must also be reversed.

3. The Probate Court erred by granting Kathleen attorney fees and denying Tom and Marilyn attorney fees.

[¶14] Kathleen concedes attorney fees supporting her personal interests are not chargeable to the Estate but argues Tom and Marilyn offered no proof her attorney fees supported her personal interests. (Appellee's Brief, ¶¶43-44). The proof is in record which shows, as Tom and Marilyn argued, that Kathleen's attorney never diverged from Kathleen the "interested person" or attempted to protect Tom and Marilyn. (Appellant's Brief, ¶¶75-78). The orders awarding Kathleen attorney fees must be reversed because requiring Tom and Marilyn to pay for Kathleen's attorney's work to deprive them of their equal shares of the Estate is unconscionable.

[¶15] Kathleen again mispresents the record by claiming Tom and Marilyn failed to preserve the argument that awarding over $100,000.00 in attorney fees based on

Kathleen's submission of incomplete invoices and an exhibit she prepared was arbitrary. (Appellee's Brief, ¶42). Tom and Marilyn argued the information Kathleen submitted was insufficient when opposing the Vogel Fees Petition and her proposed final distribution. (App.550, ¶¶24-25; Dkt.#252, ¶10, 01/09/2017 Trans.10:03-10:18). The arbitrary award of attorney fees based on inadequate information is independent grounds for reversal.

[¶16] The Probate Court's errors in allowing Kathleen's unsupportable "interested person" petition process and signing proposed orders not even arguably correct on the facts or the law do not preclude Tom and Marilyn from recovering attorney fees. On remand, Tom and Marilyn should be awarded reasonable attorney fees for responding to Kathleen's frivolous "interested person" petitions and for attempting to correct Kathleen's efforts to circumvent Ann's testamentary intent by distributing herself far more than her one-third share of the Estate.

4. The Probate Court exhibited obvious prejudice against Tom and Marilyn.

[¶17] Kathleen argues Judge Rustad, who granted the exact relief she requested on every issue, should continue to preside because Tom and Marilyn "have not pointed to a single fact" showing Judge Rustad is prejudiced against them. (Appellee's Brief, ¶51). That is untrue, and again, the proof is in the record which is replete with examples of Judge Rustad disregarding the law, the rules of procedure, and Tom and Marilyn's uncontested rights to equal shares of the Estate. (E.g., Appellant's Brief, ¶88). The undisputed purpose of this proceeding is distributing Ann's estate equally between her three children. Judge Rustad's decision to sign off on a final distribution giving Tom and Marilyn as their primary asset the inflated "value" of the Civil Action with absolutely no consideration of the costs and risks associated with litigation proves prejudice because any reasonable

person would have to conclude that distribution gives Kathleen much more than it gives Tom and Marilyn. This case must be reassigned on remand.

CONCLUSION

[¶18] This Court should grant all relief requested in the Appellant's Brief.

Dated this 3rd day of December, 2018.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Dayna Fredrickson, being first duly sworn, deposes and states that she is over the age of eighteen years, and not a party to the above-entitled matter. That on the 3rd day of December, 2018, she filed and served the following document:

Appellants' Reply Brief

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:

Robert G. Manly
Vogel Law Firm
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Dayna Fredrickson
Dayna Fredrickson

Subscribed and sworn to before me this 3 day of December, 2018.

Linda M. Reis
Notary Public

LINDA M REIS
Notary Public
STATE OF NORTH DAKOTA
My Commission Expires
March 25, 2022