

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Supreme Court No. 20180325

Steven C. Hogen,
Petitioner and Appellee

Civil No. 09-07-P-100
(Cass County District Court)

20180325

vs.

Rodney Hogen,
Respondent and Appellant

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

and

Susan Hogen and Marby Hogen,
Purported Interested Persons and Appellants

DEC 26 2018

STATE OF NORTH DAKOTA

**REPLY BRIEF OF RESPONDENT-APPELLANT
AND INTERESTED PERSONS AND APPELLANTS**

APPEAL FROM (1) ORDER FOR SUPERVISED ADMINISTRATION;
(2) ORDER FOR DELIVERY OF POSSESSION AND CONTROL OF ESTATE
PROPERTY; (3) ORDER DENYING PETITION RESTRAINING PERSONAL
REPRESENTATIVE; (4) ORDER BIFURCATING ISSUES; (5) ORDER
ON PETITION FOR COMPLETE SETTLEMENT AND DISTRIBUTION OF THE
ESTATE; (6) ORDER GRANTING MOTION TO CONSOLIDATE HEARINGS;
AND (7) ORDER DISCHARGING PERSONAL REPRESENTATIVE AND
DENYING RODNEY HOGEN'S DECLARATION AND PETITION

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

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[¶1]

ISSUES ON APPEAL

[¶2] The stated Issues on Appeal should be addressed.

[¶3]

STATEMENT OF THE CASE

[¶4] Appellee Steven C. Hogen [“Steven”] does not express any dissatisfaction with the Appellants’ Statement of the Case. However, Rodney Hogen, Susan Hogen and Marby Hogen [“Rodney”, “Susan”; “Marby”, or collectively, “the Hogens”] express dissatisfaction with Steven’s Statement of the Case. The Hogens state Rodney’s former appeal, resulting in the decision of Estate of Hogen, 2015 ND 125, 863 N.W. 2d 876, cannot be classified as an “interlocutory appeal” as done by Steven at ¶5 of his brief. In ¶1 of Estate of Hogen, *supra.*, this Court stated, “Rodney Hogen appeals and Steven Hogen, as personal representative cross-appeals from an order approving a final accounting and settlement in the probate of the estate of Arline Hogen.” As determined by this Court, the prior appeal was from a “final accounting” [not an interlocutory accounting] and a “settlement” of Arline Hogen’s estate. As defined in N.D.C.C. § 30.1-01-06 (48), a “[s]ettlement”, in reference to a decedent’s estate, includes the full process of administration, distribution, and closing.” This Court’s determination that Rodney’s prior appeal was from an “order approving a final accounting and settlement” is the law of this case. The Hogens do not believe that the Supreme Court is so cavalier, when making any decision in a probate matter, that it would attach a different meaning to the word “settlement” than what is defined by statute.

[¶5] The probate litigation that trails the “Estate of Hogen” decision cannot be blamed upon “Rodney’s unyielding litigation strategy”, as Steven claims in ¶5 of his Brief. Steven’s statement is unsupported by any facts in the record. The record, post-remand, reveals

Rodney only requested affirmative relief twice from the probate court. In September, 2015, Rodney petitioned to restrain Steven. Rodney, relying upon unambiguous statutes, believed Steven's powers as personal representative had terminated, circa 2013-2014, when the probate court issued its order(s) approving the final accounting and settlement. App., pgs. 148-154. The second time Rodney requested affirmative relief was the Hogens' August, 2017, petition that the probate court recognize the Petitioners had voided the transactions so inconsistent orders [different than 50/50 distribution/laws of partition] be vacated. App., pgs. 348-383.

[¶6] All other litigation, post-remand, involved Rodney's objection(s) to matters initiated by Steven for unequal distribution of real property violative of Arline's controlling Will and the probate court's concluding orders of 2013-2014, now final. The billing statements of Steven's law firm document Steven's efforts to dishonor Arline's Will so that he can have a disparate distribution of land. Exhibit D to the Affidavit of Robert Hoy, Docket Entry # 723.

[¶7] **STATEMENT OF FACTS**

[¶8] While Steven voiced no objection to the Hogens' Statement of Facts, objection must be taken to Steven's failure to understand the difference between "facts" and "opinions". Steven is argumentative and opinionated, includes matters not of record below, and at times, inaccurate. For example, the probate court has never determined Rodney owed any monies to his mother at death, yet Steven asserts, at ¶7, his unproven determination that Rodney "failed to make certain cash rent and crop-share payments to Arline before her death". At ¶8, Steven mentions the probate court's pre-remand determination that Rodney owed

\$95,544.44 and interest for unpaid rent – all irrelevant to the appellate issues now presented. Steven only seeks to inflame the Court, and discredit Rodney, when inserting immaterial matters – Steven should have sought clarification, not obfuscation.

[¶9] Steven’s brief, at ¶9 through ¶14, contains material more appropriate for the “course of proceedings”, and not “facts.” Yet even then, Steven’s statements are misleading or argumentative in nature. At ¶10, Steven characterizes the lower court’s stated reasons for shifting all post-remand attorney fees to Rodney as a determination of “fact” – but Rodney was not afforded the benefit of a motion, or fact finding hearing before the lower court made its April 3, 2017, order shifting all post-remand attorney fees to Rodney. Such “findings” are more aptly classified as “conclusions” without evidentiary support in the record.

[¶10]

LAW AND ARGUMENT

[¶11]

Standard of Review

[¶12] No dispute exists.

[¶13] **POINT 1. The lower court failed to honor its jurisdictional limits when entering its Order on Petition for Complete Settlement and Distribution of Estate on April 3, 2017.**

[¶14] As ¶15 of his brief reveals, Steven does not accept this Court’s prior determination, made in ¶1 of Estate of Hogen, *supra.*, that Rodney appealed from a final accounting and settlement in the probate of the estate of Arline Hogen.” The Court’s prior decision stems from Steven’s 2010 and 2013 petitions made under the provisions of N.D.C.C. § 30.1-21-01. In both petitions, Steven stated his intent to invoke the closing procedure, within N.D.C.C. § 30.1-21-01, “to terminate administration of the estate, in lieu of the filing of a sworn

statement closing the estate under N.D.C.C. § 30.1-21-03.” App., pgs. 34, 69. The Hogens’ position that Steven’s administrative powers ended, circa 2013-2014, is also supported by the lower court’s 2010 pronouncement that when it determined Steven’s claimed right to retainer, “the Estate will be distributed accordingly and this case will be over.” Tr. of 7/22/2010, p. 63.

[¶15] Steven chooses to ignore Estate of Hogen, *supra.*, the probate court’s 2010 pronouncement, Steven’s words from his prior petitions with stated legal basis (N.D.C.C. § 30.1-21-01) – all lack any request for the sale of any lands or any request for the reservation of any administrative power over Rodney’s inherited lands. Although Steven acknowledges an understanding of N.D.C.C. § 30.1-21-01 is crucial to determine the probate court’s post-remand jurisdiction, Steven fails to address Estate of Cashmore, 2010 ND 159, 787 N.W.2d 261 and In re Estate of Cashmore, 2013 ND 150, 836 N.W.2d 435. Applying the law expressed in the Cashmore cases, Steven’s powers clearly terminated upon the lower court’s order approving the final accounting and settlement. To obtain a discharge, Steven does not need administrative power to perform the purely ministerial act of distributing the estate to the 50-50 distributees.

[¶16] **A. Finality of N.D.C.C. § 30.1-21-01 Order(s).**

[¶17] Steven offers neither meaningful statute, case law, nor reasoning that would in any way refute the Hogen’s positions on finality/termination of powers.

[¶18] **B. Misapplication of subsequent administration statutes.**

[¶19] Steven offers neither meaningful statute, case law, nor reasoning that would in any way refute the Hogen’s positions on finality/termination of powers.

[¶20] C. **Failure to honor non-claim statutes/statute of limitations.**

[¶21] Steven is silent.

[¶22] D. **Failure to honor N.D.C.C. § 30.1-20-11.**

[¶23] Steven is silent.

[¶24] E. **Failing to honor notice requirements of N.D.C.C. § 30.1-03-01.**

[¶25] At ¶18 of Steven's brief, Steven cites Appendix page 431 for support of his position that Susan and Marby are not interested parties, however, the judicial notice provision of the Barnes County judgment [Appendix page 431] proves Susan and Marby are interested persons:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Estate's power over the title to all the above described real property is superior to any title or interest of Marby Hogen or Susan Hogen, and a conveyance of the Estate's interest in the real property described above to a third party extinguishes any title to or interest in said real property by Marby Hogen or Susan Hogen.

The code's definition of an "interested person" includes persons having "a property right in or claim against a trust estate or the estate of the decedent". N.D.C.C. § 30.1-01-06(26). Ever since the date of Rodney's 2014 quit claim deed to them, Marby and Susan have either had a "property right" or "interest" in real property [not yet "extinguished"] or a "claim" that Steven was acting without due process afforded them, and with a substantial conflict of interest, allowing them to void his deeds that attempted to convey their property interests.

[¶26] F. **Failure to honor N.D.C.C. § 30.1-20-06.**

[¶27] Steven is silent.

[¶28] **G. Misapplication of N.D.C.C. § 30.1-20-03 and N.D.C.C. § 30.1-18-09.**

[¶29] After the probate court's 2013-2014 concluding orders, Steven offers no cogent reasoning how a probate court can create farm lease contracts imposing farming obligations upon Rodney for crop years 2014 and 2015 when Steven did not re-take possession until 2016. Steven offers no cogent reasoning why Rodney is not credited for his mortgage payments in crop years 2015 and 2016 when N.D.C.C. § 20.1-18-09 imposes the duty upon a personal representative to "take all steps reasonably necessary for the management, protection and preservation of the estate" – this includes paying mortgage payments on the lands possessed by Steven if necessary for the preservation of the estate. If necessary for administration, the estate gets "net proceeds", not "gross proceeds". Steven's argument [two (2) of the three (3) mortgages were solely for Rodney's benefit], is specious. Rodney did not get credit for the mortgage payment Steven had personally guaranteed for their common investment. See footnote 2, App., p. 244. Steven does not adequately explain why any court, in equity or law, should not give Rodney credit for all post-death mortgage payments when the post-death income belongs to both Steven and Rodney [or Rodney and Susan], as the owners of the land since Arline's death. Steven did not make any mortgage payments from the farm rents he has taken in Barnes County since 2010. The Estate is not impoverished by giving Rodney credit for his paid mortgage payments, but Steven is greatly enriched when no credit is given – especially on a mortgage he has guaranteed.

[¶30] **POINT 2. Shifting all post-remand attorney fees to Rodney should be reversed.**

[¶31] A. Court’s failure to follow Rule 11 procedures.

[¶32] At ¶21, Steven concedes the probate court cannot shift attorney fees to Rodney under N.D.R.Civ.P. 11.

[¶33] B. Inapplicability of N.D.C.C. § 28-26-01(2).

[¶34] At ¶21, Steven concedes the probate court cannot shift attorney fees to Rodney under N.D.C.C. § 28-26-01(2).

[¶35] C. A court’s inherent power will not justify the punishment imposed.

[¶36] Steven erroneously claims Estate of Kjorvestad, 375 N.W.32d 160 (ND 1985) – when *appellate legal fees* were shifted under N.D.R.App.P. 38 – will allow for the shifting of attorney fees to Rodney. In ¶10, Steven recognizes that Rodney’s lis pendens and deed to his daughter were factors motivating the lower court to shift attorney fees, but Steven is silent as to the violations of Rodney’s due process rights and the punishment imposed when Rodney exercised rights protected by two (2) Constitutions.

[¶37] D. Conflict of interest precludes payment of attorney fees.

[¶38] Steven does not explain why Rodney should bear the expense of upholding Arline’s Will [requiring 50/50 distribution] when Steven’s litigation promotes Steven’s desired selfish and disparate distribution. Steven’s “reality”, at ¶25, was not shared by the probate court ruling, affirmed on appeal. App., ps. 77; 144. The law of the case doctrine destroys Steven’s present argument.

[¶39] E. Untimely submission of attorney fees.

[¶40] The wording of N.D.R.Civ.P. 54 is sufficiently broad enough to cover the probate court’s order of April 3, 2017, which the probate court considered final as to the Hogens’

procedural rights.

[¶41] POINT 3. The “American Rule.”

[¶42] Steven does not explain why Rodney should bear any expense for Steven’s litigation that ignores Arline’s Will and promotes his own selfish interests.

[¶43] POINT 4. Application of the claimed “right to retainer”.

[¶44] There should be no 2014-2016 retainer, as discussed above.

[¶45] POINT 5. Misapplication of N.D.C.C. § 30.1-18-13.

[¶46] Steven’s brief is without cogent argument as to why the Hogens cannot rely upon N.D.C.C. § 30.1-18-13 to void all the post-remand transactions relating to their lands. Steven’s “reality”, at ¶ 25, is not shared by the courts.

[¶47] CONCLUSION

[¶48] Steven’s administrative powers ended by the lower court’s concluding orders of 2013-2013. All post-remand orders are void, or have been voided by the Hogens. This Court should restore the Hogens lands and property.

[¶49] Respectfully submitted this 21st day of December, 2018.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Steven C. Hogen, Personal Representative,
Petitioner and Appellee,
vs.

Affidavit Of Service By Mail

Supreme Court No. 20180325
Civil Probate No. 09-07-P-100
(Cass County District Court)

Rodney Hogen,
Respondent and Appellant,
Susan Hogen and Marby Hogen,
Interested Persons and Appellants,

and

John H. Triebold, Alan N. Triebold, and
Tulip Acres, LLLP,

Interested Persons and Appellees.

State of North Dakota
County of Cass

[¶1] Pat Doty, 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.

[¶2] On the 21st day of December, 2018, 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:
Reply Brief of Respondent-Appellant and Interested Persons and Appellants.

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

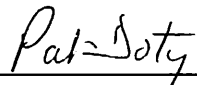
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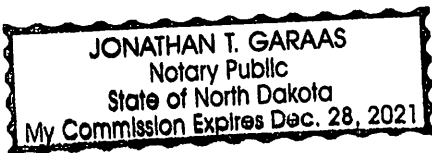
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[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Pat Doty

Subscribed and sworn to before me this 21st day of December, 2018.





Notary Public