

IN SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Janel Finch, deceased.

Christine Binstock,)	
)	
Personal Representative,)	
Petitioner, and Appellee,)	
)	Supreme Court No. 20210029
v.)	District Court No. 45-2019-PR-00030
)	
Mathew Finch,)	
)	
Respondent and Appellant.)	

Reply Brief of Appellant

Appeal from Order on Competing Petitions to Remove Co-Personal Representatives entered by the Southwest Judicial District Court, County of Stark, State of North Dakota, the Honorable Dann E. Greenwood presiding, on December 2nd, 2020.

REQUEST FOR ORAL ARGUMENT WITHDRAWN

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Argument

¶1 **Issue 1: Christine’s Statement of the Case and Statement of the Facts sections include statements that are misleading, not supported by the evidence, and not cited to the record and omit significant relevant facts.**

¶2 “Judges, whether trial or appellate, are not ferrets, obligated to engage in unassisted searches of the record for evidence to support a litigant’s position.” Earnest v. Garcia, 1999 ND 196, ¶10, 601 N.W.2d 260 (citation omitted).

¶3 In Appellee’s (“Christine”) *Brief of Petitioner and Appellee, Christine Binstock, Personal Representative of the Estate of Janel Finch, Deceased* (“Christine’s Brief”), Christine asserts “[a]dditionally, Janel and Christine did not realize they needed to get a new title for the 1975 Wicker Mobile Home at the North Dakota Department of Motor Vehicles.” Christine’s Brief, ¶12. The record is devoid of evidence of the same.

¶4 Christine argues Janel K. Finch (“Decedent”) continued to work until October of 2018. Christine’s Brief, ¶11. See also Id. at ¶18. The latter statement is misleading. Decedent missed a considerable amount of work in 2016 as a result of her diagnosis and treatment and the hours and tasks she was allowed to perform were restricted. App. 59.

¶5 Christine asserts “[Decedent] and Christine were *very close throughout* Christine’s life” and “[m]eanwhile, [Decedent] and Mathew had a *continuously* conflicted relationship.” Christine’s Brief, ¶4 (emphasis added). Christine failed to cite any evidence in support of her assertions. Furthermore, the assertions are contrary to the evidence. For example, Christine spent very little time with Decedent at the lake growing up. App. 86, 124. Conversely, Mathew and Decedent spent time at the lake working together and had a good relationship. App. 124. Christine herself admitted Mathew and Decedent were very close while Mathew was in high school. App. 85. Mathew also spent time with Decedent

at the lake subsequent to her diagnosis without conflict. App. 128.

[¶6] Christine alleges “[Mathew] refused to do anything productive with the Estate” and “...he refused to help Christine administer [Decedent]’s Estate.” Christine’s Brief, ¶¶6, 16. The latter is misleading and contrary to the evidence. Mathew attempted to sell the Ford Explorer. App. 135-36. Further, he signed the title to the same. App. 62, 66, 70. He located mineral interests, real property, and personal property for which Christine failed to account. App. 71-72, 136. Further, he was properly administering the Estate of Janel Finch (“Estate”) by attempting to consider all relevant facts and circumstances to determine Decedent’s intent. App. 74.

[¶7] Christine asserts Mathew only began to discover information regarding the alleged 2016 transactions “when he started badgering Janel, Christine, and Leon while Janel was on her death bed in early 2019.” Christine’s Brief, ¶13. The record is devoid of any evidence that Mathew badgered Decedent. Further, Christine’s assertion was refuted by Mathew, Christine herself, and Christine’s witness, Leon Vetter. App. 95-96, 107, 131, 133. Christine also alleges Mathew was belligerent. The record is devoid of evidence of the same. While Mathew may have been briefly upset, there is no evidence of belligerence.

[¶8] Christine alleges “...the estate planning actions Janel took in June of 2016 were not surprising to anyone who knew about Janel and Mathew’s troubled relationship.” Christine’s Brief, ¶14. Christine failed to cite any evidence in support of her assertion. Further, the record is devoid of such evidence.

[¶9] Christine asserts “[t]he three main things that remained centered around opening an estate bank account to pay final expenses, transferring her non-producing mineral interests, and selling Janel’s vehicle.” Christine’s Brief, ¶15. The latter is contrary to the record. The

three remaining issues asserted by Christine before the District Court were: 1) transferring the title of the 1975 Wicker mobile home; 2) transferring mineral interests identified by Christine; and 3) opening a checking account. App. 25-26; 30-31.

[¶10] Christine asserts Mathew spent eighteen (18) months investigating the 2016 transactions. Christine’s Brief, ¶¶6, 24, 32, 34. Christine failed to cite any evidence in support of her assertion. Further, the latter assertion is not supported by the evidence. Mathew began requesting records after he retained his own attorney. App. 64; Tr. 35. Mathew’s counsel first appeared in this matter on September 9th, 2019. App. 4, 22. Christine’s Petition was filed on September 2nd, 2020, i.e. less than a year after Mathew retained his own attorney and began requesting records. App. 4. The latter is also contrary to Christine’s own statements and assertions. See Christine’s Brief, ¶32 (stating “Mathew’s year long investigation...”); App. 101-02 (“After a year of Mathew investigating...”). See also Christine’s Brief, ¶18.

[¶11] Christine omitted several significant relevant facts, including she failed to account for all mineral interests, she failed to account for real property, and she failed to account for all personal property. App. 71-72, 136. Further, she failed to inform the Court: a) Mathew sought to depose Christine and requested information necessary to properly administer the Estate, information to which he was entitled; and b) she did not respond in any regard, and rather, promptly sought to remove Mathew as Co-Personal Representative. App. 64-66, 66-67, 71-72, 136.

[¶12] Lastly, Christine argues Decedent could not have lacked capacity because she continued to work as a nurse and undue influence is not possible because Christine did not know about the Quit Claim Deed or Bill of Sale until after Decedent allegedly executed

the same. Christine’s Brief, ¶18. In regard to the former, continuing to work is not dispositive of the issue of lack of capacity, especially considering the facts and circumstances surrounding the 2016 transactions, Decedent missed a considerable amount of work, restrictions were placed on her work activities, *inter alia*. See Brief of Appellant (“Mathew’s Brief”), ¶36; App. 59. In regard to the latter, lack of knowledge of the alleged transfers, the specific legal instruments used to allegedly cause the alleged transfers, or the like is not dispositive of the issue of undue influence. Further, undue influence is presumed given the allegations made by Christine regarding her close relationship with Decedent as previously argued by Mathew. App. 116; Mathew’s Brief, ¶65.

[¶13] Christine argues “[she] allowed Mathew to do whatever sort of investigation he thought was necessary.” Christine’s Brief, ¶18. The latter statement is not supported by the evidence. As previously stated, Mathew sought to depose Christine and requested information to which he was entitled as Co-Personal Representative from Christine. App. 64-66, 136-37. Christine did not respond in any regard, and rather, promptly sought to remove him as Co-Personal Representative. App. 65-66, 137; Tr. 35. The information requested was never provided and Mathew was not allowed to complete the inquiry.

[¶14] Christine argues “...it soon became clear that Mathew would most likely never cooperate, no matter how much time he was given. So, Christine decided the only route to take was to seek to have Mathew removed as Co-Personal Representative.” Christine’s Brief, ¶18. The issue is not Mathew refusing to cooperate, and rather, Christine refusing to cooperate by not providing to Mathew the information he requested which was necessary to properly administer the Estate. App. 64-66, 136-37; Tr. 35.

[¶15] Issue 2: The District Court erred in granting Christine’s Petition to Remove Mathew as Co-Personal Representative.

¶16] A personal representative may be removed for cause at any time. N.D.C.C. §30.1-17-11(1). Further, “[c]ause for removal exists when removal would be in the best interests of the estate, or if it is shown...that the personal representative has...mismanaged the estate or failed to perform any duty pertaining to the office.” N.D.C.C. §30.1-17-11(2). Further, “[a] personal representative is a fiduciary who shall observe the standards of care applicable to trustees.” N.D.C.C. §30.1-18-03(1).

¶17] Christine argues she performed her duties, Mathew failed to perform his duties, and there is no meritorious evidence of undue influence or lack of capacity. Christine’s Brief, ¶24. She also asserts an inquiry into the issues of undue influence and lack of capacity is a “fishing expedition” and a “last-ditch effort” by Mathew to benefit himself. *Id.* First, Christine failed to perform her duties by failing to account for all of the mineral interests, to account for real property, to account for all personal property, and to provide to Mathew the Estate information he requested to which he was entitled. App. 64-66, 66-67, 71-72, 136; Tr. 35. Second, an inquiry into the issues of undue influence and lack of capacity are warranted given the facts and circumstances. *See e.g.* Mathew’s Brief, ¶36. Mathew performed his duties by inquiring in regard to the same. Third, in regard to Christine’s assertion regarding meritorious evidence, Mathew is not arguing Decedent lacked mental capacity and undue influence, and rather, is arguing the facts and circumstances warrant an inquiry in regard to the same. Fourth, requiring Mathew to provide evidence is premature. Christine is essentially arguing a co-personal representative is required to prove undue influence and lack of capacity in order to warrant an inquiry into the same. Lastly, Christine has not cited any evidence to support her conclusory “fishing expedition” and “last-ditch effort” arguments, including evidence demonstrating personal knowledge of Mathew’s

intent, motivation, legal acts, or the like.

[¶18] Christine argues Mathew made admissions which alone are sufficient to remove him as Co-Personal Representative pursuant to N.D.C.C. §30.1-17-11(2). Christine Brief, ¶¶24, 27. N.D.C.C. §30.1-17-11(2) does not require a personal representative to open a new separate checking account for an estate, to execute a deed that fails to include all mineral interests, or to pay expenses without any information or verification regarding the same and without sufficient information regarding the assets of the estate. The statement regarding the payment of expenses is misleading. Mathew did not outright refuse to pay expenses as implied and was not opposed to paying expenses if there are sufficient assets to pay expenses and the expenses are legally valid. App. 66-67, 69; Tr. 35-36.

[¶19] In regard to the Estate account, Christine asserts Mathew's arguments are irrational and contrary to North Dakota law citing N.D.C.C. §30.1-18-17. Christine's Brief, ¶27. First, Christine failed to cite any evidence demonstrating Mathew was advised the concurrence of both Co-Personal Representatives was required for the Estate to act. Further, Mathew did not understand why a new separate bank account was required to be opened as it was never fully explained to him. App. 64, 66. Further, it was never explained to Mathew that two signatures would be required as argued by Christine. App. 139. Second, it is common for estate checking accounts to only require one co-personal representative to sign, especially when the co-personal representatives live in different states. Id. Third, concurrence may not occur in practice, especially when there is conflict between co-personal representatives as is the case in this matter. Fourth, a co-personal representative may act without concurrence in several situations. See N.D.C.C. §30.1-18-17. Lastly, Christine wholly disregards the basis for Mathew declining to execute the P.R. Deed, i.e.

the P.R. Deed was deficient, which is appropriate and reasonable. See e.g. App. 28, 136. Christine is essentially arguing personal representatives are required to execute documents even if deficient.

[¶20] Christine cites Jarmin in support of her argument. Jarmin v. Shriners Hospitals for Crippled Children, 450 N.W.2d 750 (N.D. 1990); Christine's Brief, ¶26. First, Mathew is not asserting claims of undue influence or lack of capacity, and rather, he is asserting the facts and circumstances warrant an inquiry in regard to the same. Second, the latter is necessary to determine the intent of Decedent which benefits the Estate. Third, the inquiry is not endless as argued. Mathew explained, through counsel, he has been diligently pursuing information, there is a plan in place, and there is an end. Tr. 35. See also App. 64-65, 136-37. Further, Christine failed to cite any evidence in support of her assertion. Fourth, Christine failed to cite any evidence of significant expense to the Estate. Moreover, the latter was not argued before the District Court. A party may not make an argument for the first time on appeal. See e.g. Paulson v. Paulson, 2011 ND 159, ¶9, 801 N.W.2d 746. Lastly, Jarmin does not support Christine's argument as Mathew's actions were appropriate and reasonable and benefit the Estate. Rather, Jarmin supports Mathew's argument. See supra; Mathew's Brief, ¶64.

[¶21] Issue 3: The District Court erred in denying Mathew's Counter-Petition to Remove Christine as Co-Personal Representative.

[¶22] Arguments that are not adequately articulated, supported, and briefed will not be considered. See e.g. Holden v. Holden, 2007 ND 29, ¶7, 728 N.W.2d 312 (quotation and citations omitted). Christine does not deny she failed to account for all of the mineral interests, failed to account for real property, failed to account for all personal property, and failed to provide the information regarding the Estate requested by Mathew to which he

was entitled as Co-Personal Representative. Further, Christine did not address the argument proffered by Mathew regarding the same in Christine's Brief in any regard. Therefore, any opposition to Mathew's argument should not be considered.

[¶23] Issue 4: The District Court erred in denying Mathew's request for attorney's fees.

[¶24] A personal representative is entitled to attorney's fees and costs if the personal representative's actions were: a) in good faith; b) free from fraudulent intent; and c) for the benefit of the estate. Matter of Estate of Peterson, 1997 ND 48, ¶¶25-26, 561 N.W.2d 618 (citations omitted); N.D.C.C. §30.1-18-20.

[¶25] Christine argues Mathew's actions were not pursued in good faith, were maliciously motivated to harm her, were an attempt to "run up charges against the Estate," and have resulted in significant cost to the Estate. Christine's Brief, ¶¶21, 29, 33, 34. Christine fails to cite any evidence in support of her assertions, including evidence demonstrating knowledge of Mathew's intent, motivation, or the like. In regard to cost, she admits the cost of the inquiry is unknown. See Id. at ¶32. In any event, the issue of cost was not argued before the District Court, and therefore, may not be considered on appeal. See supra. Lastly, taking offense to Mathew refusing to concede to demands and ultimatums, performing his duties as Co-Personal Representative, and stating the truth does not render the same malicious.

[¶26] Christine asserts "Mathew's year long investigation has resulted in no meritorious evidence to support his allegations," Mathew has not asserted an undue influence or lack of capacity claim, and such claims "would be most appropriately brought outside of the Estate..." Christine's Brief, ¶32. In regard to the first two assertions, see supra. In regard to the third assertion, she failed to cite any authority in support of the same. Further, case

law indicates otherwise. See e.g. Nelson v. Nelson, 2018 ND 212, ¶5, 917 N.W.2d 479 (stating, in relevant part, “[w]e question whether the validity of the deed and the grantor’s capacity can be effectively challenged outside of a probate proceeding…”).

[¶27] Christine argues an inquiry into lack of capacity and undue influence is self-serving, for Mathew’s sole benefit, is not a proper administration of the Estate, and does not benefit the Estate. Christine’s Brief, ¶¶28, 29, 31, 33, 34. The same argument applies to Christine’s actions. The difference is Christine’s argument relies upon suspect facts and circumstances. Lastly, an inquiry is a proper administration of and benefit to the Estate. See supra.

[¶28] Christine cites Honerud in support of her argument. Matter of Honerud’s Estate, 326 N.W.2d 95 (N.D. 1982); Christine’s Brief, ¶30. First, Christine is engaging in the very conduct in which she alleges Mathew engaged. Therefore, by her own admission, she is not entitled to the payment of her attorney’s fees by the Estate. Second, Mathew is acting in good faith, his conduct is free from fraud, and his actions are in the best interest of and benefit the Estate. See supra. Christine has failed to demonstrate otherwise. Lastly, Honerud is not applicable as the validity of the will is not contested in this case. Further, Mathew did not exercise undue influence over Decedent in regard to her will or otherwise.

Conclusion

[¶29] It is respectfully requested the Court grant the relief requested in Mathew’s Brief. See Mathew’s Brief, ¶73.

[¶30] DATED: July 9th, 2021.

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Certificate of Compliance

[¶31] I hereby certify the *Reply Brief of Appellant* complies with the page limitation. The *Reply Brief of Appellant* is twelve (12) pages in length excluding the Certificate of Compliance.

[¶32] DATED: July 9th, 2021.

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Mathew Finch,)	
)	
Respondent and Appellant.)	

Certificate of Service

[¶1] I, **Brian C. Balstad**, an attorney licensed to practice law in the State of North Dakota, hereby certify a true and correct copy of the following document:

- 1. Reply Brief of Appellant (12 pages excluding Certificate of Compliance)**

was duly served upon:

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via the North Dakota Supreme Court Odyssey Serve and File System using the email address published in the online attorney directory on the North Dakota Supreme Court website for Jordan L. Selinger, namely jordanselinger@ndsupernet.com, on the 9th day of July, 2021.

[¶2] DATED: July 9th, 2021.

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