

IN SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20210029
District Court No. 45-2019-PR-00030

In the Matter of)	
the Estate of Janel Finch,)	<u>Brief of Appellant</u> and Addendum
deceased.)	

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.

ORAL ARGUMENT REQUESTED

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Statement of Issues Presented for Review

[¶1] Issue 1: Whether the District Court erred in granting Christine’s Petition to Remove Mathew as Co-Personal Representative.

[¶2] Issue 2: Whether the District Court erred in denying Mathew’s Counter-Petition to Remove Christine as Co-Personal Representative.

[¶3] Issue 3: Whether the District Court erred in denying Mathew’s request for attorney’s fees.

Oral Argument Statement

[¶4] Oral argument would be helpful to the Court as it would allow Mathew to explain and answer any questions regarding arguments that were made, however, not addressed in the Order on Competing Petitions to Remove Co-Personal Representative (“Order”) entered by the District Court. Further, this proceeding is more complicated than other personal representative removal cases as it involves the consideration of two of the three primary legal issues in this matter, namely lack of capacity and undue influence. The third primary legal issue is the legal validity of the Bill of Sale.

Statement of the Case

[¶5] The matter before the Court is an appeal of an order of the Southwest Judicial District Court, County of Stark (“District Court”), in an informal probate proceeding. App. 163. Specifically, it is an appeal of the Order entered by the District Court. Id.

[¶6] The case commenced with the filing of an Application for Informal Probate of Will and Appointment of Co-Personal Representatives on April 3rd, 2019 requesting Mathew Finch (“Mathew”) and Christine Binstock (“Christine”) be appointed as co-personal representatives (“Co-Personal Representative(s)”) of the Estate of Janel Finch. App. 6-8. A Statement of Informal Probate of Will and Appointment of Personal Representative and Letters Testamentary were entered by the District Court the same day. App. 16-17, 18-19.

The Last Will and Testament of the Decedent, Janel K. Finch (“Decedent”), appointed Catherine Newby to serve as personal representative and Leon Vetter to serve as the alternate personal representative. App. 14. However, Ms. Newby is deceased and Mr. Vetter waived his right to serve as personal representative. App. 6, 9.

[¶7] On September 2nd, 2020, Christine served and filed a Petition to Remove Co-Personal Representative (“Christine’s Petition”), an Affidavit of Christine Binstock, Exhibit A (Bill of Sale), Exhibit B (Quit Claim Deed), and Exhibit C (unsigned Personal Representative’s Inventory and Appraisalment). App. 23-38.

[¶8] On September 4th, 2020, Mathew served and filed an Initial Response and Initial Objection to Petition to Remove Co-Personal Representative. App. 39-42. Thereafter, he served and filed a Full Response and Objection to Christine Binstock’s Petition to Remove Co-Personal Representative and Mathew Finch’s Counter-Petition to Remove Co-Personal Representative (“Mathew’s Petition”) and an Affidavit of Mathew Finch in Response to Affidavit of Christine Binstock and in Support of Petition to Remove Co-Personal Representative. App. 43-76.

[¶9] On November 3rd, 2020, Christine served and filed a Reply Brief for Christine Binstock’s Petition to Remove Co-Personal Representative and Response Brief for Mathew Finch’s Petition to Remove Co-Personal Representative, a Second Affidavit of Christine Binstock, and an Affidavit of Leon Vetter. App. 77-108.

[¶10] On November 9th, 2020, Mathew served and filed a Brief in Reply to Christine Binstock’s Response Brief for Mathew Finch’s Petition to Remove Co-Personal Representative, an Affidavit of Mathew Finch in Reply to Second Affidavit of Christine Binstock, Exhibit A (Warranty Deed – Joint Tenancy), Exhibit B (Warranty Deed), Exhibit

C (Quit Claim Deed – Joint Tenancy), and Exhibit D (Quit Claim Deed). App. 109-48.

[¶11] A hearing was held on Christine’s Petition and Mathew’s Petition on November 13th, 2020. App. 150. Christine and her attorney appeared in person. Tr. 2. Mathew and his attorney appeared remotely via Zoom. Tr. 2. Mr. Leon Vetter also appeared remotely via Zoom. Tr. 2. Given the extensive testimony provided via affidavit, the parties agreed the hearing would only consist of oral argument. Tr. 3; App. 150.

[¶12] On December 2nd, 2020, the District Court entered an Order denying Mathew’s Petition, granting Christine’s Petition, and denying Mathew’s request for attorney’s fees. App. 149-58. Amended Letters Testamentary were entered by the District Court thereafter on December 7th, 2020. App. 159.

[¶13] On December 18th, 2020, Christine served and filed a Notice of Entry of Order. App. 160-62.

[¶14] On February 1st, 2021, Mathew served and filed a Notice of Appeal. App. 163-66.

Statement of the Facts

[¶15] Mathew and Christine are the children of the Decedent. App. 58. The Decedent has no other children. Id.

[¶16] On or about October 30th, 2001, the Decedent executed a Last Will and Testament. App. 10-15. The Last Will and Testament distributed all of the Decedent’s property equally between Mathew and Christine, i.e. Christine would receive 50% and Mathew would receive 50%. Id.; App. 72. Further, the Decedent had named beneficiaries for her investment accounts, life insurance, retirement, and annuities. App. 72. The beneficiary designations stated the Decedent’s investment accounts, life insurance, retirement, and annuities were to be distributed equally between Mathew and Christine, i.e. Christine would receive 50% and Mathew would receive 50%. Id. The Decedent had also named

Christine on her checking and savings accounts so the funds could be accessed if something was to happen to the Decedent. Id. In short, the Decedent had created and implemented a complete estate plan. Id.

[¶17] In January of 2016, the Decedent was diagnosed with extensive stage lung cancer and brain and bone metastases, i.e. metastatic brain cancer and metastatic bone cancer, and was only given six (6) months to live. App. 58, 59. Thereafter, the Decedent underwent significant treatment, including chemotherapy, radiation, prescription medication, and medical marijuana, for her cancer. App. 58. The type of treatment which the Decedent underwent can cause a broad range of neurologic symptoms including cognitive problems with attention, memory, and processing. App. 72. Mathew stated the Decedent experienced cognitive issues. App. 72. Christine stated “[o]f course, there were times where [the Decedent] had brain fog from the radiation and chemo, but these were short lived” and “[i]t was true at times she felt unsafe driving so she made the decision to step back from driving until she felt more comfortable.” App. 90. While undergoing treatment, the Decedent was attempting to stop smoking after smoking for more than forty years which caused anxiety and withdrawal. App. 59, 127. She was also experiencing stress from her prognosis. App. 59, 73. Further, the Decedent had significant alcohol abuse issues. App. 125, 138.

[¶18] On May 8th, 2016, the Decedent allegedly changed the beneficiary designations of her investment accounts and an annuity so Christine would receive 70% and Mathew would receive 30%. App. 73.

[¶19] On June 2nd, 2016, the Decedent allegedly executed a Quit Claim Deed prepared by an attorney at Kubik, Bogner, Ridl & Selinger, P.L.L.P. allegedly transferring the Decedent’s personal residence to Christine and reserving a life estate. App. 34-35, 73. Also

on June 2nd, 2016, the Decedent allegedly executed a Bill of Sale prepared by an attorney at Kubik, Bogner, Ridl & Selinger, P.L.L.P. allegedly transferring a 1975 Wicker mobile home, a 2008 Chevrolet K1500 Silverado Pickup, and a 19.2 foot 2000 Crestliner to Christine. App. 32, 73. The Decedent did not transfer the titles of any of the personal property listed in the purported Bill of Sale to Christine. App. 73-74. Subsequent to the alleged transfer, the Decedent continued to use and possess the 1975 Wicker mobile home and 19.2 foot 2000 Crestliner until her death. App. 73. The Decedent also continued to use and possess the 2008 Chevrolet K1500 Silverado Pickup until she traded it in for a Ford Explorer. Id. The Decedent used and possessed the Ford Explorer until her death. Id. The Decedent did not transfer the title of the Ford Explorer to Christine or execute any other document transferring ownership of the same to Christine. App. 62. When discussing the 19.2 foot 2000 Crestliner, Christine regarded it as “my mom’s boat.” App. 92.

[¶20] In regard to the Bill of Sale, Christine stated “I did not know that she was planning on doing this prior to her actually signing the Bill of Sale” and “I only found out about the gifts after she had signed the Bill of Sale and told me about them.” App. 28-29. In regard to the Decedent’s personal residence, Christine stated “I had no knowledge that she was doing this until after she had signed the deed and told me I needed to sign as Grantee on the deed.” App. 28-29. Further, she stated she “did not know the full details,” “...I did not realize the full extent to which my mom had taken and which manner she decided to give me her assets,” and “I briefly remember when my mom told me about (sic) that she decided to give me certain assets which that was the only time we ever talked about her decisions.” App. 95.

[¶21] Christine stated she did not unduly influence the Decedent in regard to the 2016

transactions because she was not aware of the transactions until she signed the documents. App. 30. She generally denied the Decedent was “incapacitated,” “cognitively impaired,” or “unable to make decisions concerning her life” and asserted the Decedent managed her bills and daily activities. App. 89, 90, 92, 95. Christine also generally stated “[d]espite the diagnosis, she still clearly knew exactly what she was doing and did what she wanted, not what anyone else wanted her to do.” App. 101.

[¶22] Christine stated she spent a considerable amount of time with the Decedent subsequent to her cancer diagnosis, provided care for the Decedent, assisted the Decedent in regard to financial matters, and was appointed and acted as the Decedent’s medical agent/health care agent. App. 63, 88, 94, 105, 106. Christine also stated the Decedent and Mathew had a poor relationship and Mathew is upset with the 2016 transactions. App. 30, 102.

[¶23] Mr. Leon Vetter was a family friend and financial advisor. App. 104, 105, 107-08. He waived the right to serve as personal representative due to a conflict of interest. App. 29. However, he subsequently filed an affidavit through and in support of Christine. App. 104-08. In his affidavit, he stated he “pushed back” against the 2016 transactions. App. 106. He also disclosed information regarding Mathew’s financial investments without permission from Mathew which Mathew deems a breach of confidentiality. App. 107-08.

[¶24] In regard to the 2016 transactions, Mr. Vetter alleged the Decedent decided to update her estate plan in 2016 “...to pay Christine back for all the expenses she helped pay such as the annual fees, utilities and any other miscellaneous cost of living expenses they incurred together,” Christine became Janel’s primary caretaker when Christine returned from college in 2011, Christine cared for Janel on the onset of her diagnosis, and the

relationship between Mathew and the Decedent had deteriorated. App. 88, 106. Christine stated the reason she resided with the Decedent after returning from college was not to provide primary care, and rather, Christine "...decided to move back home with [her] mom since the oil boom was happening making housing very expensive." App. 88. Mathew also participated in Janel's care. App. 59, 128, 130. Further, while there were bad times in Mathew's relationship with the Decedent, there were also good times and Mathew and the Decedent loved one another. App. 124, 125, 138. Mr. Vetter also alleged "[h]er rational (sic) behind the House, Lake Cabin, Pick up and Boat was largely due to the fact that Christine had helped her maintain and pay for the expense of the property, in addition to the enormous amount of time Christine spent helping Janel." App. 106. Christine used the Decedent's home, the lake cabin, and boat. App. 88, 99. Further, Mathew contributed a significant amount of time repairing, improving, and maintaining the Decedent's assets while he was growing up. App. 63, 85-86, 124, 126. In regard to the Decedent's mental capacity, Mr. Vetter generally alleged her ability to understand her personal finances was never impaired and she always had a sound mind. App. 105.

[¶25] In July of 2018, a benefit was held for the Decedent. App. 129. Mathew spent a week with the Decedent during this time. App. 128. During a conversation, Mathew and the Decedent discussed what she would like to happen after she passes away. App. 133. The Decedent stated the lake cabin was split "50/50 along with everything else." App. 74, 132-33. On January 17th, 2019, the Decedent passed away. App. 6.

[¶26] The above-captioned matter commenced on April 3rd, 2019. App. 6-8. Mr. Jordan Selinger of Kubik, Bogner, Ridl & Selinger, P.L.L.P. represented both Mathew and Christine in this matter. App. 6, 9. The Decedent was represented by Kubik, Bogner, Ridl

& Selinger, P.L.L.P. in regard to the 2016 transactions. App. 32, 34-35, 73. When Mathew asked questions and raised concerns about the alleged transactions in 2016, Mathew was informed by Christine and counsel that if he did not sign the documents, i.e. a Personal Representative's Mineral Deed of Distribution, Assignment of Warranty of Title regarding a 1975 Wicker mobile home, and paperwork to establish a checking account for the Estate, he would be removed as a Co-Personal Representative. App. 61-62, 64, 68. Christine eventually blocked Mathew's telephone number and stopped communicating with him entirely. App. 100, 135. After asking questions and expressing concerns several times, Mathew was informed by counsel that if he did not like it, he should hire a different attorney. App. 62. The latter was the first instance in which Mathew was advised he could hire his own attorney which he did shortly thereafter. App. 62. Mr. Jordan Selinger of Kubik, Bogner, Ridl & Selinger, P.L.L.P. continued and continues to represent Christine in this matter. Tr. 2; App. 4, 23, 77.

[¶27] On September 9th, 2019, a Notice of Appearance; Alternatively, Notice of Termination and Substitution was served and filed by Mathew notifying Christine and the District Court that Mathew retained his own attorney to represent him as Co-Personal Representative. App. 39-42. Thereafter, Mathew began requesting and reviewing records from financial institutions and health care facilities. Tr. 35; App. 64. At the time of the hearing, Mathew was still waiting for records from two institutions. Id. It was anticipated the delay in receiving the records was due to the COVID-19 pandemic. Id.

[¶28] On August 11th, 2020, Mathew sent a letter to Christine, through counsel, stating, in relevant part:

Based upon the information acquired as of the present date, *inter alia*, further investigation into the alleged transfers of real and personal property in 2016 is

warranted. Therefore, it will be necessary to depose Ms. Binstock. Proposed dates and times for the deposition of Ms. Binstock will be provided within the next two weeks. At this point, only Ms. Binstock will be deposed. However, additional depositions may be necessary.

Unless and until all issues have been resolved, my client respectfully declines to execute any documents to transfer title of any real or personal property. Further, in regard to removing Mr. Finch as Co-Personal Representative, Mr. Finch respectfully objects to and opposes the same.

The letter continued, in relevant part:

In order to save time and expense, the undersigned respectfully submits the following informal request for information. It is respectfully requested the following information be provided to the undersigned at your earliest convenience, and in any event, at or before 5:00 o'clock p.m. on Friday, August 21st, 2020:

1. A list of all probate and nonprobate assets at the time of death of Ms. Finch, including a detailed description of each asset and the fair market value of each asset at the time of death and a copy of any and all records regarding the same;
2. A full and complete accounting of all Estate financial transactions and a copy of any and all records regarding the same;
3. A detailed description of all probate property transactions and a copy of any and all records regarding the same;
4. A detailed description of all costs and expenses of administration, funeral and burial expenses, debts and taxes with preference under federal law, medical and hospital expenses of the last illness of Ms. Finch, debts and taxes with preference under other laws, and all other creditor claims and a copy of any and all records regarding the same;
5. A proposed distribution of all probate assets; and
6. In regard to each person at Kubik, Bogner, Ridl & Selinger, P.L.L.P. who was involved, in any manner, in regard to the Quit Claim Deed purportedly executed by Ms. Finch, the Bill of Sale purportedly executed by Ms. Finch, estate planning by Ms. Finch, gifts from Ms. Finch, property transfers by Ms. Finch, or the like at any time, please provide:
 - a. The full name of the person;
 - b. The title/position of the person; and
 - c. The date and a detailed description of the person's involvement.

App. 40-41, 64-65, 136-37. Christine did not respond in any regard. App. 65-66, 137.

Instead, on September 2nd, 2020, she served and filed Christine's Petition and accompanying documents seeking to remove Mathew as a Co-Personal Representative because he declined to sign paperwork to establish a checking account for the Estate, he declined to sign a Personal Representative's Mineral Deed of Distribution, and declined to sign an Assignment and Warranty of Title to transfer the title of the 1975 Wicker mobile home to Christine. App. 23-27, 30-31, 41, 65-66, 137.

[¶29] On numerous occasions, Mathew told both Christine and counsel that he was not going to sign anything until he had an opportunity to look into everything. App. 64. Further, he declined not to sign the documents for the reasons set forth herein below. Christine also served and filed an Exhibit C which was an unsigned Personal Representative's Inventory and Appraisal. App. 36-38. The latter was the first time Mathew received an inventory listing the assets of the Estate. App. 66. Further, Mathew was not provided any information or documentation regarding the expenses, debts, or financial transactions of the Estate when requested by Mathew, through counsel. App. 66-67, 135.

[¶30] On October 7th, 2021, Mathew served and filed Mathew's Petition requesting Christine be removed as Co-Person Representative as she failed to make a good faith effort to investigate and fully consider the issues of testamentary intent, mental capacity, undue influence, and legal validity of the Bill of Sale. App. 43-57. Further, Mathew alleged Christine controlled all transactions of the Estate and made all of the decisions for the Estate without providing Mathew any meaningful opportunity to participate, Christine has a conflict of interest, Christine failed to account for all property of the Estate, *inter alia*. Id. Mathew also requested an award of attorney's fees. Id.

[¶31] As previously stated, a hearing was held on November 13th, 2020. App. 150.

Thereafter, on December 2nd, 2020, the District Court entered its Order denying Mathew’s Petition, granting Christine’s Petition, and denying Mathew’s request for attorney’s fees. App. 149-58. Amended Letters Testamentary were entered by the District Court thereafter on December 7th, 2020. App. 159. This appeal followed.

Standard of Review

[¶32] A decision whether to remove a personal representative for cause will not be reversed on appeal absent an abuse of discretion. In re Estate of Bartelson, 2013 ND 129, ¶15, 833 N.W.2d 522 (citation omitted) (“Bartelson II”). Likewise, a decision regarding attorney’s fees will not be reversed absent an abuse of discretion. Matter of Estate of Peterson, 1997 ND 48, ¶24, 561 N.W.2d 618. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. Bartleson II, at ¶15 (citation and quotation omitted). The standard of review regarding findings of fact is set forth in Brandt:

We review factual findings in a probate proceeding under the clearly erroneous standard of review in N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all of the evidence, we are left with a definite and firm conviction a mistake has been made. Under N.D.R.Civ.P. 52(a)(1), in an action tried on the facts without a jury, the court must find the facts specially and state its conclusions of law separately. A district court must make findings of fact and conclusions of law that are sufficient to enable an appellate court to understand the factual determinations made by the district court and the basis for its conclusions of law.

Matter of Estate of Brandt, 2019 ND 87, ¶18, 924 N.W.2d 762 (citations omitted).

Argument

[¶33] At the outset, it is imperative to note that while the District Court considered two of the three primary issues in this matter, namely lack of capacity and undue influence, it did not render a final decision on the merits in regard to the same. Christine acknowledged

the issues of lack of capacity and undue influence were not before the District Court. See e.g. App. 78.

[¶34] Issue 1: The District Court erred in granting Christine’s Petition to Remove Mathew as Co-Personal Representative.

[¶35] 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). The following, individually and collectively, demonstrates the removal of Mathew as Co-Personal Representative is not warranted.

[¶36] First, it is imperative to note Mathew is not arguing the Decedent lacked mental capacity or was subjected to undue influence. Rather, Mathew is arguing there are facts and circumstances surrounding the 2016 transactions that warrant a full good faith inquiry into the same by the Estate. The facts and circumstances include the following:

1. At the time of the alleged 2016 transactions, the Decedent was suffering from lung cancer, brain cancer, and bone cancer.
2. At the time of the alleged 2016 transactions, the Decedent was undergoing treatment that can cause a broad range of neurologic symptoms including cognitive problems with attention, memory, and processing. Further, the Decedent in fact experienced cognitive issues while battling lung cancer, brain cancer, and bone cancer and undergoing treatment for the same. Christine acknowledged the Decedent experienced cognitive issues.

3. The Decedent experienced stress from her prognosis.
4. The Decedent experienced anxiety and withdrawals from quitting smoking.
5. The Decedent abused alcohol.
6. The Decedent did not transfer the title of any of the personal property listed in the purported Bill of Sale, i.e. the 1975 Wicker mobile home, the 2008 Chevrolet K1500 Silverado Pickup, or the 19.2 foot 2000 Crestliner, to Christine. Rather, the Decedent continued to use and possess the same. Christine herself referred to the 19.2 foot 2000 Crestliner as “my mom’s boat.” Further, after continuing to use and own the 2008 Chevrolet K1500 Silverado Pickup, the Decedent traded it in for a Ford Explorer. She continued to use and possess the Ford Explorer until her death. Like the 2008 Chevrolet K1500, the title of the Ford Explorer was never transferred to Christine by the Decedent. Further, the purported Bill of Sale was never amended and a new Bill of Sale was never executed in regard to the Ford Explorer.
7. Prior to being diagnosed with lung cancer, brain cancer, and bone cancer and prior to undergoing treatment for the same, the Decedent had executed a Last Will and Testament that was prepared by an attorney that distributed her Estate equally between Mathew and Christine. Further, the Decedent’s investment accounts, life insurance, retirement, and annuities were to be divided equally between Mathew and Christine as well. Then, just a few months after being diagnosed with lung cancer, brain cancer, and bone cancer, while she was battling and undergoing treatment for the same, while she was going through anxiety and withdrawals from quitting smoking, while she was abusing alcohol,

while she was under considerable stress, and while she was allegedly spending a considerable amount of time with Christine, the Decedent allegedly transferred nearly all of her property to Christine and changed the beneficiary designations of her investment accounts and annuity so Christine would receive 70% and Mathew would only receive 30% all allegedly unbeknownst to Christine and against the advice of her financial advisor.

8. The Decedent's Last Will and Testament was never changed, and rather, remains in full force and effect. As previously stated, the Last Will and Testament of the Decedent distributes the Decedent's Estate equally between Christine and Mathew. The latter conflicts with the alleged 2016 transactions.
9. The Decedent expressed her intent to distribute her Estate equally after the alleged 2016 transactions. The latter conflicts with the alleged 2016 transactions.

Given the foregoing, a full good faith inquiry into the 2016 transactions is reasonable and justified. Mathew should not be penalized for performing his duties as Co-Personal Representative.

[¶37] Second, Mathew argued it is necessary for the Estate to determine whether the Bill of Sale is legally valid. If the District Court is going to consider the primary legal issues in this matter, it is also necessary for the District Court to consider the same. Several legal issues exist in regard to the Bill of Sale, including, however, not limited to the continued use and possession of the property listed in the Bill of Sale by the Decedent subsequent to the alleged transfer of ownership, the continued exercise of rights of ownership of the property listed in the Bill of Sale subsequent to the alleged transfer of ownership, i.e. the

Decedent traded in a vehicle listed in the Bill of Sale for a different vehicle subsequent to the alleged transfer of ownership and continued to use and possess the same until her death, the Decedent did not transfer legal title for any of the property listed in the Bill of Sale to Christine at any time, the language of the Bill of Sale contemplates a sale and not a gift, the requirements for a sale have not been satisfied, etc. A full good faith consideration of the forgoing issues is reasonable and justified. Again, Mathew should not be penalized for performing his duties as Co-Personal Representative. Further, the District Court did not address the legality of the Bill of Sale in its Order.

[¶38] Third, the decision of the District Court was based, at least in part, on whether significant evidence and direct evidence exists. App. 152-53 (Order, ¶¶11, 12). It is imperative to note the District Court did not determine the concern regarding lack of mental capacity or undue influence was unfounded. Rather, the District Court determined Mathew's claims and arguments are "conclusory at best" and "[a]t most, Matthew (sic) raises inferences that such might be the case." App. 153 (Order, ¶12). The District Court's determination supports Mathew's argument. As previously stated, Mathew's argument is the facts and circumstances regarding the 2016 transactions warrant a full good faith inquiry into the same by the Estate. The purpose of a full and good faith inquiry is to acquire evidence that can be used by the Estate to render a decision regarding lack of capacity, undue influence, and the legality of the Bill of Sale. Furthermore, the District Court deemed inferences insufficient to support Mathew's argument, however, deemed inferences sufficient to support Christine's argument. Compare supra and App. 154 (Order, ¶15 stating the Affidavit of Leon Vetter "...showed directly **or by reasonable inference...**" and ¶16 stating "[i]t is not insignificant that Matthew's own affidavit, both

directly **and by inference...**” (emphasis added)). If inferences are sufficient to support Christine’s Petition, inferences should also be sufficient to support Mathew’s Petition.

[¶39] In regard to the issue of undue influence, the District Court did not determine a full and good faith inquiry into the 2016 transactions would not uncover evidence. Rather, the District Court determined Mathew’s factual assertions regarding undue influence “...could **not likely** be supported given further opportunity.” App. 155 (Order, ¶17) (emphasis added). The acknowledgement of the possibility of discovering evidence supports Mathew’s argument. In any event, the determination of the District Court is speculative and does not take into account the absence of evidence from the law firm that represented the Decedent in regard to the 2016 transactions. In addition to being the law firm that previously represented Mathew in this matter, the law firm that represents Christine in this matter is the same law firm that represented the Decedent in regard to the 2016 transactions. Therefore, in addition to Christine, the individuals at the aforementioned law firm who were involved in the 2016 transactions possess necessary evidence and are necessary witnesses. Mathew began the process of acquiring evidence from Christine and the aforementioned law firm by sending a written request for information to Christine, through counsel. Christine did not respond in any regard, and rather, promptly sought to remove Mathew as Co-Personal Representative. In regard to the District Court’s concern regarding direct evidence, this Court has stated “...undue influence may be proven by circumstantial evidence because direct evidence is rarely available.” Nelson v. Nelson, 2018 ND 212, ¶9, 917 N.W.2d 479.

[¶40] Fourth, Mathew cannot acquire and provide evidence when Christine is hindering him from accomplishing the same. As previously stated, Mathew began the process of

acquiring evidence from Christine and the aforementioned law firm by sending a written request for information to Christine, through counsel. Christine did not respond in any regard, and rather, promptly sought to remove Mathew as Co-Personal Representative. Then, in support of Christine's Petition, Christine argues Mathew failed to provide evidence. Alternatively stated, Christine withheld necessary evidence and then argued Mathew failed to provide evidence.

[¶41] Fifth, the District Court did not establish sufficient findings to support its determination there exists compelling evidence of the following:

1. Decedent was neither unduly influenced nor susceptible to such influence.
2. The relationship between decedent and Matthew (sic) was strained in the years leading up to her death, which provided an understanding of the possible bases (sic) for decedent's decision to sign documents conveying, or indicating an intention to convey, certain of her property to Christine.
3. Matthew's (sic) conduct or lack of conduct is based upon the fact that he was unhappy with the decedent's decisions to make, or to sign documents conveying or indicating an intention to convey, certain of her property to Christine.

App. 153 (Order, ¶13). In support of latter determination, the District Court relied heavily on the Affidavit of Leon Vetter "...in addition to corroborating the similar affidavit testimony given by Christine." App. 153-154 (Order, ¶¶14-16). The District Court determined, in relevant part:

[The Affidavit of Leon Vetter] demonstrated an objective basis that decedent was completely competent and capable of resisting undue influence right up until the time of her death.

Vetter's affidavit further demonstrated that decedent had specifically discussed with him, both as a friend and as decedent's financial adviser, the decisions decedent made and the documents she signed conveying, or indicating an intention to convey, certain of her property to Christine. Furthermore, it demonstrated that Vetter was personally aware that the relationship between the decedent and Matthew (sic) was strained and showed directly or by reasonable inference that Matthew's (sic) conduct or lack of conduct as a co-personal representative was a

result of his dissatisfaction with decedent's decisions to convey property to Christine.

App. 154 (Order, ¶¶14-15). With the exception of a finding that Mr. Vetter allegedly discussed with the Decedent the decisions made and the documents signed by the Decedent which is addressed herein below, the District Court did not cite facts in support of its conclusions. It only referenced the sources of its conclusions, i.e. affidavit testimony.

[¶42] In regard to the Affidavit of Leon Vetter and the issues of mental capacity and undue influence, although not cited by the District Court, it is anticipated the District Court was referring to the following statements made by Mr. Vetter in his affidavit: “[h]er ability to understand her personal finance was never impaired due to her illness as she was always of sound mind and very much in control up to her passing” and “however, [the Decedent] being as strong minded as she was would not change her preference with the exception of her life insurance policy which she kept at 50/50 and a few other outside accounts (CHI Pension and 401k plan).” App. 105 and 106, respectively.

[¶43] Mr. Vetter failed to demonstrate he has personal knowledge of the Decedent's mental capacity when the 2016 transactions occurred, he was present when the 2016 transactions occurred, he has personal knowledge whether the Decedent was under undue influence when the 2016 transactions occurred, he was present with the Decedent at all times between her initial diagnosis in 2016 and her death in 2019 to conclude she was always of sound mind, etc. The statements made by Mr. Vetter are general conclusory statements that lack a sufficient factual basis. In regard to the facts that were stated, Mr. Vetter failed to demonstrate personal knowledge of the same. Further, Mr. Vetter's statements were refuted by both Christine and Mathew as both Christine and Mathew stated the Decedent experienced cognitive issues. The ability to understand existing financial

accounts, routine monthly bills, and the like does not demonstrate she understood or had the capacity to understand North Dakota law, legal documents, legal implications, or the like. Mr. Vetter stated the Decedent is strong willed and could not be influenced to change her preference yet she was influenced to change her preference regarding her life insurance policy, her CHI pension, and her 401k. In regard to the alleged discussion between Mr. Vetter and the Decedent, the existence of a discussion without more does not demonstrate the Decedent possessed the requisite mental capacity and was not under undue influence in regard to the 2016 transactions. Alternatively stated, the existence of a discussion alone does not establish a sufficient factual basis to conclude the Decedent possessed the requisite mental capacity and was not under undue influence in regard to the 2016 transactions. Further, Mr. Vetter failed to provide a sufficient factual basis/sufficient personal knowledge in regard to the decisions allegedly made by the Decedent. Further, Mr. Vetter is not a disinterested objective party. Mr. Vetter manages financial investments for the Finch family. He has a vested interest in Christine retaining a significant portion of the Decedent's financial assets. Further, he waived the right to serve as personal representative due to a conflict of interest. However, he then served and filed an affidavit through and in support of Christine. He disclosed Mathew's confidential financial information without permission from Mathew and made derogatory statements regarding Mathew that are not relevant and for which Mr. Vetter failed to demonstrate he was qualified to provide, e.g. "[i]n my observation, Matt (sic) has repeatedly failed to do his duties as an account owner, beneficiary and personal representative." App. 108.

[¶44] In regard to the affidavit testimony of Christine, the District Court did not establish findings of fact, and rather, only referenced Christine's affidavit testimony as a source upon

which its conclusions were based. In any event, Christine acknowledged the Decedent experienced cognitive issues. Further, Christine failed to provide any evidence that she has personal knowledge of the Decedent's mental capacity when the 2016 transactions occurred. Instead, she only made broad conclusory statements regarding the Decedent's general mental ability. In regard to her allegations that Mathew did not provide evidence of mental capacity or undue influence, she is wrongfully withholding necessary evidence and obstructing access to necessary witnesses. Alternatively stated, she wrongfully withholds evidence and then argues Mathew failed to provide evidence. Further, as previously stated, the purpose of a full good faith inquiry is to acquire evidence to render a determination in regard to the issues of mental capacity, undue influence, and the legal validity of the Bill of Sale.

[¶45] Neither Mathew's relationship with the Decedent nor his contentment or discontentment with the 2016 transactions obviate undue influence or a lack of capacity or render the Bill of Sale legally valid.

[¶46] Sixth, the District Court determined the parties "...have failed to perform any duty pertaining to the office" and "Matthew (sic) has failed to perform any duty pertaining to the office." App. 151 (Order, ¶7); App. 157 (Order, ¶22). Mathew respectfully disagrees. Mathew conducted cursory research regarding the real property interests in which the Decedent possessed an ownership interest. He located interests in real property which Christine failed to locate. He noted assets for which Christine failed to account. He began the process of acquiring information from medical and financial institutions in regard to the 2016 transactions. He also began the process of acquiring information from Christine and the law firm that represented the Decedent in regard to the 2016 transactions.

[¶47] Lastly, the basis of Christine’s Petition is: 1) Mathew declined to sign the Assignment and Warranty of Title to transfer title of the 1975 Wicker mobile home to Christine; 2) Mathew declined to sign the Personal Representative’s Mineral Deed of Distribution; and 3) Mathew declined to sign paperwork to establish a checking account for the Estate. Mathew’s actions were reasonable and justified as set forth below.

1. Assignment and Warranty of Title to transfer title of the 1975 Wicker mobile home to Christine

[¶48] Declining to sign the Assignment and Warranty of Title to transfer title of the 1975 Wicker mobile home to Christine was reasonable and justified. First, Personal representatives are required to determine and effectuate the intent of the decedent. The 2016 transactions conflict with the intent expressed in the Last Will and Testament and the intent expressed by the Decedent subsequent to the 2016 transactions. The 1975 Wicker mobile home should not be transferred until the intent of the Decedent has been determined.

[¶49] Second, the 1975 Wicker mobile home should not be transferred until the issues of mental capacity and undue influence have been resolved.

[¶50] Third, the 1975 Wicker mobile home is listed in the Bill of Sale. It should not be transferred until the legal validity of the Bill of Sale has been resolved.

[¶51] Lastly, property should not be transferred until all expenses and debts of the Estate have been paid in full or unless the other assets of the Estate are sufficient to satisfy all expenses and debts of the Estate. Mathew requested information that would have enabled him to render the foregoing determinations. Christine did not respond in any regard, and rather, promptly sought to remove Mathew as Co-Personal Representative.

2. Personal Representative’s Mineral Deed of Distribution

[¶52] Declining to sign the Personal Representative’s Mineral Deed of Distribution was

reasonable and justified. Christine failed to include all of the Decedent's mineral interests in the Personal Representative's Mineral Deed of Distribution. Further, as previously stated, property should not be transferred until all expenses and debts of the Estate have been paid in full or unless the other assets of the Estate are sufficient to satisfy all expenses and debts of the Estate. Mathew requested information that would have enabled him to render the foregoing determinations. Christine did not respond in any regard, and rather, promptly sought to remove Mathew as Co-Personal Representative.

3. Paperwork to establish a checking account for the Estate

[¶53] At the outset, it is imperative to note Mathew was not represented by his own attorney when he was directed to sign the paperwork to establish a checking account for the Estate, and rather, Mathew and Christine were both represented by Christine's attorney.

[¶54] Declining to sign paperwork to establish a checking account for the Estate was reasonable and justified. First, Mathew was not informed why it was necessary to establish a new separate checking account for the Estate rather than using the Decedent's existing checking account, using the law firm trust account, etc. App. 135.

[¶55] Second, Mathew was not informed that any safeguards, including the requirement for two signatures to issue checks, would be implemented to ensure Christine would not have unilateral control over the finances of the Estate as he does not trust her. App. 67, 135, 136, 139. Further, Christine failed to provide any evidence demonstrating safeguards would be implemented. Also, it is common for estate checking accounts to only require one signatory, especially when the co-personal representatives reside in different states.

[¶56] Lastly, Mathew requested information from Christine, through counsel, regarding the expenses of the Estate, the assets of the Estate, and the debts of the Estate. Rather than

provide the information requested which would have enabled him to render decisions in regard to the payment of expenses and debt, Christine promptly sought to remove him as Co-Personal Representative. Furthermore, whether the assets that were the subject of the 2016 transactions were assets of the Estate available to pay expenses and debt of the Estate had not been determined. In any event, Mathew indicated he is amenable to establishing a checking account for the Estate if safeguards were implemented to prevent unauthorized and improper transactions and transactions that are not in the best interest of the Estate. Tr. 28; App. 68.

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

[¶58] 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). “If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate.” N.D.C.C. §30.1-18-17. Heirs are entitled to information regarding the administration of the estate. See e.g. N.D.C.C. §30.1-18-05 (stating “[heirs and devisees] are entitled to information regarding the administration from the personal representative and may petition the court in any matter relating to the estate, including distribution of assets and expenses of administration”). Further, the failure to provide the information set forth in N.D.C.C. §30.1-18-05 is a breach of the personal representative’s duty. See e.g. Id. (stating “[t]he personal representative’s failure to give this information is a breach of duty to the persons concerned but does not affect the validity of the

appointment, the personal representative's powers, or other duties").

[¶59] "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). As a trustee of the estate, a personal representative has a duty of loyalty, is required to act impartially, is required to administer the estate prudently, and has a duty to inform and report. N.D.C.C. §§59-16-02, 59-16-03, 59-16-04, 59-16-13. See Addendum A.

[¶60] As many of the arguments applicable to Christine's Petition are also applicable to Mathew's Petition, Mathew incorporates the same herein by reference. The following, individually and collectively, demonstrate the removal of Christine as Co-Personal Representative is warranted.

[¶61] First, Mathew demonstrated Christine failed to perform her duties as Co-Personal Representative in regard to matters unrelated to the 2016 transactions. Christine failed to account for all of the property of the Estate. The foregoing includes, however, is not limited to all of the mineral interests in which the Decedent possessed an ownership interest, a strip of land in which the Decedent possessed an ownership interest, an annuity, the lake lot lease, the personal property at the lake, and the household goods and furnishings in the mobile home on the lake lot and in the Decedent's home. App. 71-72, 136, 141-48. Further, Mathew requested the following information that is unrelated to the 2016 transactions:

1. A list of all probate and nonprobate assets at the time of death of Ms. Finch, including a detailed description of each asset and the fair market value of each asset at the time of death and a copy of any and all records regarding the same;
2. A full and complete accounting of all Estate financial transactions and a copy of any and all records regarding the same;
3. A detailed description of all probate property transactions and a copy of any and all records regarding the same;

4. A detailed description of all costs and expenses of administration, funeral and burial expenses, debts and taxes with preference under federal law, medical and hospital expenses of the last illness of Ms. Finch, debts and taxes with preference under other laws, and all other creditor claims and a copy of any and all records regarding the same; and
5. A proposed distribution of all probate assets.

Christine did not respond in any regard, and rather, promptly sought to remove Mathew as Co-Personal Representative. Therefore, Christine is withholding information regarding the Estate to which Mathew is entitled as Co-Personal Representative and an heir. The foregoing warrants the removal of Christine as a personal representative. Furthermore, the District Court did not consider the foregoing in its Order.

[¶62] Second, in addition to requesting the information set forth above, Mathew also requested information regarding the 2016 transactions. As previously stated, Christine did not respond in any regard, and instead, she promptly sought to remove Mathew as Co-Personal Representative. Therefore, Christine is withholding information regarding the Estate to which Mathew is entitled as a Co-Personal Representative and an heir.

[¶63] Third, in addition to not providing information to which Mathew is entitled as Co-Personal Representative as set forth above, she also controlled nearly all of the transactions of the Estate and rendered nearly all of the decisions of the Estate without providing Mathew any meaningful opportunity to participate. App. 66, 70, 74, 100, 101. She would provide Mathew an ultimatum, namely sign the documents or she will seek to remove him as Co-Personal Representative which is what she ultimately did. Further, she blocked his telephone number and stopped communicating with him while he was serving as Co-Personal Representative.

[¶64] Fourth, Mathew is not arguing the general personal representative conflict of

interest rule applies, and rather, he is arguing the exception to the general personal representative conflict of interest rule applies. In support of its conclusion a conflict of interest does not exist, the District Court cited three paragraphs in Jarmin which set forth the general rule regarding personal representative conflicts of interest, namely a mere interest in the estate is generally an insufficient conflict of interest to warrant removal, and in regard to joint interests, a personal representative should not be removed merely because the personal representative possesses a joint interest in estate property. App. 155-57; Jarmin v. Shriners Hospitals for Crippled Children, 450 N.W.2d 750, 752-53 (N.D. 1990). The exception to the general rule begins at the end of the third paragraph cited by the District Court and continues thereafter:

Thus, we agree with the decision in Meyer’s Estate, supra, that a personal representative should not be removed solely because he or she claims a joint interest in estate property of the decedent. Under those circumstances, we believe that it would be improper for a court to conclude that cause existed for removal, and that it would be an abuse of the court’s discretion to remove a personal representative for conflict-of-interest purposes **on that basis alone**.

The instant case, however, involved more than a mere “joint interest” in estate property or a conflict of interest...

Id. at 753. This Court ultimately concluded:

We believe that the county court could have properly concluded that the removal of Jarmin under NDCC Sec. 30.1-17-11 “would be in the best interests of the estate.” In light of Jarmin’s interest in the joint tenancy account of Corrie’s estate, his irrational actions in dealing with the estate funds gave the appearance that Jarmin was furthering his own interests at the expense of the estate and its heirs. It appears that Jarmin’s primary concern was to protect his share of Corrie’s estate to the detriment of the remaining legatees, or to penalize the Bank as Corrie’s conservator because it did not agree with his position concerning the account in question. Because the instant case involved more than a mere “joint interest” in estate property or a conflict of interest, we are not prepared to state that the county court abused its discretion in concluding that Jarmin should be removed as personal representative.

Id. A conflict of interest does not exist merely because Christine possesses an interest in

property of the Estate. As previously stated, the facts and circumstances surrounding the 2016 transactions render the 2016 transactions suspect. When Mathew attempted to acquire information regarding the same, she did not respond in any regard, and instead, promptly sought to remove him as Co-Personal Representative. Further, the 2016 transactions result in Christine receiving nearly the entire Estate. Not only is the latter contrary to the intent expressed in the Decedent's Last Will and Testament, it is contrary to the wishes expressed by the Decedent herself subsequent to the 2016 transactions. The irrational actions by Christine include refusing to conduct a full good faith inquiry in regard to the facts and circumstances surrounding the 2016 transactions, refusing to provide information regarding the facts and circumstances surrounding the 2016 transactions and the expenses, debts, and financial transactions of the Estate upon request, and promptly seeking to remove Mathew as Co-Personal Representative when he requested the aforementioned information. The irrational actions of Christine set forth above gives the appearance that she is furthering her own interests at the expense of the Estate and Mathew. The irrational actions of Christine set forth above also gives the appearance that her primary concern is to protect her interests to the detriment of the Estate and Mathew or to penalize Mathew because he did not agree with her position regarding the 2016 transactions. *See supra*. Therefore, the decision by this Court in Jarmin supports the removal of Christine as Co-Personal Representative.

[¶65] Fifth, if the District Court is going to consider undue influence, it is required to consider the presumption in regard to the same. When an individual has a confidential and fiduciary relationship with the decedent, undue influence is presumed. *See e.g. In re Estate of Bartelson*, 2015 ND 147, ¶¶15-19, 864 N.W.2d 441 (“Bartelson III”). Christine alleges

she spent a considerable amount of time with the Decedent, she provided care for the Decedent, assisted the Decedent in regard to financial matters, was appointed and acted as the Decedent's medical agent/health care agent, *inter alia*. Given the same, a confidential and fiduciary relationship with the Decedent existed. Consequently, undue influence is presumed. Christine failed to rebut the same. Furthermore, while the District Court discussed undue influence, it did not address the presumption of undue influence in its Order.

[¶66] Sixth, Christine failed to make a full good faith inquiry into the issues of lack of capacity, undue influence, and legal validity of the Bill of Sale, and rather, outright dismissed the same.

[¶67] Lastly, as previously stated, if the District Court is going to consider the primary issues in this matter, it is necessary for the District Court to also consider the legal validity of the Bill of Sale. The District Court did not consider the same in its Order.

[¶68] **Issue 3: The District Court erred in denying Mathew's request for attorney's fees.**

[¶69] Pursuant to N.D.C.C. §30.1-18-20:

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

N.D.C.C. §30.1-18-20. Further, as set forth in Peterson:

Section 30.1-18-20, N.D.C.C., authorizes attorney fees incurred by a personal representative to be paid from the estate. For payment of attorney fees from the estate under N.D.C.C. §30.1-18-20, the personal representative's conduct must have been in good faith, free from fraudulent intent, and for the benefit of the estate.

A benefit to the estate includes a personal representative's good faith attempts

to effectuate the testamentary intent set forth in a facially valid will. The personal representative must seek to give effect to the testamentary intent expressed in a facially valid will regardless whether the personal representative is also a beneficiary under the will.

Peterson, at ¶¶25-26 (citations omitted). In Peterson, this Court determined a genuine controversy existed regarding the intent of the decedent as expressed in the decedent's will and the P.O.D. accounts' designations. Id. at ¶27. It was determined the personal representative acted in good faith and the attorney's fees incurred by the personal representative to give effect to the decedent's intent of equal distribution were for the benefit of the estate. Id. As many of the arguments applicable to Christine's Petition and Mathew's Petition are applicable to the issue of attorney's fees, Mathew incorporates the same herein by reference.

[¶70] First, Mathew has acted and continues to act in good faith. As previously stated, personal representatives have a duty to determine and effectuate the intent of the decedent. Given the facts and circumstances, an inquiry into the issues of mental capacity, undue influence, and the legal validity of the Bill of Sale by the Estate is warranted. Given the same, *inter alia*, Mathew is acting in good faith. In any event, Christine did not demonstrate and the District Court did not find Mathew failed to act in good faith.

[¶71] Second, Mathew's actions have been and continue to be free from fraudulent intent. The concerns raised by Mathew as Co-Personal Representative are reasonable and justified. Furthermore, Mathew is not arguing the Decedent lacked mental capacity, the Decedent was under undue influence, or the Bill of Sale is legally invalid, and rather, he is arguing the facts and circumstances warrant a full good faith inquiry into the same by the Estate. In any event, Christine failed to demonstrate and the District Court did not find fraudulent intent.

[¶72] Lastly, Mathew's actions have been for the benefit of the Estate. As was the case in Peterson, a genuine controversy exists regarding the intent of the Decedent as expressed in the Decedent's Last Will and Testament and the Decedent's financial accounts with payable on death/beneficiary designations. See supra. Further, there is also a conflict between the intent of the Decedent as expressed in the Decedent's Last Will and Testament and the other 2016 transactions. The facts and circumstances warrant a full and good faith inquiry into the issues of lack of capacity, undue influence, and the legal validity of the Bill of Sale by the Estate. Inquiring into the same will ensure the Estate is properly administered. Further, the outcome if there was undue influence or there was a lack of mental capacity is an equal distribution of Estate assets. The latter is also the result if the Bill of Sale is deemed to be invalid. The Estate would benefit as there would be more assets available to pay debts and expenses. Moreover, both parties would equally benefit as the assets would be distributed equally. Conversely, if Christine's argument is accepted, Christine would receive a substantial personal benefit leaving little property in the Estate and little property left to be distributed. In any event, Christine failed to demonstrate and the District Court did not find Mathew's actions were not for the benefit of the Estate.

Conclusion

[¶73] As per the foregoing law and argument, Mathew respectfully requests the Court: 1) Reverse the decision of the District Court granting Christine's Petition; 2) Reverse the decision of the District Court denying Mathew's Petition and appoint or direct the District Court to appoint Mathew as sole personal representative, or in the alternative, appoint a neutral third party to serve as the sole personal representative and direct the neutral third party personal representative to conduct a full good faith inquiry into the issues of lack of

capacity, undue influence, and legal validity of the Bill of Sale; 3) Reverse the decision of the District Court denying Mathew's request for attorney's fees and order or direct the District Court to order the Estate to pay the attorney's fees incurred by Mathew as Co-Personal Representative and on appeal; 4) Determine the decision of the District Court and the decision rendered by this Court does not constitute a final determination on the merits in regard to the primary issues in this matter, namely lack of capacity, undue influence, and the legal validity of the Bill of Sale; and 5) Grant any other relief this Court deems just and proper.

[¶74] DATED this 24th day of May, 2021.

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ATTORNEY FOR APPELLANT

Certificate of Compliance

[¶75] I hereby certify the Brief of Appellant complies with the page limitation. The Brief of Appellant is 34 pages in length excluding the Certificate of Compliance and Addendum A.

[¶76] DATED this 24th day of May, 2021.

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Addendum A

N.D.C.C. §59-16-02. (802) Duty of loyalty.

1. A trustee shall administer the trust solely in the interests of the beneficiaries.
2. Subject to the rights of persons dealing with or assisting the trustee as provided in section 59-18-12, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless the transaction was authorized by the terms of the trust; the transaction was approved by the court; the beneficiary did not commence a judicial proceeding within the time allowed by section 59-18-05; the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 59-18-09; or the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
3. A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with the trustee's spouse; the trustee's descendants, siblings, parents, or their spouses; an agent or attorney of the trustee; or a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.
4. A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.
5. A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
6. An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of chapter 59-17. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee at least annually shall notify the persons entitled under section 59-16-13 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.
7. In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or

- enterprise in the best interests of the beneficiaries.
8. If fair to the beneficiaries, an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee; payment of reasonable compensation to the trustee; a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a Page No. 1 beneficiary has an interest; a deposit of trust money in a regulated financial service institution operated by the trustee; or an advance by the trustee of money for the protection of the trust is not precluded by this section.
 9. The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

N.D.C.C. §59-16-03 (803) Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

N.D.C.C. §59-16-04. (804) Prudent administration.

A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

N.D.C.C. § 59-16-13. (813) Duty to inform and report.

1. Subject to section 59-14-03, while a trust is revocable or to the extent that trust property in an irrevocable trust is subject to a power of withdrawal, or to the extent that the qualified beneficiary of an irrevocable trust is then unknown because a person holds a power to change the qualified beneficiary, the duty of the trustee as set forth in subsection 2, to inform and report are owed exclusively:
 - a. To the settlor, while a trust is revocable;
 - b. To the holder of the power of withdrawal to the extent the trust property is subject to the power during the period in which the power may be executed; and
 - c. To the holder of the power to change the qualified beneficiary of an irrevocable trust during the period in which the power may be exercised; and
 - d. To a qualified beneficiary when the qualified beneficiary is required by law or regulation to provide that information to determine eligibility for benefits or to verify continued eligibility for benefits under title 50.
2. With respect to trust property in an irrevocable trust which is not subject to a power of withdrawal and which is not subject to a power to change the qualified beneficiary:
 - a. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.
 - b. A trustee upon written request shall promptly furnish to a qualified beneficiary a

- copy of the portion of the trust instrument which relates to the interest of a qualified beneficiary.
- c. A trustee within sixty days after accepting a trusteeship shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.
 - d. A trustee shall notify the qualified beneficiaries of the trust existence, of the identity of the settlor, of the right to request a copy of the trust instrument, and of the right of the trustee's report as provided in subdivision f within sixty days after the date the trustee acquires knowledge:
 - (1) Of the creation of an irrevocable trust; or
 - (2) That a formerly revocable trust has become irrevocable.
 - e. A trustee shall notify the qualified beneficiaries of any change in the method or rate of the trustee's compensation.
 - f. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.
 - g. A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.
 - h. Subdivisions c and d do not apply to a trustee that accepts a trusteeship before August 1, 2007, to an irrevocable trust created before August 1, 2007, or to a revocable trust that becomes irrevocable before August 1, 2007.

IN SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20210029
District Court No. 45-2019-PR-00030

In the Matter of)
the Estate of Janel Finch,) **Certificate of Service**
deceased.)

[¶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 documents:

- 1. Brief of Appellant; and**
- 2. Appendix of Appellant**

were duly served upon:

Jordan L. Selinger
Kubik, Bogner, Ridl & Selinger, PLLP
117 First Street East
P.O. Box 1173
Dickinson, ND 58602-1173

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 24th day of May, 2021.

[¶2] DATED this 24th day of May, 2021.

/s/ Brian C. Balstad
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