

APPENDIX

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APPENDIX A

STATE OF NORTH DAKOTA
IN DISTRICT COURT
COUNTY OF BARNES
SOUTHEAST JUDICIAL DISTRICT

Marby Hogen, et al.,
Plaintiffs
File No. 02-2017-CV-116
vs.
Steven Hogen, et al.
Defendants

MEMORANDUM AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

[¶1] Ah, the joys of fighting with your brothers. I remember daily fights with my older brothers they were only one and two years older than me, and I was a farm kid, so I could hold my own — over whose turn it was to do some chore, or who was cheating at some game, or just because it was something that had to be done. But sometime in our early teens the punches really started to hurt (we would never admit that, of course) and all three of us decided — without ever talking about it — that we were sick of fighting. But I digress.

[¶2] This is a quiet title action. The issue is what title or interest Susan or Marby Hogen hold in

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seven parcels of land in Barnes and Cass counties, totaling 737 acres, by reason of two quit-claim deeds executed by Rodney Hogen, who is Susan's spouse and Marby's father. [See Docket #23]. The essence of a quit-claim deed is that the grantor makes no representation, no warranty, that he actually has any title or interest in the property granted, so the short answer is that Susan and Marby get a share of whatever interest Rodney has — which may very well turn out to be nothing. When (if?) Rodney Hogen and his brother Steven finally exhaust all conceivable theories of litigation and avenues of appeal, it appears ever more likely that most, if not all, of the real property that their parents intended and so carefully planned to leave them as an inheritance will have been sold to pay the banks and the lawyers.

[¶3] Ironically, Curtiss and Arline Hogen's careful estate planning, which undoubtedly was done to avoid paying the IRS a portion of their legacy in estate taxes, has merely served to convolute the title to the property sufficiently to enable their sons to expend a much greater portion of that legacy in litigation. It led to the separate trust and estate actions in Cass County District Court. In this case, determining Marby and Susan Hogen's interest in the 737 acres of real property requires separate analyses of Rodney's interest in real property owned by Curtiss Hogen's testamentary trust, and the property held by Arline Hogen's estate. I find the Supreme Court's ruling in Estate of Hogen 2015 ND 125, makes the latter determination clear and straightforward. The determination of Rodney's title or interest in the trust's property is less certain only because his appeal of

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Judge McCullough's findings and orders in that matter is still pending before the Supreme Court.

[¶4] Marby and Susan Hogen are the nominal plaintiffs in this quiet-title action, but it is clearly controlled by Rodney and essentially is an effort to obtain a judicial "do over" of his long-running legal battles with Steven in Cass County District Court over their father's trust (Case No. 09-2015-CV-1717) and their mother's estate (Case No. 09-07-P-100). Rodney has vigorously argued in those cases that an undivided one-half interest in the 737 acres of real property owned jointly by his mother and his father's testamentary trust devolved to him by operation of law immediately upon his mother's death in 2007. Hence, Rodney has strenuously maintained that his interest in that real property is not subject to retainer or offset by Steven (as personal representative of their mother's estate, and co-trustee of their father's trust) on account of unpaid rents and litigation costs which the Cass County courts have found that Rodney owes to the trust and estate. Those arguments have been rejected by Judge Irby and the North Dakota Supreme Court in the estate litigation, and by Judge McCullough in the trust litigation (currently on appeal to the Supreme Court).

[¶5] Plaintiffs invite this court to re-visit those same arguments here. They vigorously contend that this court should rule that an undivided one-half interest in the 737 acres of real property owned jointly by Rodney's mother and his father's testamentary trust devolved to him by operation of law immediately upon his mother's death, and hence that the interests

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Rodney quit-claimed to them are superior to any title, encumbrances, or interests which Steven (as personal representative of their mother's estate, and trustee of their father's trust) has in that property. I decline the invitation.

MOTION TO LIFT STAY OF PROCEEDINGS

[¶6] Plaintiffs object to the defendants' renewal of the motion for summary judgment on two grounds: First, they argue that it is premature to set aside the stay of proceedings, because the trust case is not final until Rodney's appeal of Judge McCullough's rulings is resolved, and nothing has changed since the stay was imposed. Second, they contend the motion for summary judgment is procedurally defective because the court first has to decide the motion to lift the stay, then the defendants have to renew their motion for summary judgment. I find those objections are without merit.

[¶7] The second objection is contrary to the express terms of the order imposing the stay, which states: "Either party may bring this matter before the court for further proceedings in accordance with this Order, or for further relief, upon motion and proper notice to all parties." [Docket #43, ¶9]. There is no requirement of separate and sequential motions to lift the stay and then to pursue "further relief." The defendants served notice that they were moving to lift the stay and for summary judgment, and that the motions would be heard on December 19, 2017, on October 30, 2017. [Docket #67-70]. Plaintiffs filed their opposing papers on November 30, 2017. [Docket #71-75]. Rule of Civil Procedure 56(c) requires that a

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motion for summary judgment be served at least 34 days before the hearing, and that the opposing party be given 30 days after service to respond to the motion. The defendants' notice complies with those requirements. The motion to lift the stay requires "only" the standard 14-day notice under Rule of Court 3.2. The motion for summary judgment is before the court "upon motion and proper notice to all parties."

[¶8] Regarding the first objection, I find that the Cass County trust and estate actions are sufficiently "final" within the meaning and intent of the order imposing the stay. The Supreme Court's ruling and mandate in the estate action is clear, and Judge Irby has entered the order for final administration of the estate. The trust action is still on appeal to the Supreme Court, but I find that the material facts necessary to determination of the motion for summary judgment are not in dispute. [See ¶14, below]. Rodney chose not to comply with the requirements for a supersedeas bond set by the Supreme Court in order to obtain a stay on enforcement of the Cass County judgment during the pendency of his appeal of the trust action. As Steven points out in his reply brief, it is settled law in this state that an appeal in itself does not operate to stay proceedings for enforcement of the district court's judgment. Verry v. Murphy, 163 N.W.2d 721, 725 (N.D. 1968). Therefore, I find that Steven has shown good cause for the court to lift the stay on proceedings in this case in order to consider the motion for summary judgment.

SUMMARY JUDGMENT RE: ESTATE

PROPERTY

[¶9] I conclude as a matter of law that during administration of the Estate of Arline Hogen, the estate's personal representative, Steven Hogen, has the same power as an absolute owner to convey or encumber the titles to all of the estate's real property, and that Steven has authority to exercise this power to recover monies owed to the estate by Rodney. The personal representative's power over the title to the estate's property during administration of the estate is an encumbrance upon Rodney Hogen's title and interest as an heir of the estate, and that power is superior to any right, title, or interest held by Rodney, Susan, or Marby Hogen.

[¶10] I base these conclusions upon the following passages from Estate of Hogen, 2015 ND 125:

"Until termination of the personal representative's appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have [subject to the PR's fiduciary duties] . . . The personal representative is given the broadest possible 'power over title' . . . The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets." [2015 ND 125 ¶20, quoting N.D.C.C. §30.1-18-11 and Comments].

"Every personal representative has a right

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to, and shall take possession or control of, the decedent's property . . . [if] in the judgment of the personal representative, possession of the property will be necessary for purposes of administration. . . It may be possible for an heir or devisee to question the judgment of the personal representative in later action . . . for breach of fiduciary duty, but this possibility should not interfere with the personal representative's authority as it relates to possession of the estate. The Code provides for devolution of title upon death[.] This devolution is expressly stated to be 'subject to administration' and the right to possession and control of the decedent's property in administered estates is vested in the PR . . . [T]he turn-over of possession of land . . . by the PR to the person presumptively entitled thereto should not be construed as a 'distribution' . . . A 'distribution' in kind is to be made as provided in Section 3-907 [N.D.C.C. §30.1-20-07]; it enables the distributee to pass good title to a good faith purchaser." [2015 ND 125 ¶21, quoting N.D.C.C. §30.1-18-09 and Comments].

"We construe the statutory scheme in N.D.C.C. title 30.1 to authorize the personal representative, during administration of the estate, to pursue a retainer claim against real property in an estate for assertions involving a devisee's rental obligations to the decedent or the estate. Under the statutory provisions, a devisee's title to the decedent's property is encumbered as long as the estate is subject to

administration." [2015 ND 125 ¶26].

"We reject Rodney Hogen's claims that as the personal representative of the estate, Steven Hogen may not pursue a retainer claim against Rodney . . . because the personal representative did not have possession of the land and Rodney Hogen exercised his rights as a tenant-in-common owner. . . We conclude the district court did not err in determining the devolution of real property to Rodney Hogen was subject to the personal representative's power during administration of the estate to offset any noncontingent indebtedness he [Rodney] owed to Arline Hogen or the estate." [2015 ND 125 ¶27].

[¶11] Plaintiffs argue that the Supreme Court's ruling that Steven has "the broadest possible power over title" to the real property during administration of the estate (Estate of Hogen, 2015 ND 125 ¶20) is no longer applicable, because administration of the estate was complete, and Steven's appointment as personal representative was terminated, upon entry of the order approving the petition for final settlement of the estate. [Brief (Docket #71), ¶8]. Judge Irby rejected that argument. [Cass County File No. 09-07-P-100, Order for Complete Settlement and Distribution dated April 3, 2017 (Docket #702), ¶¶6-7]. I find there is no dispute as to the material facts that Arline's estate is still being administered pursuant to the court's orders in the estate action, and that Steven Hogen remains the duly appointed personal representative of the estate.

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[¶12] Therefore, I conclude that defendant Steve Hogen, in his capacity as personal representative of the Estate of Arline Hogen, is entitled to summary judgment as a matter of law because administration of the estate is ongoing, and during administration Steven's power over the title to the estate's real property embraces all possible transactions which might result in a conveyance or encumbrance of the estate's real property. Estate of Hogen, 2015 ND 125 ¶20. Steven's power over title is an encumbrance upon Rodney Hogen's title to that property as an heir of the estate (*id.* at ¶26). Until administration of the estate is finalized in accordance with the orders of the Cass County District Court, the personal representative's plenary power over the title to all of the estate's real property is superior to any right, title, or interest of Rodney Hogen, and therefore superior to any right, title, or interest that Marby or Susan Hogen acquired by and through the quit-claims deeds from Rodney. Rodney will have a superior title to or interest in any particular parcel of real property only if, and when, he receives a deed of distribution for that parcel from the estate's personal representative. [2015 ND 125 ¶¶21-22].

SUMMARY JUDGMENT RE: TRUST PROPERTY

[¶13] This court takes judicial notice of certain facts in the trust action in Cass County. Judge McCullough has (1) ruled that the Curtiss A. Hogen Trust B did not terminate upon the death of Arline Hogen, the income beneficiary, because a purpose of the trust remained unfulfilled; (2) voided quit-claim deeds which Rodney executed as co-trustee, conveying

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title to the trust's real property to himself and Steven as tenants-in-common, on grounds that execution of the deeds was a discretionary act requiring the consent of both trustees; (3) granted Steven's petition for supervised administration of the trust, and permanently suspended Rodney as co-trustee; (4) found that Rodney owes the trust \$305,961 for unpaid rents and breaches of fiduciary duties; (5) awarded Steven Hogen, as trustee, a total of approximately \$450,000 for trustee's fees, attorney's fees, and litigation costs, and allocated a portion of the attorney's fees directly to Rodney's share of the trust; and (6) authorized Steven to sell the trust's real property to pay mortgages, the trust's claims against Rodney, and legal fees and costs incurred by the trust. [See Cass County File No. 09-2015-CV-1717: Order Approving Final Report and Account (Docket #506); Order on Petition for Complete Settlement and Distribution (Docket #449); Post-Trial Order (Docket #450); Order for Summary Judgment (Docket #83)].

[¶14] Plaintiffs strenuously maintain that the findings and orders of the Cass County District Court are in error. They ask this court to rule that under the express terms of Curtiss Hogen's will and trust, the Curtiss A. Hogen Trust B terminated immediately upon the death of Arline Hogen, and an undivided one-half share of the trust's real property devolved to Rodney by operation of law at that time. Rodney has appealed the rulings of the Cass County District Court to the North Dakota Supreme Court. This court is not a court of appeal. I cannot find any evidence in the record that would justify, let alone require, this court in ruling that Judge McCullough's rulings were

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erroneous. Based upon the evidence before me, I find there is no dispute as to the following material facts:

- 1) The Curtiss A. Hogen Trust B holds absolute title to the real property placed in the trust under the terms of Curtiss Hogen's will.
- 2) Steven Hogen is a co-trustee of the Curtiss A. Hogen Trust B, and by order of the Cass County District Court, has sole authority to act on behalf of the trust.
- 3) Steven Hogen, as trustee, has been authorized by the Cass County District Court to sell trust property in order to wind up the trust.
- 4) Steven Hogen, as trustee, has not executed or delivered deeds to any of the trust's real property to the trust's remainder beneficiaries.

[¶15] I conclude that defendant Steve Hogen, in his capacity as trustee of the Curtiss A. Hogen Trust B, is entitled to summary judgment as a matter of law because the trust is the absolute owner of the real property, and as trustee Steven has "all powers over the trust property which an unmarried person, who is not incapacitated, has over individually owned property . . . subject to the [trustee's] fiduciary duties." N.D.C.C. § 59-16-15. A trustee's powers specifically include the power to sell trust property, and to exchange or change the character of trust property. N.D.C.C. § 59-16-16(2), (3). In short, a trustee's power

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over title is equal to a personal representative's power over the estate property -- it "embraces all possible transactions which might result in conveyance or encumbrance" of trust property. Estate of Hogen, 2015 ND 125 ¶20.

CONCLUSION

[¶16] There is a significant distinction, however, between Rodney Hogen's interest in the estate property and his interest in the trust property. The Comments to N.D.C.C. §30.1-18-09 make clear that Rodney cannot pass good title to estate property, even to a good faith purchaser (let alone by gift), until the personal representative makes a "distribution in kind" of that property from under N.D.C.C. §30.1-20-07, Estate of Hogen, 2015 ND 125 ¶21. Under N.D.C.C. §30.1-12-01, however, a title to the estate's property did devolve to Rodney upon Arline Hogen's death, so subject to administration Rodney has a cognizable interest in the estate's real property which can be conveyed by quit-claim deeds (at least in theory). Steven's power over title during administration is deemed an encumbrance upon Rodney's title to the estate's real property. [Estate of Hogen, 2015 ND 125 ¶26]. The shares of Rodney's title conveyed to Marby and Susan by the quit-claim deeds are likewise encumbered, and are subordinate to Steven's power to convey absolute title to the estate's real property. If the personal representative exercises his power to convey absolute title to particular estate property to a third party during administration of the Estate of Arline Hogen, the inferior titles of Rodney, Marby, and Susan Hogen will be extinguished.

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[¶17] In contrast, Rodney does not have any cognizable title or interest in any specific property owned by the trust, "only" a beneficial interest in a one-half share of the trust corpus. The trustee's power and control over the trust's property is equal to an absolute owner's. N.D.C.C. §59-16-15. Until the trust is terminated, the trustee -- Steven — can sell or change the character of the trust property at any time. N.D.C.C. §59-16-16(2), (3). The Cass County District Court has ruled that the trust did not terminate upon the death of Arline Hogen, and the trust is still being administered under the supervision of the Cass County District Court. Unless and until those rulings are overturned by the North Dakota Supreme Court, Rodney has no claim to the trust's real property. To the extent the quit-claim deeds purport to convey any interest in real property owned by the Curtiss A. Hogen Trust B to Susan and Marby Hogen, they are nullities.

ORDER

[¶18] THEREFORE, IT IS HEREBY ORDERED that the motion by Steven Hogen, as personal representative of the Estate of Arline Hogen and as trustee of the Curtiss A. Hogen Trust B, to lift the stay on these proceedings is GRANTED.

[¶19] IT IS FURTHER ORDERED that the motion for summary judgment by Steven Hogen, as personal representative of the Estate of Arline Hogen, is GRANTED. The judgment shall provide, and constitute proof, that the personal representative's power over, the title to all real property held by the

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Estate of Arline Hogen is superior to any title or interest of Marby Hogen or Susan Hagen in the estate's property, and that a conveyance of the estate's real property to a third party by the personal representative extinguishes any title to or an interest in said property by Marby Hogen or Susan Hogen.

[¶20] IT IS FURTHER ORDERED that the motion for summary judgment by Steven Hogen, as trustee of the Curtiss A. Hogen Trust B, is GRANTED. The judgment shall provide, and constitute proof, that Marby Hogen or Susan Hogen holds no title or interest in any real property held by the Curtiss A. Hogen Trust B, and that the quit-claim deeds recorded as instrument #1411518 at the Cass County Recorder's Office, and instrument #277184 at the Barnes County Recorder's Office, are declared null and void to the extent they purport to convey any title or interest in the trust's real property to Marby Hogen or Susan Hogen.

[¶21] IT IS FURTHER ORDERED that upon entry of this order any lis pendens still existing on account of this action shall be and are cancelled.

Dated this 15th day of March, 2018.

BY THE COURT:
"s/
Jay Schmitz, District Judge

Memorandum and Order for Summary Judgment
Barnes County File No. 02-2017-CV-116

APPENDIX B

IN DISTRICT COURT, COUNTY OF BARNES,
STATE OF NORTH DAKOTA

Civ. No. 02-2017-CV-00116

Marby Hogen and Susan Hogen,
Plaintiffs,
vs.

Steven C. Hogen, as Personal Representative
of the Estate of Arline H. Hagen, Deceased;
Steven C. Hogen, as a Trustee of the Curtiss
A. Hogen Trust B, as created under the Last
Will and Testament of Curtiss A. Hogen; and
Steven C. Mogen, individually,
Defendants.

ORDER FOR JUDGMENT

[¶1] Pursuant to the Court's Memorandum and Order
Re: Motion for Summary Judgment dated March 15,
2018, and the Order Dismissing Counterclaim dated
April 2, 2018,

[¶2] IT IS ORDERED, ADJUDGED, AND DECREED:

[¶3] Steven C. Hogen, as Personal Representative of
the Estate of Arline H. Hogen, Deceased (hereinafter
referred to as the "Estate") and Steven C. Hogen, as

Trustee of the Curtiss A. Hogen Trust B as created under the Last Will and Testament of Curtiss A. Hogen (hereinafter referred to as the "Trust") are the owners in fee simple of undivided interests in the Barnes County Property and Cass County Property described as follows, to-wit:

Barnes County Property

TRACT ONE: South Half of the Southwest Quarter (S $\frac{1}{2}$ SW1/4) of Section Five (5), Township One Hundred Forty (140) North of Range Fifty-six (56) West of the Fifth Principal Meridian, Barnes County, North Dakota.

TRACT TWO: The North Half of the Southwest Quarter (N 1/2S W1/4) of Section Five (5), Township One Hundred Forty (140) North of Range Fifty-six (56) West of the Fifth Principal Meridian, Barnes County, North Dakota, subject to existing highways, easements and rights of way of record, EXCEPTING the following tract, to-wit: Commencing at the West Quarter corner of said Section Five (5), Township One Hundred Forty (140), Range Fifty-six (56), Barnes County, North Dakota, thence South 46'01'57" East for a distance of 945.90 feet to the point of beginning of said tract of land to be described; thence East for a distance of 525 feet; thence South for a distance of 550 feet; thence West for a

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distance of 395 feet; thence South for a distance of 170 feet; thence West for a distance of 400 feet; thence North for a distance of 400 feet; thence East for a distance of 195 feet; thence North for a distance of 320 feet; thence East for a distance of 75 feet to the point of beginning.

Together with the following Easement

TRACT FM-500E-1
ACCESS ROAD AND UTILITY EASEMENT

A tract of land variable in width situated in the NW1/4SW1/4 of Section 5, Township 140 North, Range 56 West of the Fifth Principal Meridian, Barnes County, North Dakota, lying at various distances on each side of the following described centerline:

Commencing at the West quarter corner of said Section 5; thence South 46°01'57" East for a distance of 945.90 feet; thence West for a distance of 75.00 feet; thence South for a distance of 136.00 feet to the point of beginning of said centerline to be described; thence West with 50.00 feet on each side of said centerline for a distance of 31.00 feet;

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thence North 89°53'33" West with 50.00 feet on each side of said centerline for a distance of 525.00 feet; thence continuing North 89°53'33" West with 75.00 feet on each side of said centerline to the intersection with the West line of said Section 5.

The tract of land herein described contains 1.45 acres, more or less, all of which is included in Tract FM-500E-2. This is a perpetual and assignable easement and right-of-way to locate, construct, operate, maintain, repair and remove a roadway, overhead and/or underground utility lines and a water pipeline, in, upon, over, and across the immediately above described land, together with the right to trim, cut, fell, and remove therefrom, all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right of way as described in Grant of Easement dated November 25, 1964, in Book B-5 of Miscellaneous, Page 157, Register of Deeds of Barnes County, North Dakota.

Cass County Property

TRACT TWO. Northeast Quarter (NE1/4) of Section Thirty-three (33), in Township One Hundred Forty (140)

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North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, EXCEPTING the following described tract, to-wit: The East Half of the East Half of the Northeast Quarter (E1/2E1/2NE1/4) of Section 33, Township 140, Range 54, Cass County, North Dakota, subject to highways, easements and rights of way of record.

TRACT THREE. Northwest Quarter (NW1/4) of Section Thirty-four (34), in Township One Hundred Forty (140) North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, subject to highways, easements and rights of way of record, EXCEPTING the following tracts, to-wit:

That part of the Northwest Quarter of Section Thirty-four, in Township One Hundred Forty North of Range Fifty-four West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, described as follows. to-wit; Commencing at the Northwest corner of said Northwest Quarter; thence South 00°52'48" East, assumed bearing along the

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West line of said Northwest Quarter, a distance of 549.67 feet to the point of beginning of the tract to be described; thence North $88^{\circ}54'30''$ East 388.17 feet; thence South $02^{\circ}51'55''$ East 548.01 feet; thence South $88^{\circ}54'23''$ West 407.12 feet to the West line of said Northwest Quarter; thence North $00^{\circ}52'48''$ West 547.77 feet to the point of beginning.

AND

A tract of land situated in the Northwest Quarter of Section Thirty four, Township One Hundred Forty North of Range Fifty-four West of the Fifth Principal Meridian, Cass County, North Dakota, more particularly described as follows: Commencing at the Northwest corner of the Northwest Quarter of said Section Thirty-four; thence North $89^{\circ}52'47''$ East along the Section line and the North line of Hogen Subdivision a distance of 708.89 feet to a point; thence South $00^{\circ}52'47''$ East

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along the East line of Lot One, Block One, Hogen Subdivision a distance of 537.60 feet to an iron pin at the Southeast corner of said Lot One, the point of beginning; thence continuing South 00°52'47" East a distance of 239.48 feet to an iron pin; thence South 88°38'54" West a distance of 312.42 feet to an iron pin on the East line of Lot Two, Block One, Hogen Subdivision; thence North 02°51'55" West along the East line of said Lot Two a distance of 241.00 feet to an iron pin at the Northeast corner of said Lot Two and on the South line of said Lot One; thence North 88°54'23" East along the South line of said Lot One a distance of 320.69 feet to the point of beginning.

AND ALSO LESS

Lot One (1), Block One (1),
Hogen Subdivision, Cass
County, North Dakota.

TRACT FOUR. Lot One (1), Block One (1), Hogen Subdivision, Cass County, North Dakota.

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[¶4] 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 an interest in said property by Marby Hagen or Susan Hogen.

[¶5] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED neither Marby Hogen nor Susan Hogen hold any title or interest in any of the above described real property held by the Trust, and the Quit Claim Deeds recorded as Document No. 1411518 at the Cass County Recorder's Office, and Document No. 277184 at the Barnes County Recorder's Office are declared null and void to the extent they purport to convey any title or interest in the Trust's real property to Marby Hogen or to Susan Hogen.

[¶6] IT IS FURTHER ADJUDGED AND DECREED that any lis pendens (Cass County Document No. 151 1717 and Barnes County Document No. 285453) still existing on account of this action is hereby cancelled and the Recorders for Cass County and Barnes County are hereby ordered to discharge the same of record.

[¶7] LET JUDGMENT BE ENTERED
ACCORDINGLY.

Dated this 5th day of April , 2018.

BY THE COURT
Signed: 4/5/2018 1:46:09 PM

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Jay Schmitz, District Judge

APPENDIX C

IN DISTRICT COURT, COUNTY OF BARNES,
STATE OF NORTH DAKOTA

Civ. No. 02-2017-CV-00116

Marby Hogen and Susan Hogen,

Plaintiffs,
vs.

Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hogen, Deceased; Steven C. Hogen, as a Trustee of the Curtiss A. Hogen Trust B, as created under the Last Will and Testament of Curtiss A. Hogen; and Steven C. Hogen, individually,

Defendants.

ORDER DISMISSING COUNTERCLAIM

[¶1] This matter came on before the Court, Honorable Jay Schmitz, District Judge, in chambers and without hearing, upon the Stipulation for Dismissal of Counterclaim executed by counsel for the parties.

[¶2] The Court being familiar with its files and records in this matter, and finding the Stipulation to be effective to bring this matter to a full and final conclusion,

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[¶3] IT IS HEREBY ORDERED:

[¶4] The Counterclaim asserted by defendants is hereby dismissed, with prejudice.

Dated this ____ day of ____ , 2018.

BY THE COURT
Signed: 4/5/2018 1:44:59 PM
“s/” Jay Schmitz, District Judge

APPENDIX D

IN DISTRICT COURT, COUNTY OF BARNES,
STATE OF NORTH DAKOTA

Civ. No. 02-2017-CV-001 16

Marby Hogen and Susan Hogen,

Plaintiffs,

vs.

Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hagen, Deceased; Steven C. Hogen, as a Trustee of the Curtiss A. Hogen Trust B, as created under the Last Will and Testament of Curtiss A. Hogen; and Steven C. Mogen, individually,

Defendants.

JUDGMENT

[¶1] Pursuant to the Order for Judgment,

[¶2] IT IS ORDERED, ADJUDGED, AND DECREED:

[¶3] Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hogen, Deceased (hereinafter referred to as the "Estate") and Steven C. Hogen, as Trustee of the Curtiss A. Hogen Trust B as created under the Last Will and Testament of Curtiss A. Hogen (hereinafter referred to as the "Trust") are the owners

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in fee simple of undivided interests in the Barnes County Property and Cass County Property described as follows, to-wit:

Barnes County Property

TRACT ONE: South Half of the Southwest Quarter (S $\frac{1}{2}$ SW1/4) of Section Five (5), Township One Hundred Forty (140) North of Range Fifty-six (56) West of the Fifth Principal Meridian, Barnes County, North Dakota.

TRACT TWO: The North Half of the Southwest Quarter (N 1/2S W1/4) of Section Five (5), Township One Hundred Forty (140) North of Range Fifty-six (56) West of the Fifth Principal Meridian, Barnes County, North Dakota, subject to existing highways, easements and rights of way of record, EXCEPTING the following tract, to-wit: Commencing at the West Quarter corner of said Section Five (5), Township One Hundred Forty (140), Range Fifty-six (56), Barnes County, North Dakota, thence South 46'01"57" East for a distance of 945.90 feet to the point of beginning of said tract of land to be described; thence East for a distance of 525 feet; thence South for a distance of 550 feet; thence West for a distance of 395 feet; thence South for a distance of 170 feet; thence West for a distance of 400 feet; thence North for a distance of 400 feet; thence East for

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distance of 195 feet; thence North for a distance of 320 feet; thence East for a distance of 75 feet to the point of beginning.

Together with the following Easement
TRACT FM-500E-1

ACCESS ROAD AND UTILITY EASEMENT

A tract of land variable in width situated in the NW1/4SW1/4 of Section 5, Township 140 North, Range 56 West of the Fifth Principal Meridian, Barnes County, North Dakota, lying at various distances on each side of the following described centerline:

Commencing at the West quarter corner of said Section 5; thence South 46°01'57" East for a distance of 945.90 feet; thence West for a distance of 75.00 feet; thence South for a distance of 136.00 feet to the point of beginning of said centerline to be described; thence West with 50.00 feet on each side of said centerline for a distance of 31.00 feet; thence North 89°53'33" West with 50.00 feet on each side of said centerline for a distance of 525.00 feet; thence continuing North 89°53'33" West with 75.00

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feet on each side of said centerline to the intersection with the West line of said Section 5.

The tract of land herein described contains 1.45 acres, more or less, all of which is included in Tract FM-500E-2. This is a perpetual and assignable easement and right-of-way to locate, construct, operate, maintain, repair and remove a roadway, overhead and/or underground utility lines and a water pipeline, in, upon, over, and across the immediately above described land, together with the right to trim, cut, fell, and remove therefrom, all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right of way as described in Grant of Easement dated November 25, 1964, in Book B-5 of Miscellaneous, Page 157, Register of Deeds of Barnes County, North Dakota.

Cass County Property

TRACT TWO. Northeast Quarter (NE1/4) of Section Thirty-three (33), in Township One Hundred Forty (140) North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, EXCEPTING the following described tract, to-wit: The East Half of the East Half of the Northeast Quarter

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(E1/2E1/2NE1/4) of Section 33, Township 140, Range 54, Cass County, North Dakota, subject to highways, easements and rights of way of record.

TRACT THREE. Northwest Quarter (NW1/4) of Section Thirty-four (34), in Township One Hundred Forty (140) North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, subject to highways, easements and rights of way of record, EXCEPTING the following tracts, to-wit:

That part of the Northwest Quarter of Section Thirty-four, in Township One Hundred Forty North of Range Fifty-four West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, described as follows. to-wit; Commencing at the Northwest corner of said Northwest Quarter; thence South 00°52'48" East, assumed bearing along the West line of said Northwest Quarter, a distance of 549.67 feet to the point of beginning of the tract to be

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described; thence North $88^{\circ}54'30''$ East 388.17 feet; thence South $02^{\circ}51'55''$ East 548.01 feet; thence South $88^{\circ}54'23''$ West 407.12 feet to the West line of said Northwest Quarter; thence North $00^{\circ}52'48''$ West 547.77 feet to the point of beginning.

AND

A tract of land situated in the Northwest Quarter of Section Thirty four, Township One Hundred Forty North of Range Fifty-four West of the Fifth Principal Meridian, Cass County, North Dakota, more particularly described as follows: Commencing at the Northwest corner of the Northwest Quarter of said Section Thirty-four; thence North $89^{\circ}52'47''$ East along the Section line and the North line of Hogen Subdivision a distance of 708.89 feet to a point; thence South $00^{\circ}52'47''$ East along the East line of Lot One, Block One, Hogen Subdivision a distance of 537.60 feet to an iron pin at

the Southeast corner of said Lot One, the point of beginning; thence continuing South $00^{\circ}52'47''$ East a distance of 239.48 feet to an iron pin; thence South $88^{\circ}38'54''$ West a distance of 312.42 feet to an iron pin on the East line of Lot Two, Block One, Hogen Subdivision; thence North $02^{\circ}51'55''$ West along the East line of said Lot Two a distance of 241.00 feet to an iron pin at the Northeast corner of said Lot Two and on the South line of said Lot One; thence North $88^{\circ}54'23''$ East along the South line of said Lot One a distance of 320.69 feet to the point of beginning.

AND ALSO LESS

Lot One (1), Block One (1),
Hogen Subdivision, Cass
County, North Dakota.

TRACT FOUR. Lot One (1), Block One (1), Hogen Subdivision, Cass County, North Dakota.

[¶4] 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 an interest in said property by Marby Hogen or Susan Hogen.

[¶5] IT IS FURTHER ORDERED, ADJUDGED, AND DECREED neither Marby Hogen nor Susan Hogen hold any title or interest in any of the above described real property held by the Trust, and the Quit Claim Deeds recorded as Document No. 1411518 at the Cass County Recorder's Office, and Document No. 277184 at the Barnes County Recorder's Office are declared null and void to the extent they purport to convey any title or interest in the Trust's real property to Marby Hogen or to Susan Hogen.

[¶6] IT IS FURTHER ADJUDGED AND DECREED that any lis pendens (Cass County Document No. 1511717 and Barnes County Document No. 285453) still existing on account of this action is hereby cancelled and the Recorders for Cass County and Barnes County are hereby ordered to discharge the same of record.

[¶7] WITNESS, the Honorable Jay Schmitz, Judge of the District Court of the County of Barnes and State of North Dakota, and my hand and the seal of this Court, at Valley City, North Dakota, this 6th day of April, 2018.

BY THE COURT:

Signed: 4/6/2018 7:16:07 PM
Wanda Auka

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Clerk of Barnes County District Court
Southeast Judicial District

APPENDIX E

921 N.W.2d 672
Supreme Court of North Dakota.

Marby HOGEN and Susan Hogen, Plaintiffs and
Appellants

v.

Steven C. Hogen, as Personal Representative of
the Estate of Arline H. Hogen, Deceased; Steven C.
Hogen, as Trustee of the Curtiss A. Hogen Trust B,
as Created Under the Last Will and Testament of
Curtiss A. Hogen; and Steven C. Hogen,
Individually, Defendants and Appellees

No. 20180143

Filed 1/15/2019

Rehearing Denied 2/21/2019

Appeal from the District Court of Barnes County,
Southeast Judicial District, the Honorable Jay A.
Schmitz, Judge.

Attorneys and Law Firms

Jonathan T. Garaas, Fargo, N.D., for plaintiffs and
appellants.

Sara K. Sorenson (argued) and Robert G. Hoy (on
brief), West Fargo, N.D., for defendants and appellees.

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Opinion

Tufte, Justice.

*673 [¶1] Marby and Susan Hogen appeal from a summary judgment in their quiet title action after the district court determined their interest in certain land was inferior to the interests of the Curtiss A. Hogen Trust B and the Estate of Arline Hogen. Marby and Susan Hogen argue the district court erred in not quieting title to the land in them. We affirm.

[¶2] At issue in this appeal is an interest in about 737 acres of farmland in Barnes and Cass Counties. Curtiss and Arline Hogen were married and jointly owned the farmland. In the 1960s, their son, Rodney Hogen, began farming the land with Curtiss Hogen. Curtiss Hogen died in 1993, and his will distributed his undivided one-half interest in the farmland to the Curtiss A. Hogen Trust B, with Arline Hogen designated as the recipient of the net income from the Trust. Curtiss Hogen's will appointed his two children, Steven and Rodney Hogen, as co-trustees of the Trust and authorized the Trust to continue the farming operation. Rodney Hogen continued farming the land under a cash rent and crop-share agreement with the Trust and with Arline Hogen, the owner of the other undivided one-half interest in the farmland.

[¶3] Arline Hogen died in March 2007, and her will equally devised all her property to Steven and Rodney Hogen. Steven Hogen was appointed personal representative of Arline Hogen's Estate, and during the probate of her estate, a dispute arose about the

financial obligations and arrangements for the farming operation and the ownership of the farmland. Those disputes culminated in two prior appeals to this Court involving Steven and Rodney Hogen and the property interests held by the Estate of Arline Hogen and by the Curtiss A. Hogen Trust B. *In re Curtiss A. Hogen Trust B*, 2018 ND 117, 911 N.W.2d 305; *In re Estate of Hogen*, 2015 ND 125, 863 N.W.2d 876.

[¶4] In *Estate of Hogen*, 2015 ND 125, ¶¶ 8-27, 863 N.W.2d 876, this Court rejected Rodney Hogen's argument that his share of his mother's land vested in him by operation of law immediately upon her death and held his interest in that land was subject to probate administration and a retainer action by Steven Hogen as personal representative of the Estate. We held that Rodney Hogen's cash rent and crop-share obligations to his mother's estate were a noncontingent indebtedness subject to probate administration and a retainer claim in the administration of her estate. *Id.* at ¶¶ 13 -27. We explained a personal representative's authority over title to a decedent's property was subject to estate administration and a devisee's title to the property was subject to administration and remained encumbered as long as the estate was in administration or subject to further administration. *Id.* We concluded a devisee's right to a decedent's property was subject to administration by a personal representative, which may continue until termination of the personal representative's appointment or execution of an instrument or deed of distribution. *Id.* at ¶ 25. We concluded a devisee's title to a decedent's property was encumbered as long as the estate was

subject to administration. *Id.* at ¶¶ 26 -27.

[¶5] In *Hogen Trust*, 2018 ND 117, ¶¶ 15-23, 911 N.W.2d 305, we rejected Rodney Hogen’s arguments that his father’s trust immediately terminated as a matter of law upon Arline Hogen’s death and that he and Steven Hogen automatically *674 became fully vested owners of the land as tenants in common upon her death. We concluded the plain language of the Trust contemplated further and continuing action after the surviving spouse’s death to effectuate a division of the Trust property into equal shares. *Id.* We held the evidence supported the district court’s decision that the Trust was entitled to an offset against Rodney Hogen’s share of the Trust property for his breaches of fiduciary duties to the Trust. *Id.* at ¶¶ 24 -36.

[¶6] After the probate court issued an order approving the final accounting and settlement in the probate of Arline Hogen’s estate in 2013 and before this Court’s decision in *Estate of Hogen*, 2015 ND 125, 863 N.W.2d 876, Rodney Hogen and his wife, Susan Hogen, executed quit claim deeds in February 2014, granting all their right, title, and interest in the tracts of land to their daughter, Marby Hogen, while reserving a life estate for themselves. In June 2017, Marby and Susan Hogen brought this quiet title action against Steven Hogen personally and as personal representative of the Estate and as trustee of the Trust to quiet their title to the land described in the February 2014 quit claim deeds. In June 2017, lis pendens were filed against the land in the recorder’s offices in Barnes and Cass Counties, giving notice of the pending quiet

title action.

[¶7] In October 2017, the district court ordered cancellation of the lis pendens. In March 2018, the district court granted Steven Hogen's motion for summary judgment, explaining the interests of Marby and Susan Hogen depended on whatever interest their grantor, Rodney Hogen, had in the farmland and that inquiry required separate analyses of his interests in the property held by the Estate and held by the Trust.

[¶8] In addressing the property held by the Estate, the district court relied extensively on Estate of Hogen and ruled the Estate's power over the title to the land during the administration of the Estate was an encumbrance upon Rodney Hogen's title and interest as an heir and was superior to any interest of Marby and Susan Hogen in the land. The court concluded any conveyance of the Estate's interest in the land to a third party extinguished the interests of Marby and Susan Hogen in the land. The court rejected their argument that administration of the Estate was complete upon entry of the probate court's order approving the final settlement of the Estate in 2013, because the Estate was still being administered under court order and Steven Hogen remained the duly appointed personal representative of the Estate. The court concluded:

Steve Hogen, in his capacity as personal representative of the Estate of Arline Hogen, is entitled to summary judgment as a matter of law because administration of the estate is ongoing, and during administration Steven's

power over the title to the estate's real property embraces all possible transactions which might result in a conveyance or encumbrance of the estate's real property. *Estate of Hogen*, 2015 ND 125 ¶ 20. Steven's power over title is an encumbrance upon Rodney Hogen's title to that property as an heir of the estate (*id.* at ¶ 26). Until administration of the estate is finalized in accordance with the orders of the Cass County District Court, the personal representative's plenary power over the title to all of the estate's real property is superior to any right, title, or interest of Rodney Hogen, and therefore superior to any right, title, or interest that Marby or Susan Hogen acquired by and through the quit-claims deeds from Rodney. Rodney will have a superior title to or interest in any particular *675 parcel of real property only if, and when, he receives a deed of distribution for that parcel from the estate's personal representative.

[¶9] In addressing the property held by the Trust, the district court relied extensively on the trial court's rulings in the Trust proceeding, which had not yet been affirmed by this Court in *Hogen Trust*. The district court ruled the Trust did not terminate immediately upon Arline Hogen's death, an undivided one-half share of the Trust land did not devolve to Rodney Hogen immediately upon her death, the Trust was the absolute owner of the land, Steven Hogen was sole trustee of the Trust with sole authority to act on behalf of the Trust, a co-trustee's deed by Rodney Hogen to himself and his brother was void, and

Rodney Hogen's subsequent quit claim deeds to Marby and Susan Hogen were void to the extent they purported to convey any Trust interest in the land to Marby and Susan Hogen. The court concluded:

Rodney does not have any cognizable title or interest in any specific property owned by the trust, "only" a beneficial interest in a one-half share of the trust corpus. The trustee's power and control over the trust's property is equal to an absolute owner's. N.D.C.C. § 59-16-15. Until the trust is terminated, the trustee—Steven—can sell or change the character of the trust property at any time. N.D.C.C. § 59-16-16(2), (3). The Cass County District Court has ruled that the trust did not terminate upon the death of Arline Hogen, and the trust is still being administered under the supervision of the Cass County District Court. Unless and until those rulings are overturned by the North Dakota Supreme Court, Rodney has no claim to the trust's real property. To the extent the quit-claim deeds purport to convey any interest in real property owned by the Curtiss A. Hogen Trust B to Susan and Marby Hogen, they are nullities.

[¶10] The district court's judgment also cancelled and discharged any lis pendens related to the quiet title action.

II

[¶11] Marby and Susan Hogen argue the district court erred in not quieting title in the farmland to them.

They claim their title to the land is superior to the title of the Trust and the Estate because when Rodney Hogen executed the quit claim deeds to them, he was a vested owner of an undivided one-half interest in all the land through his parents' probated wills. They argue Rodney Hogen's interest in the land fully vested by operation of law when Arline Hogen died and he did not need a deed from the personal representative or the trustee to transfer that interest to himself. They argue their interests in the land are free from any claims by the Estate or by the Trust. They also claim they are not bound by the decision in the Trust proceeding because they were not parties to that proceeding.

[¶12] Steven Hogen responds summary judgment was appropriate because any interest of Marby and Susan Hogen under the quit claim deeds from Rodney Hogen was dependent on his interest in the land and it is undisputed that he will receive no land from the Trust or Estate because the land has been sold to pay the retainer claims incurred in the Estate proceeding and the offset expenses incurred in the Trust proceeding.

[¶13] The district court decided this action by summary judgment, which is "a procedural method to promptly resolve a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only *676 issue to be resolved is a question of law." *Hogen Trust*, 2018 ND 117, ¶ 16, 911 N.W.2d 305. "Whether a district court properly granted summary judgment is a question of law, which we review *de novo* on the entire record."

Id.

[¶14] In a quiet title action, plaintiffs must recover on the strength of their own title. *Gajewski v. Bratcher*, 221 N.W.2d 614, 637 (N.D. 1974); *Woodland v. Woodland*, 147 N.W.2d 590, 602 (N.D. 1966); *Shuck v. Shuck*, 77 N.D. 628, 634, 44 N.W.2d 767, 771 (1950). In *Shuck*, at 637, 44 N.W.2d at 773, this Court said that a grantee obtaining no title under a deed from a grantor has no title to transfer to another. *Shuck* recognizes the general rule that a transferor cannot convey an interest greater than the transferor has in the property, and a transferor who does not hold title to property cannot pass or transfer title to that property. 23 Am. Jur. 2d *Deeds* § 7 (2013). See N.D.C.C. § 47-09-16 (“A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily implied.”).

[¶15] Here, Marby and Susan Hogen obtained their interests in the land from Rodney Hogen, and their interest in the land depends on his interest in the land. In this case, their interest in the land is derived from Rodney Hogen’s quit claim deeds, and his quit claim deeds conveyed only his interest or title, if any, in the land rather than the land itself. See *Carkuff v. Balmer*, 2011 ND 60, ¶ 10, 795 N.W.2d 303; *Gajewski*, 221 N.W.2d at 637. Rodney Hogen’s interests in the land were determined in the Estate and the Trust proceedings to be subject to the Estate administration and to an offset in the Trust proceeding. We rejected Rodney Hogen’s arguments that he was immediately vested with title to the land when his mother died.

Hogen Trust, 2018 ND 117, ¶ 22, 911 N.W.2d 305; *Estate of Hogen*, 2015 ND 125, ¶¶ 1, 27, 863 N.W.2d 876. To the extent the appellants' arguments in this case about the strength of their title are based on arguments we rejected in those proceedings, we again reject those arguments and we evaluate the appellants' interests in the Estate and the Trust land.

[¶16] In *Estate of Hogen*, 2015 ND 125, ¶ 27, 863 N.W.2d 876, we held Rodney Hogen's interest in Estate property was subject to the personal representative's power during administration of the Estate to offset any noncontingent indebtedness of Rodney Hogen to the Estate. Although Rodney Hogen claims the administration of the Estate ended with the probate court's order approving the final accounting and settlement in the probate of the Estate in 2013, this record does not reflect an order closing the Estate or discharging Steven Hogen as personal representative of the Estate. See N.D.C.C. § 30.1-21-01. The probate court's order approving the final accounting in 2013 indicates the Estate was still subject to administration by the personal representative. When Rodney Hogen issued the quit claim deeds to Marby and Susan Hogen in February 2014, his interest in the land held by the Estate was still subject to administration. We agree with the district court's conclusion that Steven Hogen's power over the Estate property as personal representative is superior to any title or interest of Marby and Susan Hogen in the Estate property and that any conveyance of that property to a third party by the personal representative extinguishes their title or interest in the land. We affirm the summary judgment as to the

Estate land.

[¶17] In considering the Trust land, the district court in this action relied on the trial court's decision in the Trust proceeding, which ruled the Trust did not *677 terminate upon Arline Hogen's death and voided quit claim deeds issued solely by Rodney Hogen as co-trustee to himself and Steven Hogen on the grounds that the discretionary act required consent of both trustees. The district court explained the prior Trust proceeding authorized Steven Hogen, as sole trustee, to sell Trust property to pay mortgages, claims against Rodney Hogen, and legal fees and costs incurred by the Trust. The district court concluded the Trust was the absolute owner of the Trust land, Steven Hogen had sole authority as trustee to act on behalf of the Trust, Steven Hogen was authorized to sell Trust property, and Steven Hogen had not executed or delivered deeds for Trust property to the Trust's remainder beneficiaries. The court concluded Rodney Hogen had no claim to the Trust land and to the extent his quit claim deeds purported to convey Trust land to Marby and Susan Hogen, those deeds were nullities. The district court's rationale in this case is consistent with this Court's decision in *Hogen Trust*, 2018 ND 117, 911 N.W.2d 305, affirming the trial court's decision in the Trust proceeding. We conclude the court did not err in granting summary judgment determining Marby and Susan Hogen had no interest in the Trust land.

III

[¶18] Marby and Susan Hogen argue good cause was

not established to cancel their lis pendens against the land. Because we affirm the summary judgment in the quiet title action, we conclude any issue about whether the lis pendens was wrongfully discharged is moot. *N. Rock Island Plow Co. v. Jepson*, 28 N.D. 29, 30, 147 N.W. 729 (1914) (dismissing appeal from order cancelling lis pendens where original action was affirmed).

IV

[¶19] We have considered the remaining issues raised by the parties and conclude they are either unnecessary for our decision or without merit. We affirm the summary judgment.

[¶20] Jerod E. Tufte

Daniel J. Crothers

Jon J. Jensen

Lisa Fair McEvers

Gerald W. VandeWalle, C.J.

APPENDIX F

SUPREME COURT OF NORTH DAKOTA
OFFICE OF THE CLERK
600 E Boulevard Avenue
Bismarck, ND 58505-0530
(701)328-2221 (voice) (701) 328-4480 (fax)
1-800-366-6888 (TTY)
supclerkofcourt@ndcourts.gov
(via e-mail only)
February 21, 2019
Jonathan T. Garaas
DeMores Office Park
1314 23rd St. S.
Fargo, ND 58103-3707

RE: Hogen, et al. v. Hogen, et al.

Supreme Court No. 20180143

Barnes Co. No. 2017-CV-00116

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

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/s/ Sheree Locken
Deputy Clerk
North Dakota Supreme Court
pc: Robert G. Hoy
Sara K. Sorenson
The Honorable Jay A. Schmitz, District Judge

APPENDIX G

Article XIV, § 1, of the Articles of Amendment to the Constitution of the United States of America states:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

N.D.C.C. § 30.1-03-01. (1-401) Notice--Method and time of giving

1. If notice of a hearing on any petition is required and, except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or the interested person's attorney if the interested person has appeared by attorney or requested that notice be sent to the interested person's attorney. Notice shall be given:
 - a. By mailing a copy thereof at least fourteen days before the time set for the hearing by certified or ordinary first-class mail addressed to the person being notified at the post-office address given in that person's demand for notice, if any, or at that person's office or place of residence, if known;
 - b. By delivering a copy thereof to the person being notified personally at least fourteen days before the time set for the hearing; or
 - c. If the address, or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three consecutive weeks, a copy thereof in a newspaper

having general circulation in the county where the hearing is to be held, the last publication of which is to be at least ten days before the time set for the hearing.

2. The court for good cause shown may provide for a different method or time of giving notice for any hearing.
3. Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

N.D.C.C. § 30.1-03-03. (1-403) Pleadings--When parties bound by others--Notice

In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:

1. Interests to be affected must be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in another appropriate manner.
2. A person is bound by an order binding another in the following cases:
 - a. An order binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of

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appointment, including one in the form of a power of amendment, binds another person to the extent that person's interests, as objects, takers in default, or otherwise, are subject to the power.

b. To the extent there is no conflict of interest between them or among persons represented, an order binding a conservator binds the person whose estate the conservator controls; an order binding a guardian binds the ward if no conservator of the ward's estate has been appointed; an order binding a trustee binds a beneficiary of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a former fiduciary and in proceedings involving creditors or other third parties; an order binding a personal representative binds a person interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and an order binding a sole holder or all coholders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default, or otherwise are subject to the power.

c. Unless otherwise represented, a minor or an incapacitated, unborn, or unascertained person is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding.

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3. If no conservator or guardian has been appointed, a parent may represent a minor child.

4. Notice is required as follows:

a. The notice prescribed by section 30.1-03-01 must be given to every interested person or to one who can bind an interested person as described in subdivision a or b of subsection 2. Notice may be given both to a person and to another who may bind that person.

b. Notice is given to unborn or unascertained persons who are not represented under subdivision a or b of subsection 2 by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

5. At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall state its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

N.D.C.C. § 30.1-12-01. (3-101) Devolution of estate at death--Restrictions

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to the person's property, are subject to the restrictions and limitations contained in this title to facilitate the prompt settlement of estates. Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to the decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property, and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

N.D.C.C. § 30.1-16-04. (3-504) Supervised administration--Powers of personal representative

Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this title, but shall not exercise the power to make any distribution of the estate without prior order of the court. Any other restriction

on the power of a personal representative which may be ordered by the court must be endorsed on the personal representative's letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

N.D.C.C. § 47-09-02. What may be transferred--Exceptions

Property of any kind may be transferred except:

1. A mere possibility not coupled with an interest.
2. A mere right of re-entry or of repossession for breach of a condition subsequent which cannot be transferred to anyone except the owner of the property affected thereby.

N.D.C.C. § 59-03-14. Whole estate vests in trustees.

Except as otherwise provided in this chapter, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust.

N.D.C.C. § 59-03-20. When estate of trustee ceases.

When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

APPENDIX I

Filing Date: August 3, 2017, in Barnes County
District Court; Docket Entry #28

IN THE DISTRICT COURT FOR
BARNES COUNTY, NORTH DAKOTA

Hogen and Susan Hogen,
Plaintiffs,
vs.

Steven C. Hogen, as Personal Representative
of the Estate of Arline H. Hogen, Deceased;
Steven C. Hogen, as a Trustee of the Curtiss A.
Hogen Trust B, as created under the Last Will
and Testament of Curtiss A. Hogen; and
Steven C. Hogen, individually,
Defendants.

Civil No. 02-2017-CV-00116

**Plaintiff's Brief Resisting Motion for Summary
Judgment**

* * *

[¶32] **D. Plaintiffs Marby Hogen and Susan Hogen are not bound by Judge McCullough's decisions.**

[¶33] It is first noted that Judge McCullough never intended to adjudicate the validity of the Quit Claim Deeds to Marby Hogen and Susan Hogen, or any rights they may have in the property. See ¶ 10 of Judge McCullough's Memorandum and Order Granting Motion to Amend Petition.

[¶34] Further, Plaintiffs Marby Hogen and Susan Hogen obtained their title in 2014, through recorded quit claim deeds, prior to the Trust litigation involving the testamentary trust created under Curtiss A. Hogen's Will that commenced thereafter, in 2015. Marby Hogen and Susan Hogen were neither parties nor "privies" in the Trust litigation because their real property interest vested prior to the 2015 Trust litigation. See, Bismarck Public School District No. 1 v. Hirsch, 136 N.W.2d 449 (N.D. 1965) for the general rule:

In support of the rule that one is not a privy to a judgment where his succession to the rights of property thereby affected occurred previous to the institution of the suit, see: *Texas Co. v. Marlin*, 109 F.2d 305 (5th Cir. 1940); *White v. Peterson*, 222 Iowa 720, 269 N.W. 878; *Hawkeye Life Ins. Co. v. Valley-Des Moines Co.*, 220 Iowa 556, 260 N.W. 669, 105 A.L.R. 1018; *Leach v. First Nat. Bank*, 206 Iowa 265, 217 N.W. 865; *Hocken v. Allstate Ins. Co.*, 235 Mo.App. 991, 147 S.W.2d 182; *Application of Commercial Casualty Ins. Co.*, 257 App.Div. 536, 13 N.Y.S.2d 754,

reargument denied 257 App.Div. 1080, 14 N.Y.S.2d 807, appeal denied; *Tibbals v. Graham*, 50 Wyo. 277, 61 P.2d 279, 62 P.2d 285, further hearing denied, 51 Wyo. 350, 66 P.2d 1048; *Boulter v. Commercial Standard Ins. Co.*, 175 F.2d 763 (9th Cir. 1949); *Mitchell v. Austin*, 266 Ala. 128, 94 So.2d 391; *Allstate Ins. Co. v. Warren*, 125 So.2d 886 (Fla.Ct.App.1961); *In re Richardson's Estate*, 250 Iowa 275, 93 N.W.2d 777; *Henschke v. Christian*, 228 Minn. 142, 36 N.W.2d 547; *Suburban Home Mortg. Co. v. Hopwood*, 83 Ohio App. 115, 81 N.E.2d 387.

[¶35] Summary judgment in this Quiet Title Action cannot be granted upon a claim that Marby Hogen and Susan Hogen are bound by Judge McCullough's orders. Rodney Hogen's ownership of land, through his parents' Will(s), was not a true issue in the Trust litigation as it is in this case. The trust litigation relates to how it was to be distributed because Steven Hogen did not want an equal distribution as required by their parent's Will(s).

* * *

APPENDIX J

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Marby Hogen and Susan Hogen,
Plaintiffs-Appellants

vs.

Steven C. Hogen, as Personal Representative
of the Estate of Arline H. Hogen, Deceased;
Steven C. Hogen, as a Trustee of the Curtiss A.
Hogen Trust B, as created under the Last Will
and Testament of Curtiss A. Hogen; and
Steven C. Hogen, individually,

Defendants-Appellees.

NOTICE OF APPEAL

Civil No. 02-2017-CV-00116

(Barnes County District Court)

[¶1] TO: The above named Defendants-Appellees,
and their attorneys, Robert G. Hoy and Sara K.
Sorenson, of OHNSTAD TWICHELL, P.C., 444
Sheyenne Street, Suite 102, P.O. Box 458, West Fargo,
ND 58078-0458 and to the District Court in and for

Barnes County, North Dakota:

[¶2] PLEASE TAKE NOTICE that the above named Plaintiffs-Appellants do appeal to the Supreme Court of the State of North Dakota from the Judgment of the said District Court entered on April 6, 2018; from the Memorandum and Order Re: Motion for Summary Judgment, dated March 15, 2018; and from the Order for Release of Lis Pendens, dated October 26, 2017.

[¶3] The preliminary statement of issues consists of the following probable issues:

- [¶4] A. Did Appellants' grantor, Rodney Hogen, through his mother Arline H. Hogen's Will, have a vested interest in inherited real estate that he could freely alienate and convey a remaindermens' interest to the Appellants upon Arline H. Hogen's March 23, 2007, death?
- [¶5] B. Did Appellants' grantor, Rodney Hogen, through his father Curtiss A. Hogen's testamentary trust, have a vested interest in the testamentary trust's real estate that he could freely alienate and convey a remaindermens' interest to the Appellants no later than "upon the death" of Arline H. Hogen [March 23, 2007]?
- [¶6] C. Are two (2) February 20, 2014, Quit Claim Deeds from Rodney Hogen, as grantor, to Marby Hogen, as grantee,

[which quit claim deeds reserve a life estate to Rodney Hogen and grant a life estate to Susan Hogen of all subject Cass County and Barnes County real property] null and void?

- [¶7] D. Does Steven C. Hogen, as either a Personal Representative of the Estate of Arline H. Hogen, Deceased, or as a Trustee of the Curtiss A. Hogen Trust B, have a fee simple interest [or other ownership interest] in the real estate that was the subject matter of the underlying quiet title action?
- [¶8] E. Did Personal Representative Steven C. Hogen's statutory power over the Appellants' interest in real property terminate, under the provisions of N.D.C.C. § 30.1-17-10, no later than March 6, 2014, when, in Cass Court file No. 09-07-P-100, the probate court issued its Order on Second Amended Petition for Approval of Final Account?
- [¶9] F. In a quiet title action, is a personal representative, of a decedent's estate, required to first assert a counterclaim claiming an estate administrative need over real property, and then factually prove the administrative need, before his statutory "power" is recognized as an encumbrance to the real estate interest that is the subject matter of the quiet

title action?

- [¶10] G. Were Appellants, Marby Hogen and Susan Hogen, bound by orders and/or judgments, made in trust proceedings involving the Curtiss A. Hogen Trust B, when such orders and/or judgments are subsequent to the February 20, 2014, quit claim deeds to the Appellants?
- [¶11] H. Did the lower court abuse its discretion by denying the Appellants the provisional remedy of a lis pendens?
- [¶12] I. Did the Appellees establish the requisite “good cause” to cancel, or modify, the two (2) Lis Pendens placed of record in Barnes County and Cass County by the Appellants?
- [¶13] J. Did the lower court err by not quieting Marby Hogen and Susan Hogen’s title to the remainderns’ interest, plead by them, in the subject Barnes County and Cass County real estate?

Dated this 10th day of April, 2018.

GARAAS LAW FIRM
“s/”
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App. 64

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APPENDIX K

Filing Date: June 21, 2018, in Supreme Court of
North Dakota; Docket Entry #8

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Marby Hogen and Susan Hogen,

Plaintiffs-Appellants

vs.

Steven C. Hogen, as Personal Representative of the
Estate of Arline H. Hogen, Deceased; Steven C.
Hogen, as a Trustee of the Curtiss A. Hogen Trust B,
as created under the Last Will and Testament of
Curtiss A. Hogen; and Steven C. Hogen, individually,

Defendants-Appellees.

BRIEF OF PLAINTIFFS-APPELLANTS

Supreme Court No. 20180143

Civil No. 02-2017-CV-00116

(Barnes County District Court)

* * *

[¶45] 5. The Hogens are not bound by Judge McCullough's decisions in the Trust proceedings.

[¶46] It is first noted that Judge McCullough, in the Trust proceedings, never intended to adjudicate the validity of the Quit Claim Deeds to Marby and Susan, or any rights they may have in the property. See ¶ 10 of Judge McCullough's Memorandum and Order Granting Motion to Amend Petition, found at Appendix pages 120-121, stating, "(t)hat portion of the proposed AMENDED PETITION which requests the Court adjudicate the validity of the Quit Claim Deeds to Marby Hogen (or any rights she may have in the property) are not allowed."

[¶47] Further, the Hogens obtained their title in 2014, through recorded quit claim deeds, prior to the Trust litigation which began in 2015, involving Curtiss' testamentary trust. Neither Marby nor Susan were "parties" or "privies" in the Trust litigation because they had vested real property rights and interests that were previous in time [by way of the 2014 quit claim deeds; App., ps. 94-99] to the 2015 Trust litigation. See, Bismarck Public School District No. 1 v. Hirsch, 136 N.W.2d 449 (N.D. 1965) concerning the general rule:

In support of the rule that one is not a privy to a judgment where his succession to the rights of property thereby affected occurred previous to the institution of

the suit, (multiple citations are omitted).

[¶48] The lower court erred when it failed to quiet the Hogen's title by erroneously honoring Steven's claim that Marby and Susan were bound by Judge McCullough's orders in the Trust proceedings. By Judge McCullough's specific order, the validity of the quit claim deeds and Marby's rights were not allowed to be adjudicated in the Trust proceedings. App., p. 121. Neither Susan's, nor Marby's rights and "title" in the subject land were placed in issue in the Trust litigation, but their title was to be determined in the quieting title action below. The Trust litigation was solely limited to the proper 2017 allocation between Rodney and Steven of the subject lands, and never was to be determined the "Title" each would receive upon the 2017 allocation. Res judicata does not apply to "incidental" or "collateral" matters. Sundance Oil and Gas, LLC v. Hess Corporation, 2017 ND 269, ¶ 6, 903 N.W.2d 712. Rodney and Steven were the only named parties to the Trust proceedings, and the allocation of their respective interests in the subject land, as they existed in 2017, was the only interests allocated under the auspices of the Trust court. Neither Marby, nor Susan's interests in the real property were involved in the 2017 allocation. Since neither Marby, nor Susan were parties to the Trust proceedings, the Hogens were denied due process of law when the lower court gives conclusive effect to the final orders in the Trust proceedings never involving either of them. Giving res judicata effect to the Trust proceedings, deprives the Hogens of their real property interests without affording them a meaningful opportunity to be heard. *Richards v.*

Jefferson County, Ala., 417 US 793, 798 (1996).

[¶49] Susan's marriage to Rodney does not create privity concerning her separate property, acquired in any manner, after their marriage. See specifically, Art. XI, § 23 of the Constitution of North Dakota.

[¶50] This Court's recent decision, in Matter of Curtiss A. Hogen Trust B, 2018 ND 117, 911 N.W.2d 305, does not distract from the Hogens' position. Even though Steven's and Rodney's real property interests [inherited from their father, and as their inherited interests existed in 2017] were allocated between the two of them, nothing in the Trust proceedings could deprive the Hogens from their vested interests in the title to all of the subject lands, received by them through Rodney's 2014 quit claim deeds to the Hogens. On the same day the decision of Matter of Curtiss A. Hogen Trust B, *supra*., was issued, this Court, reaffirmed the settled principle of law, that a life tenant cannot make any transfers that would disregard the rights of those who would take the property when the life tenant dies. Estate of Nelson, *supra*., ¶ 8. Under Curtiss' Will, and as to the rentals and real estate, the Trustees only enjoyed a legal title measured by Arline's lifetime. App., 103. After Arline's death on March 23, 2007, the Trustees cannot control the beneficiaries' right to alienate their vested real property interests, nor can they disregard the rights of the beneficiary's transferees.

* * *

[¶56] ... The proof submitted by the Appellees for

their Summary Judgment motion did not establish a fee simple title in either the Estate or Trust , or a source for that title, nor any need to control the Hogens' real property. Arguably, if his appointment as personal representative did not terminate under N.D.C.C. § 30.1-17-10, Steven, as personal representative, might have a statutory "power" over the Hogen's real estate if it is necessary to exercise control over the Hogens' real property for administrative purposes. However, Steven did not provide proof that he, as Arline's personal representative, or the probate court, provided any notice to the Hogens that their vested real estate interests could be affected by probate proceedings involving only Rodney and Steven, occurring in 2015, and thereafter, and all subsequent to the subject 2014 quit claim deeds. An essential requisite of Due Process of Law, guaranteed by the Fourteenth Amendment to the Constitution of the United States of America, is providing interested persons with an opportunity to be heard. A court deprives a litigant of due process of law if it gives conclusive effect to a prior judgment [or probate court order] against one who is neither a party, nor in privity with a party to the proceedings. *Richards v. Jefferson County, Ala.*, *supra*. Thus, the lower court errs when in determines the "power" encumbered the Hogens' real property interests for such decision is made (a) without proper pleadings, (b) without proof that all of the Hogens' interest in land was needed for Estate administration, (c) without proper pleadings supported by evidentiary proof that a probate administrative need exists below, or (d) without proof that the Hogens have been provided due process in the probate proceedings

involving Arline's Will.

* * *

[¶59] The statutes, cited by the lower court, were part of the Uniform Trust Code enacted after Arline's March 23, 2007, death. It is respectfully submitted, the real property rights involved in this case are always controlled by historic N.D.C.C. § 59-03-20, and not the subsequent statutes relied upon by the lower court. As of March 23, 2007 – the date of death of the sole life income beneficiary – the Trust had no legal title to the subject real property. Manice v. Manice, *supra*., on pages 363-364. By operation of law [historic N.D.C.C. § 59-03-20,], the legal title, once enjoyed by the Trustees, had been transferred to Rodney and Steven equally. Marby's and Susan's real property interests cannot be divested by the retrospective application of law, or the denial of the equal protection of law.

[¶60] This Court's recent decision, in Matter of Curtiss A. Hogen Trust B, *supra*., does not distract from the Hogens' position. The 2017 allocation between Steven and Rodney, recently affirmed by this Court, involved only what Steven and Rodney had owned in 2017. The Trust [or the Trustee] did not need "title," or an ownership interest in the lands to make that allocation. This Court's decision, in Matter of Curtiss A. Hogen Trust B, *supra*., can be explained by only authorizing the exercise of a "naked power" of allocation between what Steven and Rodney each owned in 2017. Manice v. Manice, *supra*., on pages 363-364. A trustee acting under a "naked" power or

“naked Trust” is one acting without legal title. But such allocation could not affect the Hogens’ previously acquired title, nor interest in real property, for they were not parties to the action, nor did they have privity with Rodney, and their real property interest(s) were not adjudicated in the prior Trust proceeding by Judge McCullough’s order. App., p. 121. Marby and Susan would each be deprived of property without due process of law if the prior Trust proceedings controlled their real property interests in any manner. *Richards v. Jefferson County, Ala.*, *supra*.

* * *

APPENDIX L

Filing Date: July 25, 2018, in North Dakota Supreme Court; Docket Entry #15

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Marby Hogen and Susan Hogen,

Plaintiffs-Appellants

vs.

Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hogen, Deceased; Steven C. Hogen, as a Trustee of the Curtiss A. Hogen Trust B, as created under the Last Will and Testament of Curtiss A. Hogen; and Steven C. Hogen, individually,

Defendants-Appellees.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Supreme Court No. 20180143

Civil No. 02-2017-CV-00116

(Barnes County District Court)

* * *

[¶6] Steven mistakenly asserts Hogens brought their quiet title action as “an attempt to convolute title and delay a judicially approved sale of the Trust and Estate’s farmland.” Appellees’ Brief, ¶4. Hogens submit there has never been an order in Arline Hogen’s probate proceedings, nor in the Curtiss A. Hogen’s Trust proceedings, that ever authorized Steven, as a personal representative or trustee, to sell the Hogens’ ownership interest in the subject real property. The Hogens assert, through the quit claim deeds executed by Rodney, they have a vested ownership interest in the real property. Hogens’ real property interests, received from Rodney, are protected by the constitutional guaranties of Due Process of Law and/or Equal Protection of the Law, embodied in the Fourteenth Amendment of our Constitution, and comparable North Dakota Constitution provisions. The Hogens assert their vested real property interests cannot be taken from them by probate or trust proceedings without affording them notice and a meaningful hearing. Hogens assert the Equal Protection Clause of the Fourteenth Amendment requires this Court to quiet their title to the real property – their appellate position is based upon historic, and current statutes, that have been interpreted in their favor. The lower court erred by not quieting the Hogens’ title.

* * *

[¶23] Even if the Hogens are wrong as to when personal representative’s powers ends, it is only a

App. 74

“power”, not “title”. The personal representative has neither plead, nor proven, an administrative need to interfere with the Hogens’ vested title. Without notice to the Hogens making them parties to the probate proceeding [required by N.D.C.C. § 30.1-03-01], no ESTATE proceeding, subsequent to February 20, 2014, can be binding on the Hogens, or their interest in the lands. Alward v. Borah, 381 Ill. 13, 44 N.E.2d 865 (1942). Courts, in civilized countries, have no power to divest a person of a vested right without notice and a meaningful opportunity to be heard. *Id.* Federal due process rights are implicated. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 796 (1996).

APPENDIX M

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Marby Hogen and Susan Hogen,
Plaintiffs-Appellants

vs.

Steven C. Hogen, as Personal Representative of the
Estate of Arline H. Hogen, Deceased; Steven C.
Hogen, as a Trustee of the Curtiss A. Hogen Trust B,
as created under the Last Will and Testament of
Curtiss A. Hogen; and Steven C. Hogen, individually,

Defendants-Appellees.

PETITION FOR REHEARING

Supreme Court No. 20180143

Civil No. 02-2017-CV-00116

(Barnes County District Court)

[¶1] **Petition for Rehearing**

[¶2] Appellants Marby Hogen and Susan Hogen (“Hogens”) respectfully request rehearing to avoid this Court’s unprecedented departure from the Rule of Law recognized and protected by the Constitution of the United States, and its state counterpart(s) protecting landowner(s) and litigant(s). Hogen v. Hogen, 2019 ND 17, __ N.W.2d __, if allowed to stand, is an unprecedented judicial act depriving Hogens of their real property in violation of due process, and depriving Hogens of the equal protection of the laws.¹

[¶3] As to property devolving to him upon Arline Hogen’s death pursuant to two (2) wills, Rodney Hogen had a “free and unlimited power of alienation”, an inseparable incident to an estate in fee [Holien v. Trydahl, 134 N.W.2d 851, 855-856 (N.D. 1965); N.D.C.C. § 47-02-26], which was duly executed in favor of Hogens. Hogens are guaranteed due process of law, and the equal protection of the law, before their interest(s) in these acquired inherited lands can be taken, or ignored. Rodney Hogen’s title, alienated in favor of Hogens by quit claim deed(s), was constitutionally sound, and such devised title is recognized to judicially exist by approximately twenty (20) different judicial opinions cited in Part A of Hogens’ Appellate Brief [entitled “Strength of the Hogens’ Title”; ¶s 26-50; many are North Dakota decisions] – not a single principle of established law [predicated upon constitutional, statutory, and historic law] from any one of the cited cases was even

1. Constitution of the United States, Fourteenth Amendment; §1; North Dakota Constitution, Article 1, §§ 9 & 12 (due process) and §§ 21 & 22 (equal protection of laws).

addressed in the opinion.

* * *

[¶5] ... Hogens concede Rodney Hogen's interest in decedent Arline Hogen's land ["title", not "record title"] had been "subject to administration", but such encumbrance on Rodney's title as a devisee to the real property ended years ago as a matter of law, and his subsequent conveyance of title to real property to his daughter and spouse must be recognized as matters of both fact and law, or each is deprived of due process of law and/or equal protection of the law.

* * *

[¶7] Since the death of his father in 1992, Rodney Hogen had a vested interest in real property by way of his father's will, which interest could be freely alienated to his wife/daughter. Hull v. Rolfsrud, 65 N.W.2d 94 (N.D. 1954). This Court denies Hogens the equal protection of settled law and the protections of historic statutes (N.D.C.C. § 59-03-20 and N.D.C.C. § 59-03-14) when it does not recognize the vested title transfer to Hogens through Rodney Hogen's quit claim deed (a deed never addressed in Hogen Trust).

* * *

[¶9] The current opinion, at ¶16, dishonors Hogens' right to due process of law, the only named Plaintiffs and Appellants, when it first paraphrases ¶ 27 of Estate of Hogen, and then blames non-party and devisee Rodney Hogen for any deficiencies in Personal

Representative Steven Hogen's record relating to his administration of the estate of Arline H. Hogen:

Although Rodney Hogen claims the administration of the Estate ended with the probate court's order approving the final accounting and settlement in the probate of the Estate in 2013, this record does not reflect an order closing the Estate or discharging Steven Hogen as personal representative of the Estate. See N.D.C.C. § 30.1-21-01.

[¶10] Such statement is clearly erroneous, and apparently inserted to be used to support a decision for a Hogen Estate case to be argued on February 4, 2019 [Sup. Ct. #20180325]. Using "formal proceedings" under N.D.C.C. § 30.1-21-01(1), Personal Representative Steven Hogen "petition(ed) for an order of complete settlement of the estate", which was duly noted by Justice Kapsner in Estate of Hogen, ¶1: "Rodney Hogen appeals and Steven Hogen, as personal representative of the estate of Arline Hogen, cross-appeals from an order approving a final accounting and settlement in the probate of the estate of Arline Hogen."² As to orders for closing the estate,

2. N.D.C.C. § 30.1-21-01 seeking a "complete settlement of the estate" was specifically mentioned by Personal Representative Steven Hogen in every reiteration of his changing "Petition For Approval of Final Account, For Determination of Testacy Status and For Settlement of Estate". March 19, 2010, Docket Entry #13, page 9, ¶14 ("This Petition .. is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate

there exist several such orders to include (A) District Judge Irby's specific order dated October 24, 2013, which provided "(u)pon determination of any fee issue, the PR will submit an amended final account consistent with this order which will be ruled upon by the Court without further hearing .. (and) "(t)he Estate will proceed to a formal close" [Docket Entry #436], (B) the amended order dated December 11, 2013, again reiterating "(t)he Estate will proceed to a formal close" [Docket Entry #490], and (C) an Order dated March 6, 2014, recognizing the "PR'S Second Amended Final Report and Account is approved, and that this Order shall constitute a final Order and final Judgment under Rule 54(b) .." – before, and after remand, none of those orders were appealed by Steven Hogen, and all are now final, but more importantly, this Court's opinion is premised upon falsehood. Also, the laws of North Dakota provide that any order closing an estate as provided in the formal proceedings of N.D.C.C. § 30.1-21-01 will "terminate() an appointment of a personal representative." See, N.D.C.C. § 30.1-17-10(2). N.D.C.C. § 30.1-17-08 provides termination of appointment of a personal representative "ends the right and power pertaining to the office of personal representative" and "terminates the personal representative's authority to represent the estate in any pending or future proceeding"; but "(t)ermination does not discharge a

administration of the estate .."); and February 15, 2013, Docket Entry #197, page 12, ¶ 14; and February 21, 2014, Docket Entry #502, page11, ¶ 14 (and recognition at ¶13, that "the Court ruled, in its Amended Order entered on December 11, 2013, at Odyssey #488, that the estate will proceed to a formal close."

personal representative (from liability or duties)”. Under the Uniform Probate Code Official Comments for this statute, it is stated, “(i)t is important to note that ‘termination’ is not a ‘discharge’. However, an order of the Court entered under 3-1001 [N.D.C.C. § 30.1-21-01] or 3-1002 both terminates the appointment of, and discharges, a personal representative.” Without authority to act as a matter of law, Steven Hogen cannot even seek a judicially-sanctioned discharge because he has failed to perform ministerial tasks of distribution of the estate “50/50” as ordered by Judge Irby.

[¶11] ... Always true, Rodney Hogen’s title devolved by two (2) different wills upon his mother’s death, and he always had the right to alienate – to deny the alienation favoring Hogens *before any estate or trust fiduciary exercised their administrative rights pursuant to due process of law*, would act to deny Hogens due process of law, and also, the equal protection of the law as to the conveyed title to real property.

Respectfully submitted this 28th day of January, 2019.

GARAAS LAW FIRM

“s/”

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App. 81

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APPENDIX N

863 N.W.2d 876

Supreme Court of North Dakota.

In the Matter of the ESTATE OF Arline H. Hogen,
Deceased,

Steven C. Hogen, Petitioner and Appellee and
Cross-Appellant

v.

Rodney Hogen, Respondent and Appellant and
Cross-Appellee.

No. 20140119.

| May 27, 2015. |

Rehearing Denied July 1, 2015.

Attorneys and Law Firms

Jonathan T. Garaas, Fargo, N.D., for respondent and
appellant and cross-appellee.

Michael D. Nelson, West Fargo, N.D., for petitioner
and appellee and cross-appellant.

Opinion

KAPSNER, Justice.

[¶1] Rodney Hogen appeals and Steven Hogen, as personal representative of the estate of Arline Hogen, cross-appeals from an order approving a final accounting and settlement in the probate of the estate of Arline Hogen. We hold the district court did not err in concluding the devolution of real property to Rodney Hogen was subject to the personal representative's power during administration of the estate to seek a retainer for any noncontingent indebtedness Rodney Hogen owed Arline Hogen or the estate. We conclude the court erred to the extent it calculated the estate's retainer based on Barnes County conservation reserve program land, but we otherwise conclude the court did not clearly err in determining the estate's retainer against Rodney Hogen's interest in the estate. We further conclude the court did not abuse its discretion in awarding personal representative fees and attorney fees. We affirm in part, reverse in part, and we remand for recalculation of the retainer against Rodney Hogen's interest in the estate after considering the effect of the Barnes County conservation reserve program land on the cash rent for the Barnes County land and on the average per acre cost of production for the Cass County Land.

I

[¶2] Curtiss and Arline Hogen were husband and wife, and they jointly owned about 737 acres of farmland in

Barnes and Cass Counties. In the late 1960s, Rodney Hogen began farming the land with his father, Curtiss Hogen. When Curtiss Hogen died in 1993, his will distributed his undivided half interest in the farmland into the Curtiss Hogen Trust B, with Arline Hogen designated as the recipient of the net income from the Trust. Curtiss Hogen's will appointed his sons, Steven and Rodney Hogen, as co-trustees of the Trust and authorized the Trust to continue the farming operation. Rodney Hogen continued farming the land under a cash rent and crop-share rental arrangement with the Trust and with Arline Hogen, the owner of the other undivided half interest in the farmland. An inventory of Arline Hogen's estate reflected the Barnes County land consisted of about 308 tillable acres and 14 non-tillable acres and the Cass County land consisted of about 393 tillable acres and about 22 non-tillable acres. Rodney Hogen initially cash rented the Barnes County land for \$30 per acre and farmed the Cass County land as a crop-share tenant. According to Rodney Hogen, under the terms of the crop-share agreement for the Cass County land, he received two-thirds of the crop-share proceeds and was responsible for two-thirds of the input costs and Arline Hogen and the Trust each received one-sixth of the crop-share proceeds and were each responsible for one-sixth of the input costs. Rodney Hogen claimed he made yearly reconciliations of the cash rent and crop-*881 share proceeds due to Arline Hogen against the input costs she owed for the Cass County land.

[¶3] When Arline Hogen died on March 23, 2007, she was survived by her two sons, Steven and Rodney Hogen, and her 1994 will equally devised all her

property to them. In April 2007, Steven Hogen applied for informal probate of Arline Hogen's will and appointment as personal representative of her estate, and he was appointed personal representative of her estate. According to Steven Hogen, he subsequently determined Rodney Hogen had not made certain cash rent and crop-share payments to Arline Hogen before her death in March 2007, and he claimed her estate was authorized to offset the amount of Rodney Hogen's indebtedness to her against Rodney Hogen's interest in her estate.

[¶4] On March 19, 2010, Steven Hogen, as personal representative of the estate, petitioned for approval of a final accounting, for a determination of Arline Hogen's testacy status, and to formally close the probate of her estate. The personal representative sought a retainer against Rodney Hogen's share of the estate under N.D.C.C. § 30.1–20–03, claiming Rodney Hogen owed the estate about \$98,000 for cash rent, crop-share payments, and conservation reserve program payments for crop years 2003 through 2009.

[¶5] Rodney Hogen opposed the personal representative's petition, denying any liability for an offset against his interest in the estate and seeking removal of Steven Hogen as personal representative of the estate and removal of the estate's counsel. Rodney Hogen also sought appointment as successor personal representative and supervised administration of the estate. After a hearing, the district court ordered the parties to proceed under N.D.C.C. § 30.1–20–03 to determine the amount of retainer or offset, if any, against Rodney Hogen's

interest in the estate.

[¶6] Rodney Hogen answered the petition, asserting any debt he owed the estate was a contingent indebtedness under N.D.C.C. § 30.1–20–03. He denied “the estate [was] in a condition to be closed,” and claimed he was not indebted to the estate for any unpaid rents and expenses. Rodney Hogen thereafter moved for summary judgment on the personal representative's claim for a retainer, asserting any debts he owed the estate were barred by statutes of limitations in N.D.C.C. §§ 28–01–26 or 30.1–19–03. He also claimed he and Steven Hogen were co-owners of the cash rent and crop-share proceeds immediately after Arline Hogen's death and those funds were not needed for administration of her estate. The district court ruled the personal representative's claims for cash rent and crop-share proceeds before March 19, 2004, were barred by the six-year statute of limitations in N.D.C.C. § 28–01–16 and granted Rodney Hogen summary judgment dismissing the estate's claim for a retainer for the 2003 crop year. The court denied the remainder of Rodney Hogen's motion for summary judgment.

[¶7] After further proceedings, the personal representative filed an amended petition for approval of a final accounting and formal settlement of the estate in February 2013, seeking a retainer against Rodney Hogen's share of the estate for cash rent, crop-share proceeds, and conservation reserve program payments for crop years 2004 through 2012. After a protracted bench trial, the district court determined that the estate was not entitled to an

offset against Rodney Hogen's share of the estate for cash rent or crop-share proceeds before Arline Hogen's death in March 2007, but that Rodney Hogen owed the estate \$95,544.44 for cash rent and *882 crop-share proceeds for crop years 2007 through 2013. The court further determined Rodney Hogen owed the estate for a share of conservation reserve program payments and also awarded the estate interest, which resulted in a determination that Rodney Hogen owed the estate a total of \$123,387.44 to be offset against his interest in the estate. The court also approved Steven Hogen's request for the estate to pay \$27,500 in personal representative fees and \$333,272.23 in attorney fees, costs, and expert witness fees.

II

A

[¶8] Rodney Hogen argues the district court erred in authorizing the personal representative to pursue a retainer in this probate proceeding against his devised real property for claimed post-death cash rent and crop-share proceeds under N.D.C.C. § 30.1–20–03. He claims his share of Arline Hogen's real property vested in him immediately upon her death under N.D.C.C. § 30.1–12–01 and the common law rule stated in *Stanton v. Stanton*, 134 Neb. 660, 279 N.W. 336 (1938). He asserts “North Dakota's present statutory scheme seems to follow the general common law rule ... as to devised real property” to the effect that when a decedent dies testate, a debt owed the decedent, who failed to mention the debt in the will, is not subject to the right of retainer and the debt must

be collected in a separate legal action.

[¶9] In *Stanton*, 279 N.W. at 341, the Nebraska Supreme Court described the common law for devolution of a decedent's property:

It must be remembered that at common law all of the property of a deceased person passed direct to his heirs upon his death, free from any debts due the deceased from the heirs. Most states, including this state, have enacted statutes providing that personal property passes to the executor or administrator upon the death of the owner. Such statutes are clearly in derogation of the common law and it is only because of them that an executor or administrator comes into possession of the personality and may retain from the interest of a legatee or distributee the amount owing to the deceased. In this state the legislature has not changed the common law in so far as the descent of real estate is concerned. The result is that real estate descends to the devisees of a deceased free from the debts of such devisee subject only to conditions imposed by statute. Our statutes, hereinbefore cited, do not provide for advancements in testate estates, the will of testator presumably being the testator's last expression of his intention. There being nothing in the

will purporting to charge the devisee with the indebtedness owing the testator, it evinces an intention to treat the notes as a simple indebtedness and to leave their enforcement to the ordinary legal methods provided by law. No charge against the land was created by the testator in the case at bar. Under such circumstances, the only remedy of the administrator or executor is to invoke the ordinary legal remedies to enforce payment. The adoption of any other rule would be equivalent to a rewriting of testator's will by us or tantamount to the passage of a statute by the court in a field where the legislature has refused to act.

[¶10] In *Stenson v. H.S. Halvorson Co.*, 28 N.D. 151, 156, 147 N.W. 800, 801 (1913) (citing 1905 R.C. § 5186), a case involving a decedent without a will, this Court considered the effect of a statutory provision stating that both real and personal property of an intestate decedent *883 passed to the decedent's heirs subject to administration. This Court sustained a right of retainer against an heir of the intestate decedent and held the heir's indebtedness constituted part of the estate's assets for which the heir should account before receiving anything out of the estate's other assets. 28 N.D. at 159–62, 147 N.W. at 802–04.

[¶11] Both *Stanton* and *Stenson* recognize the common law rule for devolution of property may be altered by statute, and Rodney Hogen's arguments require

examination of relevant parts of the Uniform Probate Code (“U.P.C.”), adopted in North Dakota in 1973. *See* 1973 N.D. Sess. Laws ch. 257, § 1. *See also* N.D.C.C. § 1–01–06 (“[i]n this state there is no common law in any case in which the law is declared by the code”).

[¶12] Statutory interpretation is a question of law, fully reviewable on appeal. *Estate of Elken*, 2007 ND 107, ¶ 7, 735 N.W.2d 842. The primary objective in interpreting a statute is to determine the intent of the legislation. *Id.* The intent of legislation must be sought initially from the statutory language. *Olson v. Job Serv.*, 2013 ND 24, ¶ 5, 827 N.W.2d 36. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1–02–02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1–02–07. We construe statutes to give effect to all of their provisions, so that no part of a statute is rendered inoperative or superfluous. N.D.C.C. § 1–02–38(2) and (4). Statutory provisions that are part of a uniform statute must be construed to effectuate their general purpose to make uniform the law of those states enacting them. N.D.C.C. § 1–02–13. In construing the U.P.C., we may also look to the Editorial Board Comment for guidance. *In re Estate of Conley*, 2008 ND 148, ¶ 15, 753 N.W.2d 384.

[¶13] Section 30.1–20–03, N.D.C.C. (U.P.C. § 3–903), provides for a right of retainer or offset against a successor's interest in an estate for the amount of a noncontingent indebtedness of the successor to the estate:

The amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest. But, the successor has the benefit of any defense which would be available to the successor in a direct proceeding for recovery of the debt.

[¶14] Under the U.P.C., “[s]uccessors' means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or ... [by intestate succession under N.D.C.C.] title [30.1],” and “[p]roperty' includes both real and personal property.” N.D.C.C. § 30.1–01–06(43) and (53) (U.P.C. § 1–201(38) and (49)). The language of the retainer statute applies to the “amount of a noncontingent indebtedness ... if due, or its present value if not due,” but the U.P.C. does not define a “noncontingent indebtedness.”

[¶15] One source defines “contingent” as “[p]ossible; uncertain; unpredictable,” or “[d]ependent on something that might or might not happen in the future; conditional.” *Black's Law Dictionary* 387 (10th ed.2014). Another source defines contingent as “likely but not certain to happen: possible”; “in happening by chance or unforeseen causes.” *Merriam Webster's Collegiate Dictionary* 270 (11th ed.2005). Juxtaposing those definitions with the ordinary definition of “non” as the “reverse, absence of, or lacking the usual esp. positive characteristics of the thing specified” in *Merriam Webster's Collegiate Dictionary* at 841, results in ascribing a meaning *884 to noncontingent

as something that is certain to happen or is not conditioned on something that might or might not happen in the future. These sources also define “indebtedness” to mean the condition of owing money or being indebted, or something such as an amount of money that is owed. *Black's Law Dictionary* at 885; *Merriam Webster's Collegiate Dictionary* at 632.

[¶16] We conclude a “noncontingent indebtedness” means an amount owed that is certain to occur and is not subject to some future uncertain event which may or may not happen. *See Gruber v. Bontrager*, 69 N.D. 300, 305–06, 285 N.W. 865, 868–69 (1939) (defining contingent claim as a claim for which the liability depends upon some future event which may or may not happen and which makes it uncertain whether it will ever be a liability). We further conclude cash rent and crop-share obligations a devisee owes a decedent or the estate are debts or obligations that are certain to happen and are not conditioned on something that might or might not happen in the future. We therefore conclude a devisee's cash rent and crop-share obligations to a decedent are a noncontingent indebtedness under N.D.C.C. § 30.1–20–03 (U.P.C. § 3–903).

[¶17] Moreover, the plain language of N.D.C.C. § 30.1–20–03 (U.P.C. § 3–903) authorizes an offset against a “successor's interest” and permits a successor to raise any defense to a noncontingent indebtedness which would be available to the successor in a “direct proceeding” for recovery of the indebtedness. The U.P.C. defines a “proceeding” to include an “action at law and suit in equity.” N.D.C.C.

§ 30.1–01–06(42) (U.P.C. § 1–201(37)). We construe the phrases “successor's interest” and “direct proceeding” in N.D.C.C. § 30.1–20–03 (U.P.C. § 3–903) to give meaning to each phrase and to authorize the personal representative to allege “offsets against the successor's interest” in the context of the probate of an estate instead of requiring the personal representative to bring a separate lawsuit or direct proceeding to collect the debt. We therefore reject Rodney Hogen's argument the personal representative was required to bring a separate lawsuit to offset Rodney Hogen's indebtedness, if any, to Arline Hogen or to the estate against his successor's interest in the estate.

[¶18] Rodney Hogen nevertheless argues his share of Arline Hogen's real property vested in him immediately upon her death under N.D.C.C. § 30.1–12–01 (U.P.C. § 3–101), and the district court should have determined the estate had no right to post-death cash rent and crop-share proceeds from 2007 through 2009 because the estate made no demand, had no administrative need, and did not have possession of the land and the court should have determined the estate had no right to post-death farm rent from 2010 through 2013 because the personal representative did not have possession of the land and Rodney Hogen exercised his right to farm the land as a tenant-in-common owner.

[¶19] Section 30.1–12–01, N.D.C.C. (U.P.C. § 3–101), describes the devolution of a decedent's real and personal property to devisees and heirs upon the decedent's death, subject to administration, and provides, in relevant part:

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The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to the person's property, are subject to the restrictions and limitations contained in this title to facilitate the prompt settlement of estates. Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will ... or in the absence *885 of testamentary disposition, to the decedent's heirs ... subject to ... administration.

[¶20] A personal representative's powers and duties are generally described in N.D.C.C. ch. 30.1–18. A personal representative is a fiduciary under a duty to settle and distribute a decedent's estate under the terms of a will and N.D.C.C. title 30.1 consistent with the best interests of the estate. N.D.C.C. § 30.1–18–03 (U.P.C. § 3–703). Section 30.1–18–11, N.D.C.C. (U.P.C. § 3–711), describes a personal representative's broad power over property of a decedent's estate until termination of the personal representative's appointment and provides:

Until termination of the personal representative's appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

The Editorial Board Comment to N.D.C.C. §

30.1–18–11 (U.P.C. § 3–711), states:

The personal representative is given the broadest possible “power over title”. He receives a “power”, rather than title, because the power concept eases the succession of assets which are not possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs.... The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of rights of possession. The relationship of the personal representative to the estate is that of a trustee.

A noted practice manual for the U.P.C. explains the personal representative's broad power, subject to administration, over a decedent's property under U.P.C. § 3–711:

In general, the power[s] of a personal representative [PR] are said to be those that an absolute owner would have, subject only to the trust to exercise the power for the benefit of creditors and others interested in the estate. This general power and any power specifically conferred upon him may be exercised without notice, hearing, or court order. Since the PR has a “power over the title” rather than “title”, no gap in title will result if the PR does not exercise his power during the administration. The title of the heir or devisee, however, is

“subject to administration”; hence, it remains encumbered so long as the estate is in administration or is subject to further administration.

1 Richard V. Wellman, *Uniform Probate Code Practice Manual* 317–18 (2d ed.1977).

[¶21] Section 30.1–18–09, N.D.C.C. (U.P.C. § 3–709), also describes a personal representative's power, subject to administration, over a decedent's property and provides:

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof,*886 that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in

the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine the title thereto.

The Editorial Board Comment to N.D.C.C. § 30.1-18-09 (U.P.C. § 3-709), explains the relationship of the devolution of title on death and a personal representative's authority to take possession or control of a decedent's property and states:

Section 30.1-12-01 provides for the devolution of title on death. Section 30.1-18-[11] defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may need to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative

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authority as it relates to possession of the estate.

As Professor Wellman explains:

The Code provides in [U.P.C.] Section 3–101 for devolution of title upon death to the successors. This devolution is expressly stated to be “subject to ... administration” and the right to possession and control of the decedent's property in administered estates is vested in the PR [personal representative] by Section 3–709. Thus, “title” and “power to possess and control” are to be distinguished. The PR is required to possess and to protect all money and intangible assets of the estate. He has the right, in relation to land and tangible personal property, to surrender possession to the persons presumptively entitled to the asset when in his judgment it is in the best interest of the estate. He also has the power at any time to take or retake possession of these assets for the estate, and his request for delivery of any property in the hands of an heir or devisee is conclusive evidence in any action that he may bring to show that possession is necessary for the purposes of administration....

Two other points should be made. The first is that in the full context of Section 3–709, the term “surrender” should not be given the meaning of finality in a common law surrender. This appears from the “unless or until” and the language that follows in the same sentence.

Secondly, the turn-over of possession of land or an item of tangible personal property by the PR to the person presumptively entitled thereto should not be construed as a “distribution.” Section 3–709 is obviously concerned with possession for the present time; no finality should attend the PR's decision under this section not to disturb possession *887 of an estate asset by one presumptively entitled to the asset, or his decision to hand over the possession of an estate asset to such a person for the present. A “distribution” in kind is to be made as provided in Section 3–907; it enables the distributee to pass good title to a good faith purchaser. (Section 3–910). A “distribution” is appropriate only if the PR does not think that the asset will be needed for administration. It reflects the PR's determination that the “distributee” is the correct person to receive the asset. A “distribution” should end the assumption that the PR still has control of the asset, even though Section 3–909 gives rights to recover assets improperly distributed to an estate representative who can assert the right to have distributions “returned.” See the official Comment, Section 3–907 *infra*.

1 Wellman, *supra*, at 316–17.

[¶22] Section 30.1–20–07, N.D.C.C. (U.P.C. § 3–907), authorizes a personal representative to distribute a decedent's property in kind by an instrument or deed of distribution and provides:

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If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

The Editorial Board Comment to that section explains:

This and sections following should be read with section 30.1–18–09 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The “release” contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

Under section 30.1–18–11, a personal representative's relationship to assets of the estate is described as the “same power over the title to property of the estate as an absolute owner would have.” A personal representative may, however, acquire a full title to estate assets, as in the case where particular items are conveyed to the personal representative by sellers, transfer agents, or others. The language of section 30.1–20–07 is designed to cover instances where the instrument of distribution operates as a transfer, as well as those in which its operation is more like a

release.

Under N.D.C.C. § 30.1–20–08 (U.P.C. § 3–908), proof that a distributee has received an instrument or deed of distribution of assets in kind from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets.

[¶23] Professor Wellman explains distribution in kind:

The personal representative is required to execute whatever instrument may be appropriate to the type of property in order to give the distributee evidence of his inheritance. When the distributee is already in possession of such property, the appropriate form may be a release. When the property to be transferred is real estate, the appropriate instrument is a deed.

The instrument of distribution does not, in the purest sense of the words, cause the vesting in interest of the title of the devisee or heir; rather, it transforms the beneficiary's beneficial interest in the estate, as acquired by him at death by the operation of Section 3–101, from an equitable right to receive his due interest in the estate to regular ownership *888 of the asset distributed. The ownership as distributed is not necessarily the distributee's only right since the distributee may have additional claims on the PR for further distributions or for money to make him whole on account of

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breaches of duty by the PR. Rather, it is evidence that, as between the PR and the distributee, since the former has discharged his responsibility for administering the distributed asset, the latter is now entitled to hold himself out to the world as its full owner. Distribution is a release of the PR's primary right to possess the asset for administration purposes, although it does not follow that the same or a successor PR may not later be entitled to a return of the distributed asset if that is found necessary in order to correct a defective distribution....

The distributive acts of a PR, whether consisting of payments by check or in cash, physical delivery of possession, or execution and delivery of an instrument or distribution, are quite important. These acts reflect the PR's determination of heirs in intestacy, his interpretation of the will in a testate case, and his conclusion regarding the identity of the taker and the propriety of the distribution in the light of all of his duties as estate fiduciary. These and other determinations by the PR are given importance by the Code and are considered administrative determinations that are assumed to be correct. Errors can be corrected, of course, but the Code seeks to give these administrative acts of the PR considerable stability and stature. Sections 3-908, 3-909, and 3-910 of the Code supply many details regarding the consequences of distributions.

Wellman, *supra*, at 384–85.

[¶24] This Court has recognized a devisee's right to a decedent's property is subject to administration by a personal representative. *Feickert v. Frounfelter*, 468 N.W.2d 131, 132 (N.D.1991). We have also said a personal representative has power over title to property during the administration of an estate. *Green v. Gustafson*, 482 N.W.2d 842, 846 n. 3 (N.D.1992). In *Matter of Estate of Johnson*, 2015 ND 110, ¶ 19, 863 N.W.2d 215, we recently construed several of the preceding statutory provisions about a devisee's title to property during the administration of an estate, to pass title to a decedent's property to devisees at death, subject to a personal representative's broad power over title for administration purposes. We held a personal representative had statutory authority under N.D.C.C. § 30.1–18–15 (U.P.C. § 3–715) to retain and lease farmland in an estate for administration purposes for the benefit of interested persons. *Estate of Johnson*, at ¶ 19. We recognized states with statutes similar to N.D.C.C. § 30.1–18–15 had reviewed whether a personal representative's sale or lease of an estate's land was reasonable. *Estate of Johnson*, at ¶ 18 (citing *Matter of Estate of Booth*, 202 Neb. 6, 272 N.W.2d 915, 916 (1978) and *In re Estate of Corbin*, 637 So.2d 51, 52 (Fla.Dist.Ct.App.1994)). In *Estate of Johnson*, at ¶ 19, we held a personal representative could lease farmland for a term within or extending beyond the period of administration if the personal representative acted reasonably for the benefit of interested persons.

[¶25] Under the U.P.C. statutory scheme, a devisee's

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right to a decedent's property is subject to administration by a personal representative, which may continue until termination of the personal representative's appointment or execution of an instrument or deed of distribution, and nothing in the statutory scheme for title to a decedent's land requires a personal representative to take actual possession of the *889 property to effectuate an offset. Rather, N.D.C.C. § 30.1–18–09 (U.P.C. § 3–709) contemplates the personal representative may take "possession or control" of property except that any real property may be left with the person presumptively entitled thereto unless or until possession or control is necessary for purposes of administration. The personal representative's power or control over the decedent's property or estate during administration may be exercised without notice, hearing, or an order and may continue until termination of the personal representative's appointment, or execution of an instrument or deed of distribution transferring the assets to the distributee. *See* N.D.C.C. §§ 30.1–18–11 (U.P.C. § 3–711), 30.1–20–07 (U.P.C. § 3–907) and 30.1–20–08 (U.P.C. § 3–908).

[¶26] We construe the statutory scheme in N.D.C.C. title 30.1 to authorize the personal representative, during administration of the estate, to pursue a retainer claim against real property in an estate for assertions involving a devisee's rental obligations to the decedent or the estate. Under the statutory provisions, a devisee's title to the decedent's property is encumbered as long as the estate is subject to administration. *See* N.D.C.C. § 30.1–18–11 (U.P.C. § 3–711).

[¶27] Steven Hogen was the duly authorized personal representative of Arline Hogen's estate engaged in administration of the estate, and he executed no instrument or deed of distribution transferring or releasing the property to Rodney Hogen. *See* N.D.C.C. §§ 30.1–20–07 (U.P.C. § 3–907) and 30.1–20–08 (U.P.C. § 3–908). Rather, the record reflects the estate leased the land to Rodney Hogen while the estate was being administered. *See Estate of Johnson*, 2015 ND 110, ¶ 19, 863 N.W.2d 215. We reject Rodney Hogen's claims that as the personal representative of the estate, Steven Hogen may not pursue a retainer claim against Rodney Hogen for post-death crops and farm rentals because the estate made no demand, had no administrative need, and did not have possession of the lands, or because the personal representative did not have possession of the land and Rodney Hogen exercised his rights as a tenant-in-common owner. We also conclude the statutory scheme for a personal representative's powers during administration of the estate does not preclude the personal representative from seeking a retainer for conservation reserve program payments attributable to the estate's Cass County land for the 2010 through 2013 crop years. We conclude the district court did not err in determining the devolution of real property to Rodney Hogen was subject to the personal representative's power during administration of the estate to offset any noncontingent indebtedness he owed to Arline Hogen or her estate.

B

[¶28] Rodney Hogen argues the personal

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representative's claim for a retainer is barred by the three-month limitation in N.D.C.C. § 30.1–19–03(2) (U.P.C. § 3–803) and by the three-year limitation in N.D.C.C. § 30.1–21–06 (U.P.C. § 3–1006).

[¶29] Section 30.1–19–03(2), N.D.C.C. (U.P.C. § 3–803), provides:

All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

- a. A claim based on a contract with the personal representative, within four *890 months after performance by the personal representative is due.
- b. Any other claim, within three months after it arises.

[¶ 30] The plain language of N.D.C.C. § 30.1–19–03(2) (U.P.C. § 3–803) applies to “claims against a decedent's estate” and does not apply to claims an estate may have against devisees for a retainer. We conclude the personal representative's claim for a retainer is not barred by the plain language of N.D.C.C. § 30.1–19–03(2) (U.P.C. § 3–803).

[¶31] Section 30.1–21–06, N.D.C.C. (U.P.C. § 3–1006), provides:

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or unless otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of:

1. Three years after the decedent's death.
2. One year after the time of distribution thereof.

This section does not bar an action to recover property or value received as the result of fraud.

[¶32] The plain language of N.D.C.C. § 30.1–21–06 (U.P.C. § 3–1006), applies to time limits to “recover property improperly distributed ... from any distributee.” A personal representative's claim for a retainer against a devisee is not a claim to “recover property improperly distributed,” and we conclude the personal representative's claim for a retainer is not barred by the plain language of N.D.C.C. § 30.1–21–06 (U.P.C. § 3–1006).

[¶33] Rodney Hogen argues the district court clearly erred in determining the amount of the retainer or offset. He argues the court failed to subtract 81.3 acres of conservation reserve program land in Barnes County in determining the cash rent due for the Barnes County land and in determining the average per acre cost of production for crop-share calculations for the Cass County land. He also claims the court erred in admitting evidence under N.D.R.Ev. 602, 701, and 802.

[¶34] To the extent Rodney Hogen argues the district court erred in admitting evidence under the cited rules of evidence, he has not marshaled any argument with supporting authority on the evidentiary issues, and we decline to consider those issues on appeal. *See Hale v. State*, 2012 ND 148, ¶ 12, 818 N.W.2d 684 (“we are not ferrets and we ‘will not consider an argument that is not adequately articulated, supported, and briefed’ ”).

[¶35] To the extent Rodney Hogen argues the district court erred in failing to subtract about 81 acres of conservation reserve program land in Barnes County in determining cash rent due for the Barnes County land and in determining the average per acre cost of production for crop-share calculations for the Cass County land, we agree with him that the record reflects the court failed to account for the conservation reserve program land in those calculations. During oral argument, counsel for the personal representative conceded minor adjustments to the retainer may be necessary. We decline to make those adjustments on the record before us, and we reverse the district

court's determination of the retainer to that limited extent and direct the court to recalculate the retainer after considering the effect *891 of the Barnes County conservation reserve program land on the cash rent for the Barnes County land and on the average per acre cost of production for the Cass County land.

[¶36] We conclude that review of the district court's other findings about the terms of lease arrangements for the relevant years, and the unpaid cash rent, crop-share proceeds, and conservation reserve program payments are governed by N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction a mistake was made. *Brandt v. Somerville*, 2005 ND 35, ¶ 12, 692 N.W.2d 144. Under N.D.R.Civ.P. 52(a), we do not reweigh conflicting evidence and a choice between two permissible views of the evidence is not clearly erroneous. *Brandt*, at ¶ 12.

[¶37] Except for calculations involving the Barnes County conservation reserve program land, evidence in the record supports the district court's findings about payments Rodney Hogen owed Arline Hogen and the estate for post-death cash rent, crop-share proceeds, and conservation reserve program payments. Steven Hogen and an accountant, Wayne Bradley, testified about the amount due for those obligations and Rodney Hogen's failure to make payments. Although Rodney Hogen disputed the personal representative's evidence, there was

conflicting evidence about the extent of his obligations and payments under relevant agreements. We conclude the court's findings were not induced by an erroneous view of the law, and we are not left with a definite and firm conviction the court made a mistake. Except for a recalculation based on the Barnes County conservation reserve program land, we conclude the court's findings are not clearly erroneous.

III

[¶38] In the personal representative's cross-appeal, Steven Hogen argues the district court clearly erred in determining the estate was not entitled to a greater offset from Rodney Hogen.

A

[¶39] Steven Hogen initially argues the district court clearly erred in finding Rodney Hogen did not purloin \$23,329.75 from the Curtiss Hogen Trust, which was set up to provide Arline Hogen with a stream of income.

[¶40] The district court determined the personal representative's claim about purloined money from the Curtiss Hogen Trust was subject to a contingency within the meaning of N.D.C.C. § 30.1–20–03, because the Trust was not a party to the probate proceeding and any money allegedly due to the Trust could not be considered in the probate proceeding. The court explained the Trust could bring a direct action against Rodney Hogen for any money allegedly due the Trust. We agree with the court's conclusion that any money

Rodney Hogen owed to the Trust was subject to a contingency for purposes of a retainer against Arline Hogen's estate under N.D.C.C. § 30.1–20–03, and we conclude the district court did not err in rejecting that claim.

B

[¶41] Steven Hogen also argues the district court clearly erred in determining Arline Hogen waived pre-death cash rent and crop-share proceeds owed by Rodney Hogen to her. Steven Hogen argues Arline Hogen was confined to an Alzheimer's unit in a nursing home in *892 2002, Rodney Hogen never talked with Arline Hogen about reconciling payments for the cash rent and crop-share proceeds against her input costs, the shortages were not discovered until after her death, and she could not have voluntarily and intentionally waived any payment deficiencies for crop years 2004 through 2006.

[¶42] The district court found that in reconciling his yearly cash rent and crop-share payments to Arline Hogen against her input costs, Rodney Hogen had not always credited her for excess input costs or paid her for her full one-sixth of crop-share proceeds for the Cass County land, but explained:

Rodney testified that he reconciled his cash rent obligations, his crop-share obligations and his mother's crop-share expenses every year. Rodney's "reconciliation" certainly wasn't done with any type of accounting standard in place. It is evident that the expenses that Rodney

paid on behalf of the landlord for the Cass County crop share were less than the cash rent owed on the Barnes County land. The Court, more importantly, finds that Rodney's farming relationship with his mother was not defined by exact standards. The so-called contract was more or less a loose guideline. What Rodney may have deemed reconciled was, in fact, Arline agreeing that what was received was good enough. This is based on Rodney's history of farming the property, the past course of conduct of the parties and the estate planning documents executed by Arline and Curtiss Hogen indicating a specific desire to maintain the farming operation. Any alleged shortfalls for Arline for the years 2004, 2005 and 2006 are deemed to have been waived and Rodney's contractual obligations to Arline were satisfied.

[¶43] A waiver requires a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit. *Miller v. Walsh Cnty. Res. Dist.*, 2012 ND 152, ¶ 27, 819 N.W.2d 526. Here, there was evidence Arline Hogen had been in an Alzheimer's wing at a nursing home since 2002. She had not been judicially determined to be incompetent, however, and Steven Hogen testified she was capable of handling some of her affairs and she wrote some checks for gifts after 2002. There also was evidence Rodney Hogen had farmed the land under arrangements with the Curtiss Hogen Trust and with Arline Hogen at least since Curtiss Hogen died in 1993. The district court applied the parties' course of conduct over several previous years to Rodney Hogen's

reconciliations for the claimed years to determine any alleged shortfalls were deemed waived and his reconciliations satisfied his contractual obligations. The court explained that what Rodney Hogen deemed reconciled over the course of the parties' contractual relationship was Arline Hogen agreeing that his reconciliations were sufficient to satisfy his contractual obligations. The parties' course of conduct over the years indicates they did not abide by all the contractual terms for their farming arrangement and provides support for the court's finding that Rodney Hogen's yearly reconciliations of his obligations satisfied his specific obligations for the 2004 through 2006 crop years. On the record in this case, we decline to reweigh the evidence about the parties' course of conduct and prior reconciliations or Arline Hogen's agreement about the sufficiency of Rodney Hogen's reconciliations. We conclude the court did not clearly err in determining the estate was not entitled to a retainer for the crop years from 2004 through 2006.

IV

[¶44] Rodney Hogen argues the district court abused its discretion in not removing *893 Steven Hogen as the personal representative of the estate and in awarding Steven Hogen personal representative fees and attorney fees, costs, and expert witness fees from the estate.

A

[¶45] Under N.D.C.C. § 30.1–17–11 (U.P.C. § 3–611), a person interested in an estate may petition for

removal of a personal representative for cause, which exists when removal would be in the best interest of the estate, or the personal representative has mismanaged the estate or failed to perform a duty pertaining to the office. A district court has discretion to remove a personal representative, and the court's decision will not be set aside on appeal absent an abuse of discretion. *Estate of Shubert*, 2013 ND 215, ¶ 27, 839 N.W.2d 811. A court abuses its discretion "when it acts in an arbitrary, unconscionable, or unreasonable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id.*

[¶46] A cursory review of the record in this case reflects a contentious probate dispute between the parties and their attorneys. On this record, we cannot say the district court's denial of Rodney Hogen's request to remove Steven Hogen as personal representative was arbitrary, capricious, or unreasonable. We therefore conclude the court did not abuse its discretion in denying Rodney Hogen's request to remove Steven Hogen as personal representative of the estate.

B

[¶47] Rodney Hogen argues the district court abused its discretion in awarding Steven Hogen \$27,500 in personal representative fees from the estate, because Steven Hogen pursued the retainer claim for his personal benefit without benefiting the estate and he failed to account for his time administering the estate.

[¶48] Under N.D.C.C. § 30.1–18–19 (U.P.C. § 3–719), a personal representative is entitled to reasonable compensation for services rendered for an estate. We review an award of personal representative fees under the abuse-of-discretion standard. *Estate of Flaherty*, 484 N.W.2d 515, 521 (N.D.1992). The district court recognized the extensive volume of work done by Steven Hogen for the estate and that the actions taken by him were all done in good faith. The court awarded Steven Hogen \$27,500 in personal representative fees. We agree with the court's assessment of the volume of work done by Steven Hogen to reconstruct the parties' financial records for several years. The court's decision about personal representative fees was the product of a rational mental process leading to a reasoned determination and was not arbitrary, capricious, or unreasonable. We conclude the court did not abuse its discretion in awarding Steven Hogen personal representative fees from the estate.

C

[¶49] Rodney Hogen argues the district court abused its discretion in awarding the personal representative \$333,272.23 in attorney fees, costs, and expert witness fees from the estate, because Steven Hogen allegedly pursued the retainer claim for his personal interest.

[¶50] Section 30.1–18–20, N.D.C.C. (U.P.C. § 3–720), authorizes a district court to award a personal representative necessary expenses and disbursements, including reasonable attorney fees, from an estate for prosecuting estate proceedings in

good faith, whether successful or not. A personal representative's *894 actions must be in good faith and for the benefit of the estate. *Matter of Estate of Peterson*, 1997 ND 48, ¶ 25, 561 N.W.2d 618; *Estate of Flaherty*, 484 N.W.2d at 518. A benefit to the estate includes a personal representative's good faith attempt to effectuate a testator's testamentary intent or to increase the assets in the estate. *Peterson*, at ¶ 26; *Flaherty*, at 518. We review an award of attorney fees under the abuse of discretion standard. *Flaherty*, 484 N.W.2d at 519.

[¶51] Although the amount of awarded attorney fees in this case is large, the district court provided a reasoned explanation for the award, including consideration of the "lodestar" rate, and the fact the case involved "tough litigation" and was "hard going." This proceeding involved lengthy evidentiary hearings and issues related to reconstructing financial records and tracing crop-share proceeds and cash rent over several years for farmland in contentious litigation. Rodney Hogen vigorously litigated the retainer issue, which required Steven Hogen to expend additional resources to resolve the issue. We have recognized a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent' overcoming its vigorous defense." *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, 19 (N.D.1995) (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 580 n. 11, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986)). The district court determined Steven Hogen acted in good faith and pursued funds owed to the estate. Steven Hogen's duty to effectuate an equal distribution of Arline Hogen's estate by collecting all assets belonging to the

estate, including offsetting Rodney Hogen's debts to the estate, applies regardless of whether Steven Hogen was also a beneficiary under the will. On this record, we conclude the district court's award of attorney fees was not arbitrary, capricious, or unreasonable. We conclude the court did not abuse its discretion in awarding the personal representative attorney fees and expert witness fees from the estate.

V

[¶52] We have considered any remaining issues and arguments raised by the parties, and we conclude they are either unnecessary to our decision or are without merit. We affirm the district court order in part, reverse in part, and remand for proceedings consistent with this opinion.

[¶53] LISA FAIR McEVERS, DANIEL J. CROTHERS and DALE V. SANDSTROM, JJ., concur.

GERALD W. VANDE WALLE, C.J., concurs in the result.

APPENDIX O

IN DISTRICT COURT, COUNTY OF CASS, STATE
OF NORTH DAKOTA

In the Trust of Curtiss A. Hogen Trust B created
under the Last Will & Testament of Curtiss A. Hogen

Case No. 09-2015-CV-01717

MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT

[¶1] The above-entitled matter came before the Court on the Respondent's MOTION FOR SUMMARY JUDGMENT AND ATTORNEY FEES, which was filed on September 21, 2015. The Petitioner filed his OPPOSITION to the MOTION on October 26, 2015. A hearing on the Motion was held November 18, 2015. The Petitioner, Steven C. Hogen ("Steven"), appeared with counsel, Michael Nelson. The Respondent, Rodney Hogen ("Rodney"), appeared with counsel, Jonathan Garaas. For the following reasons, this Court grants summary judgment on the following issues.

[¶2] The trust at issue in this matter, the CURTISS A. Hogen TRUST B ("Trust"), was created under the LAST WILL AND TESTAMENT OF CURTISS A. Hogen ("Will"), who passed away in 1993. Curtiss A.

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Hogen ("Curtiss") was survived by his wife, Arline H. Hogen ("Arline"), and their two adult children, Steven and Rodney. At the time of his death, Curtiss owned an undivided interest in farmland. Half of that farmland was placed into the Trust and Arline remained as owner of the other undivided half interest in the farmland. The income from the Trust was to be paid to Arline for her life. Article III of the Will provides direction as to the Trust's administration after the death of Arline, as follows:

- (3) Upon the death of the survivor of my said spouse and me, my Trustee shall divide this trust into equal separate shares so as to provide One (1) share for each then living child of mine and One (1) share for each deceased child of mine who shall leave issue then living.
 - (a) Each share provided for a living child of mine shall be distributed to such child. . . .

Article VI of the Will named and appointed Steven and Rodney as co-trustees of the Trust.

[¶3] After Curtiss' death, Rodney continued farming the land under a cash rent and crop-share rental arrangement with the Trust and Arline. Arline died on March 23, 2007. Arline's Will equally devised all her property to Steven and Rodney. In April 2007, Steven initiated an informal probate of Arline's Will, which eventually led to protracted litigation proceedings in both the District Court and the

Supreme Court (09-07-P-0010). Issues raised in the estate proceedings exclusively regarding the Trust led to the initiation of the instant proceedings.

[¶4] Since Arline's death, Rodney has continued to farm the land owned by the Trust. Based on the evidence in the record, it appears the Trust has not yet been completely administered and distributed and that the Trust is still listed as the owner of the farmland Rodney has been farming. On July 13, 2015, Steven filed his PETITION in this matter, requesting the Court for the following relief:

- a. seek a supervised trust administration;
- b. compel an accounting by Rodney;
- c. recover (by way of offset) on behalf of the Trust the rent that Rodney has failed to pay to the Trust, plus interest;
- d. void deeds from Rodney as Co-Trustee to himself;
- e. enjoin Rodney from entering upon Trust property and from contacting any rent of Trust property; and
- f. remove Rodney as Co-Trustee of the Trust.

[¶5] On September 21 , 2015, Rodney moved for summary judgment and attorney fees. His main assertion is that the Trust unambiguously terminated

automatically upon the death of Arline, so Steven and Rodney automatically became co-owners of the Trust property, excluding them from the duties of trustees at issue in the PETITION after its termination. Due to this alleged automatic termination date, Rodney also argues the statute of limitations have expired on any alleged violations of his fiduciary duties as co-trustee of the Trust. For these reasons, he claims the PETITION is frivolous, there are no genuine issues of material fact, he is entitled to judgment as a matter of law, and that he is entitled to reasonable attorney fees.

[¶6] On October 26, 2015, Steven filed a Brief in Opposition to Rodney's MOTION, arguing that the Trust did not terminate upon Arline's death, the statute of limitations does not bar Steven's causes of action against Rodney for his alleged breaches of fiduciary duties, that Rodney did not have authority to distribute any Trust assets by himself as only one of two co-trustees of the Trust, and that Rodney is not entitled to attorney fees because the claims for relief set forth in the PETITION are not frivolous. Further, at the hearing held on November 18, 2015, Steven asserted that he believed summary judgment in his favor would be proper for the issues raised in Rodney's MOTION.

[¶7] Summary judgment, under Rule 56 of the North Dakota Rules of Civil Procedure, is a procedural device that promptly and expeditiously disposes of an action "without a trial if either party is entitled to judgment as a matter of law and no dispute exists as to either the material facts or the reasonable

inferences to be drawn from undisputed facts, or resolving the factual disputes will not alter the result." Skjervem v. Minot State University, 2003 ND 52, ¶4, 658 N.W.2d 750. The party seeking summary judgment has the burden of showing no genuine issues of material fact exist and that they are entitled to judgment as a matter of law. Capps v. Weflen, 2014 ND 201 , ¶ 7, 855 N.W.2d 637. When considering a motion for summary judgment, a court" must view the evidence in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence." Skjervem, 2003 ND 52, 114, 658 N.W.2d 750.

[¶8] The "primary objective in construing a trust instrument is ascertaining the settlor's intent." Sabo v. Keidel, 2008 ND 41 , ¶ 8, 745 N.W.2d 661 (citing Matter of Estate of Schmidt, 1997 ND 244, IT 13, 572 N.W.2d 430). "When a trust instrument is unambiguous, the settlor's intent is ascertained from the language of the document itself." Id. North Dakota law provides that the rules of construction governing the interpretation of wills also apply to the interpretation of a trust. N.D. Cent. Code § 59-09-12. Thus, a trust, like a will, "is ambiguous if, after giving effect to each word and phrase, its language is susceptible to more than one reasonable interpretation." Duemeland v. Norback, 2003 ND 1, ¶12, 655 N.W.2d 76. Whether or not a trust is ambiguous is a question of law. See id. Therefore, where a trust instrument is unambiguous, summary judgment on the intent of language is proper.

[¶9] Here, the crux of Rodney's Motion rests on the assertion that the trust automatically terminated on the death of Arline. However, as Steven so aptly discussed in his OPPOSITION BRIEF, the Trust never states specifically when or upon what specific occurrence the Trust is to terminate. The Trust merely requires that "Upon the death . . . of my said spouse . . . , my Trustee shall divide this trust into equal separate shares so as to provide One (1) share for each then living child of mine. . . ." Thus, the Trust itself does not state the Trust is to terminate automatically on the death of Arline. As a result, it is unambiguous that the intent of the Trust was for it to end at some point after Arline's death, but termination of the Trust was not to be automatically triggered in the event of her death.

[¶10] Further, the Trust has not been terminated since the date of Arline's death. The Court finds Steven's argument on this issue persuasive. The controlling statute regarding termination of a trust at the time the Will was executed on June 25, 1984 is section 59-02-17 of the North Dakota Century Code, which stated: "A trust is extinguished by the entire fulfillment of its object or upon its object becoming impossible or unlawful." N.D. Cent. Code § 59-02-17. Curtiss made his intent regarding the purpose of the Trust quite clear and unambiguous. Its first purpose was to provide support for Arline during her lifetime. That purpose ended upon her death. The second purpose was for the corpus of the Trust to be divided into equal shares for each of his then-living children, and then, for each share to be distributed to each living child. At the time of Arline's death, Steven and

Rodney were his only living children. Steven argues this second purpose of the Trust has not been fulfilled, because the Trust has not yet been properly divided and distributed. The facts support Steven's argument. The trustees have not yet gathered all of the trust assets and divided them equally. Further, this is more than the ministerial act that Rodney claims it to be. The trustees could have properly divided the corpus so that each residuary beneficiary would receive an undivided, one half interest. However, the trustees could have divided the corpus in any fashion that dissolved equal shares to each residuary beneficiary (not necessarily undivided one-half interests but individual assets that were equal in value). Until the trustees have actually performed the division, there remains a purpose unfulfilled in the Trust. As a result, this Court finds that the Trust has not yet been terminated. Therefore, the Court grants summary judgment in favor of Steven and finds that the Trust did not automatically terminate upon Arline's death and has not yet been terminated.

[¶11] Whether the Trust was automatically terminated is determinative of Rodney's request for summary judgment that all claims made by Steven for rentals, crops, or breach of fiduciary duty are barred under the statute of limitations. Section 59-18-05 of the North Dakota Century Code governs claims for violation of a fiduciary duty of a trustee that occurred after August 1, 2007. That statute provides:

1. A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the

date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary in the report or in a separate notice accompanying the report of the time allowed for commencing a proceeding.

2. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

3. If subsection 1 does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after whichever occurs first: the removal, resignation, or death of the trustee; the termination of the beneficiary's interest in the trust; or the termination of the trust.

N.D. Cent. Code § 59-18-05. Here, the first two subsections of this statute commence the statute of limitations upon the beneficiary's receipt of a disclosure report that would evidence a breach of the duties of a trustee. It is undisputed that Rodney did not provide such a report to Steven. Thus, subsection three applies to this case, which means that a

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five-year statute of limitations would commence upon any of the three situations described. Here, Steven and Rodney were co-trustees and both have remained co trustees until present day. Neither Steven's nor Rodney's interest in the Trust has been terminated. And as the Court found above, the Trust has not yet been terminated. As a result, the statute of limitations has not yet commenced for Steven's breach of fiduciary duties claims against Rodney. Therefore, this Court finds summary judgment in favor of Steven and finds that the statute of limitations does not bar Steven's claims for breach of fiduciary duties by Rodney.

[¶12] For his third claim for summary judgment, Rodney argues that any real property he deeded to himself from the Trust as a co-trustee were merely ministerial acts, so he did not require Steven's consent for such. Rodney executed the deeds in 2014 without Steven's consent. Thus, the controlling statute for when and how co-trustees may act is section 59-15-03, which states that "[c]o-trustees who are unable to reach a unanimous decision may act by majority decision." N.D. Cent. Code § 59-1503(1). Hence, a co-trustee needs either unanimous decision or majority decision to act. Here, there are only two co-trustees, Steven and Rodney, so a majority decision necessitates a unanimous decision. As a result, any decision by Rodney as a co-trustee to act must be agreed to by Steven. However, Rodney attempts to argue that merely signing a deed is a ministerial act, because the act of signing is not a discretionary decision. This argument may technically be accurate, but the discretionary decision to deed the property to

himself without Steven's consent is what is actually at issue; not his technical act of signing the deeds. Therefore, the Court finds summary judgment in favor of Steven and finds that Rodney's acts of deeding real property from the Trust were not ministerial acts, but were discretionary, and required Steven's consent as a co-trustee.

[¶13] Lastly, Rodney argues he is entitled to attorney fees in this case because he asserts that the PETITION is frivolous. However, as this Court has found summary judgment in favor of Steven on all three other issues contained in Rodney's Motion, the Court also finds that the PETITION is not frivolous and an award of attorney fees under N.D. Cent. Code § 28-26-01 will not be ordered. Therefore, neither party is entitled to attorney fees as requested in the Motion.

[¶14] Based on the foregoing, IT IS HEREBY ORDERED that the Respondent's MOTION FOR SUMMARY JUDGMENT AND ATTORNEY FEES is **DENIED**.

[¶15] IT IS FURTHER ORDERED that the Petitioner's request for summary judgment on the first three issues of the Respondent's Motion is **GRANTED**.

Dated this 30th day of December, 2015.

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BY THE COURT

“s/”

Honorable Steven E. McCullough
Judge of the District Court

APPENDIX P

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

File No.: 09-2015-CV-01717

In the Trust of Curtiss A. Hogen Trust 13, created under the Last Will and Testament of Curtiss A. Hogen,

ORDER ON PETITION FOR COMPLETE SETTLEMENT AND DISTRIBUTION OF TRUST

[¶1] The above-entitled case is before the Court on Petitioner's, Steven Hogen, PETITION FOR COMPLETE SETTLEMENT AND DISTRIBUTION OF TRUST. Rodney Hogen has objected to these proceedings. This Order is being filed in conjunction with this Court's POST-TRIAL OPINION AND ORDER, which will be incorporated herein. Petitioner and cotrustee Steven Hogen (Steven) is represented by Robert G. Hoy and Sara K. Sorenson. Cotrustee Rodney Hogen (Rodney) is represented by Jonathan T.

Garaas.

BACKGROUND

[¶2] A complete background to this Trust litigation can be found in paragraphs three (3) through twenty-one (21) of this Court's POST-TRIAL OPINION AND ORDER.

[¶3] The issue before the Court today is how to properly settle and divide the Curtiss A. Hogen Trust B ("Trust"), given it may, for the most part, only claim undivided one-half shares of the main corpus: farmland in Cass and Barnes County, North Dakota. (See District Court Case No.: 09-07-P-100 and this Court's POST-TRIAL OPINION AND ORDER for a breakdown of Tracts.) The actions of the parties here have forced this Court to fashion some type of Order to prevent the Trust corpus from being lost to foreclosure, and to finally separate the two cotrustees who have been unable to manage this Trust without Court intervention. It appears the only manner in which this Court can properly effectuate an Order is through Steven, and his powers as both Personal Representative to the Estate and as a cotrustee here.

[¶4] Cotrustee Steven has brought forward current documentation showing that a number of AgCountry and First State Bank of North Dakota mortgages, secured with Trust property, are now in default and may soon be foreclosed upon. The mortgages were personal to Rodney, but still effect both the Trust assets and, due to the undivided manner in which this land sits, the Estate property. The encumbrances

include: (1) AgCountry Mortgage — Loan #XXX4180-00; (2) AgCountry Mortgage — Loan #XXX9174-01; (3) AgCountry Mortgage — Loan #XXX3758-00; AgCountry Mortgage — Loan #XXX1523-00; (5) AgCountry Mortgage — Loan #XXX8533-01; and (6) First State Bank of ND Mortgage — Loan #XXX7908. All but Mortgage (6), through First State Bank of ND, were taken out for the sole benefit of Rodney.

[¶5] It is clear from the outstanding debt on the Trust and Estate land here, as well as the choses of claim by the Trust against Rodney, that real property will need to be sold in order to pay for the obligations incurred. Complicating this is that there is a pair of lis pendens on the land, one for Barnes County and one for Cass County, filed by Rodney.

[¶6] Further complicating this issue is Rodney's attempt to deed Trust and Estate land (also owners of undivided one-half interests in the total land, to be split between heirs Steven and Rodney) to himself, without the approval or signature of cotrustee Steven. The deeds signed by Rodney, and the deeding action itself, was invalid and are each void. See MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT, dated December 30, 2015. Rodney has since personally deeded the land in question to his daughter, Marby Hogen, and his wife, Susan Hogen.

[¶7] Before this Court, Rodney and Steven both testified to an agreement they made to split the Barnes and Cass County land here. To his PETITION,

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Steven attached Exhibit A (later corrected), a snapshot of the assets owned by both the Trust and Estate and how they were intended to be split. However, any split decided will need to incorporate the division of the Estate, a matter still pending. It appears to this Court that the only way to accomplish that is to have Steven act as both the Personal Representative of the Estate, and as the only Trustee to the Trust for the limited purpose of settling and distributing the land here. These appointments will be restricted as stated below, but will enable Steven to wind up the Trust, account for all the land and other assets, pay off any encumbrances, setoffs, or choses of action, and close this litigation.

ORDER

[¶8] Based on the foregoing, IT IS HEREBY ORDERED AND DECREED as follows:

1. Steven Hogen's Petition for Complete Settlement and Distribution of Trust is **GRANTED**;
2. The *lis pendens*, filed by Rodney Hogen, on both the Cass and Barnes County land are hereby **CANCELLED**;
3. Rodney Hogen is **PERMANENTLY SUSPENDED** as cotrustee of the Curtiss A. Hogen Trust B;
4. The deeds signed by Rodney Hogen, deeding Trust property to himself, are

VOID AND INVALIDATED by this Court ORDER and this Court's prior MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT, dated December 30, 2015;

5. Steven Hogen, as the remaining cotrustee of the Curtiss A. Hogen Trust B., is **INSTRUCTED** to allocate the Trust property for the benefit of the Trust itself and the co-beneficiaries, and is **AUTHORIZED** to sell sufficient Trust property, in a commercially reasonable manner, to pay: (1) the outstanding mortgages, debts, and encumbrances on the Trust land, (2) the Trust's attorney's fees, as approved by this Court, and (3) equal shares to co-beneficiaries Rodney and Steven Hogen, with \$305,961.65 first being offset from Rodney Hogen due to his breaches and non-payments as found by this Court;
6. Steven Hogen is **INSTRUCTED** to take any commercial reasonable means to effectuate a final settlement and distribution of this Trust, including the sale or allocation of real property, with any capital gains being paid by the new, outright property owner;
7. Steven Hogen shall **FILE** any necessary motions with this Court in order to settle

and distribute this Trust in a reasonable manner; and

8. Upon completion of a final settlement and distribution, this Trust shall **TERMINATE** and both Steven and Rodney Hogen shall be **DISCHARGED** as cotrustees.

[¶9] It is the Court's understanding that Steven, as Personal Representative to the Estate of Arline Hogen (the other undivided one-half interest here) may allocate Estate property as he sees fit as a Personal Representative. See District Court Case No.: 09-07-P-00100. Therefore, Steven may choose to sell, distribute, and otherwise allocate Trust and Estate property at the same time in any commercial reasonable manner. This Court and ORDER cannot force the hand of Rodney as a PR to the Estate, but the logical understanding between this Trust case and the Estate case is that Steven, acting as PR and the only remaining Trustee, may finally bring about a binding distribution and an end to these proceedings.

Dated this 7th day of March, 2017.

BY THE COURT:

“s/”

Honorable Steven E. McCullough
District Judge
East Central Judicial District

APPENDIX Q

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

In the Trust of Curtiss A. Hogen Trust B, created
under the Last Will and Testament of Curtiss A.
Hogen

File No.: 09-2015-CV-01717

POST-TRIAL OPINION AND ORDER

PROCEDURAL FACTS

[¶] Curtiss A. Hogen (Curtiss) created the CURTISS A. HOGEN TRUST B ("TRUST"), by the LAST WILL AND TESTAMENT OF CURTISS A. Hogen ("WILL"), executed in 1984. Curtiss passed away in 1993. Curtiss was survived by his wife, Arline H. Hogen ("Arline"), and their two adult children, Steven (the present Petitioner) and Rodney (the present Respondent). At the time of his death, Curtiss owned several parcels of farmland. Upon his death, a roughly one-half undivided interest of that farmland was

placed into the TRUST. Arline remained as owner of the other roughly one-half undivided interest in the farmland. The income from the TRUST was to be paid to Arline for her life. After Arline's death, the TRUST required the cotrustees to divide the corpus of the TRUST into equal shares and to distribute those shares to Curtiss' living children (Steven and Rodney). Article VI of the WILL named and appointed Steven and Rodney as cotrustees of the TRUST.

[¶2] After Curtiss' death, Rodney continued farming the land under cash rent and crop-share rental arrangements. Arline died on March 23, 2007. Arline's LAST WILL AND TESTAMENT equally devised all her property to Steven and Rodney. In April 2007, Steven initiated an informal probate of Arline's LAST WILL AND TESTAMENT, which eventually led to protracted litigation proceedings in both the District Court and the Supreme Court (Cass County File No. 09-07-P-0010). Issues raised in the estate proceeding led to the initiation of this instant proceeding.

[¶3] The primary asset in the TRUST is its interest in the farmland. However, there are other assets of the TRUST in the form of choses in action (by Steven against Rodney, for his alleged actions and omissions as a cotrustee, and by Rodney against Steven, for his alleged actions and omissions as a cotrustee). The Estate has been open since 2007. Active hostilities between the parties commenced in the Estate at least as early as 2010 (with the filing in the Estate of Rodney's PETITION OF AN HEIR TO REMOVE PERSONAL REPRESENTATIVE AND THE ESTATE'S LEGAL COUNSEL & OPPOSITION TO

PENDING MOTIONS & PETITION FOR SUPERVISED ADMINISTRATION.) The Estate litigation has been to the North Dakota Supreme Court twice, and likely will be there a third time. See In re Estate of Hogen, 2015 ND 125, 863 N.W.2d 876; and In re Estate of Hogen, 2016 ND 97 (appeal dismissed for lack of Rule 54(b) certification).

[¶4] This gets us to the case at bar. On July 13, 2015, Steven filed his PETITION in this matter. On December 30, 2015, the Court issued a MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT. Specifically, the Court granted summary judgment as follows:

1. That the TRUST did not automatically terminate upon Arline's death, and has not yet been terminated;
2. That the statute of limitations had not expired prior to the filing of Steven's PETITION in this case and, therefore, did not bar Steven's claims against Rodney for possible breaches of fiduciary duty; and
3. That Rodney's acts of purporting to deed real property from the TRUST were not merely ministerial acts, but rather were discretionary acts which required Steven's consent as cotrustee in order to be effective.

[¶6(sic)] On April 22, 2016, Steven filed several

motions relating to the farming of the Trust land for the 2016 crop year. Ultimately, the Court entered an ORDER FOR CASH RENTING BARNES COUNTY FARMLAND allowing the Trust's land in Barnes County to be farmed by KOLDOK Farms. The land in Cass County was farmed by Tim Berntson.

[¶7] A Court trial was held in this matter from September 20 through September 23, 2016. Between them, the parties filed 89 pages of post-trial briefs in this matter (excluding exhibits and attachments) on October 24, 2016. The matter is now ripe for decision.

[¶8] This is a case involving administration and, hopefully, winding up of a TRUST. The Court sees its task as basically accounting the TRUST assets (both hard and inchoate) and setting forth a plan for distribution of those assets. To do so the Court must first determine which assets compose the TRUST corpus and the value of those assets, be those assets real property or choses in action. The Court must then decide how those assets will be distributed by the ultimate beneficiaries of this Trust. While this may seem like an easy task, this case is greatly complicated by the facts of the case and the legal positions taken by the parties. The Court will not, however, engage in going beyond this point. For example, this case does not involve a personal lawsuit by one Hogen against another. Additionally, this case does not involve third persons, not made parties to this case. This OPINION AND ORDER is the first step in bringing some finality to this TRUST. Where the parties go from here, and whether additional litigation between them is necessary or desirous, is

simply not within the purview of this case. Neither is any dispute they may have in the administration of the Estate of Arline Hogen.

SUBSTANTIVE FACTS

[¶9] In his lifetime, Curtiss A. Hogen ("Curtiss") acquired 737 acres of real property, primarily tillable farmland, in Barnes and Cass County, North Dakota. In 1984, Curtiss executed the Last Will and Testament of Curtiss A. Hogen ("Will"), creating the Curtiss A. Hogen Trust B ("Trust"). When Curtiss passed away in 1993, a roughly one-half undivided interest in the acres was placed in the Trust, with the remainder given to Arline Hogen, Curtiss' wife. The Trust profits were to be paid to Arline for life from a continued farming operation. After Arline's death, the corpus of the Trust was to be divided between Curtiss' living children: Steven and Rodney Hogen ("Steven" and "Rodney," respectively). The Will stated: "upon the death . . . of my said spouse . . . my Trustee shall divide this trust into equal separate shares so as to provide One (1) share for each then living child of mine . . ." Steven and Rodney were the only children of Curtiss and Arline, and were appointed cotrustees of the Trust.

[¶10] Rodney continued to farm the land after Curtiss passed away in 1993, as he had previously done with his father starting in the 1960's. On March 23, 2007, Arline passed away. Arline's Will equally devised all her property to Steven and Rodney and appointed Steven as Personal Representative. The protracted probate proceedings for Arline's Will led to these

Trust proceedings, and many of the same issues in probate are shared, like the farmland here. On December 11, 2013, the Honorable John C. Irby issued an AMENDED ORDER ON PETITION FOR APPROVAL OF FINAL ACCOUNT, FOR DETERMINATION OF TESTACY STATUS, AND FOR SETTLEMENT OF ESTATE. This AMENDED ORDER followed a lengthy bench trial, where expert testimony was received and considered on the rents due by Rodney to the Estate, separated by time period. The AMENDED ORDER was later modified on remand from the North Dakota Supreme Court.

The Corpus

[¶1] The primary asset in the Trust is the 737 acres of farmland in Barnes and Cass County, North Dakota. However, there are other assets of the Trust in the form of choses in action (by Steven against Rodney, for his alleged actions and omissions as a cotrustee, and by Rodney against Steven, for his alleged actions and omissions as a cotrustee), as well as miscellaneous property. The claims and issues are not easily divided due to the undivided ownership interests of Rodney and Steven from the Estate, and the undivided interests of the Trust. The farmland can be divided into tracts, as follows:

1. Cass County land:
 - a. Tract A — a 144.1 acre tract of land located in the Northeast Quarter of Section 21 of Buffalo Township, Cass County, North

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Dakota;

- b. Tract B — a 120 acre tract of land located in the Northeast Quarter of Section 33 in Buffalo Township, Cass County, North Dakota;
- c. Tract C — a 150 acre tract of land located in the Northwest Quarter of Section 34 in Buffalo Township, Cass County, North Dakota;
- d. Tract D — a 7.42 acre tract of land located at Lot One (1), Block One (1), of the Hogen Subdivision in Cass County, North Dakota;

2. Barnes County land:

- a. Tract E — a 322.93 acre tract of land located in the West Half of Section 5 of Oriska Township, Barnes County, North Dakota;
- b. Tract F — a 10.17 acre tract of land located in Section 5 of Oriska Township, Barnes County, North Dakota.

[¶12] The above list describes the tracts, but the division of undivided interests between the Trust and Estate, and then the division of equal and/or undivided interests of each to both Rodney and Steven, adds a layer to this litigation. The interests

are as follows:

1. Tract A — Trust owns a 71.5% undivided interest and Estate owns a 28.5% undivided interest;
2. Tract B — Trust owns a 50% undivided interest and Estate owns a 50% undivided interest;
3. Tract C — Trust owns a 50% undivided interest and Estate owns a 50% undivided interest;
4. Tract D — Trust owns a 50% undivided interest and Estate owns a 50% undivided interest;
5. Tract E — Trust owns a 50% undivided interest and Estate owns a 50% undivided interest;

and

6. Tract F — Trust owns a 100% interest and Estate has no interest.

Crop-Share and Rent

[¶13] As found above, Rodney continued to farm the Estate's and Trust's land, after the death of Curtiss and after the death of Arline. This was done with the Cass County land on a crop-share basis, Tracts A through D, and the Barnes County land on a

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cash-rental basis, Tracts E and F (where tillable land was available in both Counties). In 2009, the crop-share basis was removed due to an agreement between Rodney and Steven. From 2010 through 2016, a third-party was present as either a renter or sublesor. The types of "rent" are broken down as follows:

Year	Property	Renter	Type
2004	Barnes	Rodney	Cash
	Cass	Rodney	Crop-Share
2005	Barnes	Rodney	Cash
	Cass	Rodney	Crop-Share
2006	Barnes	Rodney	Cash
	Cass	Rodney	Crop-Share
2007	Barnes	Rodney	Cash
	Cass	Rodney	Crop-Share
2008	Barnes	Rodney	Cash
	Cass	Rodney	Crop-Share
2009	Barnes	Rodney	Cash
	Cass	Rodney	Cash

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2010	Barnes	Third-Party	Cash
	Cass	Rodney	Cash
2011	Barnes	Third-Party	Cash
	Cass	Rodney	Cash
2012	Barnes	Third-Party	Cash
	Cass	Rodney	Cash
2013	Barnes	Third-Party	Cash
	Cass	Rodney	Cash
2014	Barnes	Third-Party	Cash
	Cass	Rodney	Cash
2015	Barnes	Third-Party	Cash
	Cass	Rodney (sublease)	Cash
2016	Barnes	Third-Party	Cash
	Cass	Rodney (sublease)	Cash

The Estate

[¶14] In the Estate proceedings, Judge Irby began by following the crop-share agreement for the Cass

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County land as favorably structured by Rodney: 2/3 of proceeds and expenses to Rodney, and 1/3 to the Estate (1/6) and Trust (1/6) combined. The Court then found that Arline had not been paid her due 1/6 share from Rodney's crop-share usage of the Cass County land, or the cash rent usage of the Barnes County land, for years 2004, 2005, and 2006. However, before her death, Arline was never declared incompetent and had waived any claim to the shortages based on her dealings with Rodney. After her death, Arline could not waive any claim to the shortages thus found by Judge Irby.

[¶15] For the years 2007 and 2008, the Estate Court found \$6,804.00 was owed by Rodney to the Estate, as follows: \$30.00 rent per acre in Barnes County, multiplied by 226.8 cash-rented acres of tillable farmland, divided by two for the Estate's 1/2 interest, and multiplied by two for each year. Each year was \$3,402.00. See Exhibit 126C in District Court Case File No.: 09-07-P-100, as modified for CRP re-calculation.

[¶16] For the 393.1 tillable acres of crop-share Cass County farmland in 2007, Judge Irby found the Estate's 1/6 crop-share was \$10,407.89. Funds actually paid into the Estate by Rodney were subtracted when calculating the year's shortage for the Estate, as well as crop-share expenses of \$10.00 per acre (1/6 of average input cost per acre at \$59.99), totaling \$3,930.00. The 2007 shortage was **\$2,381.00**. This process was repeated in 2008, where the Court found the Estate's crop-share was \$16,149.71, minus \$3,683.35 in input expenses (1/6 of \$62.45 at \$10.41

per acre) and any proceeds actually received by the Estate. The 2008 shortage was **\$8,819.40**.

[¶17] In 2009, an agreement was reached between Rodney and Steven, then both the Personal Representative to the Estate and cotrustee to the Trust, for a per acre rental agreement on all the available land. Barnes County rent was \$55.00 per acre, and Cass County rent was \$60.00 per acre. Rent due to the Estate for Barnes County, owning a 50% interest in the land, was **\$6,237.00** (\$55.00 per acre, multiplied by 226.77 acres, multiplied by $\frac{1}{2}$ for the Estate's share). Rent due to the Estate for Cass County was **\$11,793.00** (same formula at 393.1 acres). No rental payments were made to either the Estate or Trust.

[¶18] In 2010, Rodney no longer farmed the Barnes County land, and instead rented the land to a third-party. However, Rodney continued to farm the Cass County land under an oral agreement of \$60.00 per acre, as before. Thus, Judge Irby found Rodney owed the Estate **\$11,310.00** for rent in 2010 (\$60.00 per acre, multiplied by 377 acres, multiplied by $\frac{1}{2}$ for the Estate's share). This calculation was repeated for 2011, yielding the same finding and **\$11,310.00** due from Rodney to the Estate.

[¶19] In the Estate proceedings, "after extensive research and as testified to by expert witness, Kyle Nelson," new rental rates were found for 2012 and 2013. In 2012, the 377 Cass County acres farmed by Rodney would have resulted in the Estate receiving **\$16,722.00** (\$95.00 per acre, multiplied by 377 acres,

multiplied by $\frac{1}{2}$ for the Estate's share). In 2013, the rent due was **\$21,497.00** (\$125.00 per acre, multiplied by 377 acres, multiplied by $\frac{1}{2}$ for the Estate's share).

[¶20] No rental payments were received by the Estate from Rodney for 2009, 2010, 2011, 2012, or 2013. From a total of \$90,069.00 due to the Estate for rent, the Court added Conservation Reserve Program (CRP) payments from the United States Government, which Rodney collected himself and did not distribute to the Estate or Trust. In Barnes County, there were 81.3 CRP acres receiving an annual payment of \$39.53 per acre. Rodney was responsible for, and did maintain, the Barnes County CRP acres in 2007, 2008, and 2009, and thus proceeds for those years would be 1/3 to Rodney and 2/3 to the Estate. In Cass County, there were 21.7 CRP acres. For 2007 through 2009, the per acre rate was \$55.85. For 2010 through 2013, the per acre rate was \$39.77. Rodney was responsible for, and did maintain, the Cass County CRP acres from 2007 through 2013, and thus proceeds for those years would be 1/3 to Rodney and 2/3 to the Estate. Because the Estate Court did not subtract these acres from the rent and/or crop-share acres above, the North Dakota Supreme Court remanded the Estate back to Judge Irby for a retainer determination (subtraction) of the rented acres in Barnes County and the crop-share acres in Cass County. See Estate of Hogen 2015 ND 125, ¶¶ 33-37, 863 N.W.2d 876. The recalculations, as found by Judge Irby in October of 2015, have been incorporated herein as modified.

[¶21] Judge Irby finished the calculations by adding 6 percent interest per annum for the amounts due by

Rodney. Judge Irby, in the Order, used November 1 as the calendar set point, as this typically corresponds to a harvest season. The total rent and CRP payment due to the Estate, with interest, from 2007 through 2013, is **\$116,308.00**.

The Trust Litigation

[¶22] On July 13, 2015, Steven filed a PETITION in this matter. In his PETITION, Steven sought, primarily, the following relief:

1. Supervised administration of the Trust;
2. An offset against Rodney's share of the Trust for any amount he is found to owe the Trust (plus interest) for any actions taken by Rodney which lessened the amount of the Trust corpus, including but not limited to farming the land without paying fair market value or other alleged inappropriate self-dealing from 2004 to the present;
3. Voiding of Quit Claim Deeds issued solely by Rodney (purportedly as a Trustee of the Trust) to other individuals, not co-beneficiaries to this Trust;
4. An injunction preventing Rodney, both directly and through any agent, from entering upon Trust property, from contacting renters of Trust property

without Steven's prior written consent, and from receiving any rents of Trust property without Steven's prior written consent; and

5. Removal of Rodney as cotrustee of the Trust.

[¶23] On December 30, 2015, this Court issued a MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT. Through that ORDER, the Court denied Rodney's request for summary judgment and, in part, granted Steven's request for summary judgment. Specifically, this Court granted summary judgment as follows:

1. That the Trust did not automatically terminate upon Arline's death, and has not yet been terminated;
2. That the statute of limitations had not yet expired prior to the filing of Steven's Petition in this case and, therefore, did not bar Steven's claims against Rodney for possible breaches of fiduciary duty; and
3. That Rodney's acts of purporting to deed real property from the Trust were not merely ministerial acts, but rather were discretionary acts which required Steven's consent as cotrustee in order to be effective.

[¶24] On May 16, 2016, the Court issued a MEMORANDUM OPINION AND ORDER ON PETITIONER'S MOTION FOR INTERIM RELIEF. Through that ORDER, the Court ordered supervised administration of the Trust going forward. The Court denied Steven's motion to suspend Rodney as a cotrustee, and the Court denied Steven's motion to be appointed as a special fiduciary in possession and control of all Trust property. The Court enjoined both Steven and Rodney from executing any documents or agreements on behalf of the Trust, without the agreement and signature of both cotrustees or an Order of the Court. Rental payments from this date forward were paid into the Ohnstad Twichell, P.C., Interests on Lawyers Trust Account (IOLTA).

[¶25] On July 13, 2016, the Court issued a MEMORANDUM OPINION AND ORDER GRANTING MOTION TO AMEND PETITION. Through that ORDER, the Court allowed for Steven to amend his PETITION, but not in a manner where the Court would adjudicate the validity of Quit Claim Deeds from Rodney to his daughter, Marby Hogen, as she was not a party to this litigation and Rodney had not signed the Deeds as a cotrustee of this Trust. However, the amendments to the PETITION involving a potential offset from funds that should have been paid to Arline were allowed.

[¶26] On September 20 through September 23, 2016, a Court Trial was held. Numerous witnesses, including both Rodney and Steven, were heard from, and a number of exhibits were received. The exhibits and witnesses made some claims and amounts more

clear, as has the accounting on previous rents not paid by Rodney. Some of the expert witnesses were shared between this Trust litigation and the Estate litigation, and provided summaries (with underlying factual support) for Rodney's breaches, as found below. Both Steven and Rodney submitted post-trial Briefs. However, this was not the end of filings for this Court. Since the Court Trial:

1. Steven has moved for consolidation of this Trust litigation and the Estate litigation;
2. Michael D. Nelson, counsel for Steven, was substituted with Robert G. Hoy;
3. Steven filed another PETITION FOR COMPLETE SETTLEMENT AND DISTRIBUTION OF TRUST;
4. Rodney moved to strike a number of docket entries and a BRIEF filed by Steven; and
5. Rodney responded to Steven's MOTION.

[¶27] On January 27, 2017, Steven filed a renewed Petitioner for COMPLETE SETTLEMENT AND DISTRIBUTION OF TRUST. In his PETITION, Steven seeks:

1. Allocating the real property involved here for the benefit of both parties, as agreed to by cotrustees Steven and

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Rodney, and as contained in Exhibit "A" to the PETITION;

2. Direct and order Rodney to convey the land he attempted to convey from the Trust to himself, and then to other third-parties, when acting unilaterally as a cotrustee;
3. Authorize Steven to sell Trust and Estate property to pay the mortgage and liens on the property, Trust attorney's fees and costs, and payments to Beneficiaries;
4. Authorize Steven to distribute the remaining real property between himself and Rodney, after any encumbrances, attorney's fees, and amounts due by Rodney into the Trust are paid;
5. Authorize Steven to distribute any remaining property, cash, or proceeds from the sale of the Trust property, after the funds have paid for one-half of the Trust's attorney's fees and one-half of the First state Bank of ND encumbrance; and
6. Order any capital gains taxes from the sale of Trust property be assessed against the Estate devisee to whom such property is allocated.

Rodney objects to this newest PETITION, claiming it, and the documentation provided with it, are ex parte communication with this Court.

LAW

Equity, Trustee Duties, and Systematic Breaches

[¶28] This is a Court of equity to this trust litigation. The terms of the trust will control, except where a court recognizes action outside the trust terms is "necessary in the interests of justice . . ." N.D. Cent. Code § 59-09-05(2)(k). Common law principles of equity supplement the Trust Code of North Dakota. N.D. Cent. Code § 59-09-06. When shown breaches of trust, a court may fashion relief as necessary, including removal of a trustee or some other appropriate relief. N.D. Cent. Code §§ 59-18-01(1) and (2). "[T]he court of equity has jurisdiction in the administration of the trust, and though the discretion of the trustee will not ordinarily be interfered with," a court may do so where a trustee acts in bad faith. In re Le Page's Trust, 269 N.W. 53, 58 (N.D. 1936).

[¶29] "Unless a trust provides otherwise, a trustee's primary obligation is as a fiduciary to administer the trust for the benefit of the beneficiaries." Matter of Mangnall, 1997 ND 19, 111 11, 559 N.W.2d 221. A trustee must administer a trust in good faith, for the benefit of the beneficiaries, and not obtain an advantage over a beneficiary by the slightest concealment. N.D. Cent. Code §§ 59-16-01 and 02(1); Estate of Vizenor ex rel. Vizenor v. Brown, 2014 ND

143, ¶ 12, 851 N.W.2d 119.

[¶30] In handling trust property, a trustee must act impartially for the benefit of the beneficiaries. N.C. Cent. Code § 59-16-03. A trustee must protect trust property. N.D. Cent. Code § 59-16-04. This protection includes a duty to not comingle personal and trust property. N.D. Cent. Code § 59-16-10. A trustee violates their fiduciary duties by engaging in self-dealing with the trust. Allard v. Johnson, 2006 ND 243, ¶ 6, 724 N.W.2d 331. A transaction involving self-dealing is voidable by any beneficiary to the trust. N.D. Cent. Code § 59-16-02(2).

[¶31] This Court inquired with both parties' counsel as to whether Steven's lack of diligence as a cotrustee would prevent any claims he may have against Rodney's breaches. This was an "unclean hands" type of inquiry. Section 59-15-03(7) of the North Dakota Century Code provides: "[e]ach trustee shall exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and compel a cotrustee to redress a serious breach of trust." However, the general rule is a cotrustee is not liable to a beneficiary for a breach of trust committed by a cotrustee. See e.g. Saigh v. Saigh, 218 S.W.3d 556, 561 (Mo. Ct. App. 2007). The North Dakota Trust Code is based on the Uniform Trust Code (UTC). The comments to UTC § 703, contained in N.D. Cent. Code § 59-15-03, explain:

Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) [N.D. Cent. Code

§ 59-15-03(6)] protects trustees who refused to join in the action. Subsection (h) [§ 59-15-03(8)] protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the protections provided by subsections (f) and (h) [§ 59-15-03(6) and (8)] no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) [§ 59-15-03(7)] may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct.

Unif. Trust Code § 703, comment.

[¶32] At the outset, this is a Court of equity. This allows for this Court to fashion relief in the interests of justice, and to appropriately settle the Trust. See e.g., Beckstrand v. Beckstrand, 2017 ND 20, ¶ 12. This Court also finds that Rodney systematically and continuously breached his duties as a cotrustee to the Trust, by purloining trust assets for himself, as well as by engaging in self-dealing and mishandling of Trust corpus for his own benefit. Each year, Rodney would structure a crop-share or other rental agreement with the Trust and/or the Estate, and then either not fully pay the entity or, worse, play a shell game with Trust assets, proceeds, and other monies as a subterfuge of his breaches. Rodney's accounting and

dealings with the Trust, to borrow a term-of-art from Judge Irby in the Estate litigation, were "loose." Eventually, Rodney simply stopped paying into the Trust and Estate outright, despite being a tenant. The breaches by Rodney below were to the detriment of the Trust, and thereby Steven as a co-beneficiary. The breaches are laid out, year-by-year, to show their breadth and depth.

[¶33] Finally, this Court does not find Steven breached a duty as a cotrustee, or that he comes to this Court with unclean hands. See N.D. Cent. Code § 31-11-05(8) ("No one can take advantage of his own wrong."); Beavers v. Walters, 537 N.W.2d 647, 650-51 (N.D. 1995) ("This Court has relied on that maxim in decisions holding a wrongdoer may not take advantage of his own wrong against the victim of the wrongdoing."). Steven took reasonable steps to rectify Rodney's breaches and improper conduct once it was known to him and proper to do so.

Collateral Estoppel

[¶34] This Court will apply collateral estoppel to the issues fully litigated and decided in In the Matter of the Estate of Arline H. Hogen deceased, District Court Case No.: 09-07-P-100. This is especially helpful with the rent amounts owed to both the Trust and Estate, owners of an undivided one-half interest in the land here. "Courts bare relitigation of claims and issues to promote the finality of judgments, which increases certainty, discourages multiple litigation, wards off wasteful delay and expense, and conserves judicial resources." Riemers v. Peters-Riemers, 2004 ND 153,

¶9, 684 N.W.2d 619. Collateral estoppel, or issue preclusion, prevents relitigation in a separate action of the same issues, as previously decided. Id. An issue must satisfy four tests to be considered estopped for relitigation:

1. Was the issue decided in the prior adjudication identical to the one presented in the action in question?;
2. Was there a final judgment on the merits?;
3. Was the party against whom the plea is asserted a party or in privity to the prior adjudication?;
4. Was the party against whom the pleas is asserted given a fair opportunity to be heard on the issue?

Norberg v. Norberg, 2017 ND 14, ¶ 12. Collateral estoppel is not a new legal doctrine, but the Norberg decision shows how far it may be taken and how it applies here.

[¶35] In Norberg, the North Dakota Supreme Court held that collateral estoppel prevented the relitigation of issues decided in a prior criminal case, and in a prior divorce proceedings, as brought in a subsequent civil case. Id. at ¶¶ 27-28. In the criminal proceedings, Alonna Knorr alleged Jon Norberg sexually abused her after drugging her with Propofol; a jury acquitted Norberg of all charges. Id. at ¶ 2. In the divorce

proceedings, the district court held Knorr had lied about the allegations of sexual abuse from Norberg in an attempt to secure primary residential responsibility of the parties' children, and the court used this information while distributing the marital assets and debt. Id. at ¶¶ 2-3. Knorr later sued Norberg for medical malpractice, amongst other claims; Norberg counterclaimed for abuse of process, malicious prosecution, and defamation. Id. at ¶ 3. The district court denied Norberg's motion to estop Knorr from presenting evidence contrary to the issues already decided in the divorce proceedings, and a jury found Knorr not liable. Id. Only the first test of collateral estoppel was at issue, and thereby the questions for the North Dakota Supreme Court to determine were: "(1) the relevant factual issues decided in the criminal and divorce cases; (2) whether those factual issues in the earlier cases were 'necessarily decided'; and whether the facts decided in the earlier cases are the facts decided by the jury in the current case." Id. at ¶ 14.

[¶36] Here, despite the parties arguments to the contrary, collateral estoppel does apply. The issues previously decided in the Estate proceeding — the rent owed, the crop-share expenses and proceeds, the amount of land that was rented vs. set-aside for CRP checks as calculated — all from 2007 through 2013 — will be used here, recognizing the only difference is the label of the undivided one-half interest in the land (Estate or Trust). Further, it is clear that Rodney's actions in the Estate litigation are the same that give rise to the breach claims, found below, in this Trust litigation.

[¶37] First, the amount of land rented (or crop-shared), and the rate of fair rent, was litigated in the Estate proceedings with Judge Irby. The land, rent, inputs and proceeds garnered were "actually litigated and . . . essential to the prior decision." Id. at ¶ 21 (citing Riverwood Commercial Park, LLC v. Standard Oil Co., 2007 ND 36, ¶ 21, 729 N.W.2d 101). These are identical to the issues now before this Court. The burden of proof is also the same between the Estate litigation and this Trust litigation. Second, there was a final judgment on the merits in the Estate litigation, and only a recalculation of land totals in light of CRP findings was before Judge Irby on remand. These adjusted calculations will be factored into this Court's analysis below. Estate of Hogen, 2015 ND 125, ¶ 35, 863 N.W.2d 876. Third, Rodney is a constant party between the litigations, and the changes of his title are immaterial. Liability for Rodney's actions attached in the Estate proceedings based on his status as an heir who acted out of the bounds from his inheritance; liability here has attached based on his status as a cotrustee. The result, in the end, is the same, just varies depending on which undivided one-half interest is seeking to be properly accounted for from rents and crop-proceeds. The title of Steven is equally immaterial, just as the title of Jon Norberg, from criminal defendant to civil defendant-father, was also immaterial in the Court's Norberg analysis. And fourth, there is no question that in both litigations, Rodney has had a fair opportunity to be heard. Rodney litigated the rent, his ownership interest, and the factual findings in the Estate proceedings, just as they are to be applied here.

Motion to Consolidate

[¶38] Steven cites to Rule 42 of the North Dakota Rules for Civil Procedure, which state a district court may consolidate cases with shared law and facts when appropriate. As Judge Irby did in the Estate proceedings, this Court declines to exercise its discretion and consolidate this matter with the Estate case. Both cases have been extensively litigated, and the Estate case has been to the North Dakota Supreme Court twice. In the extensive litigation, both this Court and Judge Irby have devoted considerable resources and time in an effort to decide the issues here. To now order consolidation would extinguish one responsibility, while doubling another, and only add time to already protracted proceedings.

[¶39] Simply put, the time for consolidation came and went, long before the years, filings, and attorney's fees for both the Estate and this Trust case piled up. These cases are tied to one another factually, as this Court's analysis under Norberg clearly shows. However, the Estate and Trust must proceed as they are split today. The Court finds that there are no compelling reasons to consolidate the two matters.

APPLICATION

Year-by-Year Trust Breaches and Shortfalls

[¶40] In 2004, the 308.1 tillable acres of Barnes County farmland, namely Tract E, was cash rented to Rodney. 81.3 acres were under the CRP umbrella, and therefore must be excluded. The accepted rental rate

was \$30.00 per acre. The Trust was owed half of the rent, as it owned a one half interest in the Barnes property. The Trust's share of rent was **\$3,402.00** (226.8 acres, multiplied by \$30.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). Insufficient evidence is before this Court showing the CRP payments, if any were in place, required to the Trust for this year.

[¶41] In 2004, the 393.1 tillable acres of Cass County land was rented on a crop-share basis with Rodney. No acres fell under the CRP umbrella. The Trust's share of proceeds was \$10,533.00 (1,820.25 bushels of soybeans), of which the Trust received \$6,663.63, leaving a shortage of \$3,869.67. The average input cost per acre was \$43.36, putting the Trust's expense share at \$2,840.80 (393.1 acres, multiplied by \$43.36 per acre, multiplied by the Trust's 1/6 share). Rodney charged the Trust \$3,402.00 for the input costs, leaving an overpayment difference of \$561.20. The Trust's share of crop-share proceeds was **\$4,430.87** (\$3,869.67 share owed, plus \$561.20 overcharged for expenses).

[¶42] In 2005, the 308.1 tillable acres of Barnes County land was cash rented to Rodney. 81.3 acres were under the CRP umbrella, and therefore must be excluded. The accepted rental rate was \$30.00 per acre. The Trust was owed half of the rent, as it owned a one-half interest in the Barnes property. The Trust's share of rent was **\$3,402.00** (226.8 acres, multiplied by \$30.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). No evidence is before this Court showing any CRP payments required to the Trust.

[¶43] In 2005, the 393.1 tillable acres of Cass County land was rented on a crop-share basis with Rodney. No acres fell under the CRP umbrella. The Trust's share of proceeds was \$8,457.88 (1/6 share of 1,386.14 bushels of soybeans and 786.67 bushels of corn; \$7,336.47 and \$1,121.42, respectively), of which the Trust received \$3,924.12, leaving a shortage of \$4,533.76. The average input cost per acre was \$37.86, putting the Trust's expense share at \$2,480.53 (393.1 acres, multiplied by \$37.86 per acre, multiplied by the Trust's 1/6 share). Rodney charged the Trust \$3,402.00 for the input costs, leaving an overpayment difference of \$921.47. The Trust's share of crop-share proceeds was **\$5,455.23** (\$4,533.76 share owed, plus \$921.47 overcharged for expenses).

[¶44] In 2006, the 308.1 tillable acres of Barnes County land was cash rented to Rodney. 81.3 acres were under the CRP umbrella, and therefore must be excluded. The accepted rental rate was \$30.00 per acre. The Trust was owed half of the rent, as it owned a one-half interest in the Barnes property. The Trust's share of rent was **\$3,402.00** (226.8 acres, multiplied by \$30.00 per acre, multiplied by the Trust's ½ share). No evidence is before this Court showing the CRP payments required to the Trust.

[¶45] In 2006, the 393.1 tillable acres of Cass County land was rented on a crop-share basis with Rodney. No acres fell under the CRP umbrella. The Trust's share of proceeds was \$7,554.08 (1/6 share of 718.33 bushels of wheat and 740.12 bushels of soybeans; \$3,054.82 and \$4,499.26 respectively), of which the Trust received \$8,319.93, showing Rodney overpaid by

\$765.85. The average input cost per acre was \$26.80, putting the Trust's expense share at \$1,755.80 (393.1 acres, multiplied by \$26.80 per acre, multiplied by the Trust's 1/6 share). Rodney charged the Trust \$3,402.00 for the input costs, leaving an overpayment difference of \$1,646.20. The Trust's share of crop-share proceeds was **\$880.35** (\$1,646.20 overcharged expenses, minus \$765.85 overpaid).

[¶46] In 2007, as found by Judge Irby in the Estate proceedings, the 308.1 tillable acres of Barnes County land was cash rented to Rodney. 81.3 acres were under the CRP umbrella, and therefore must be excluded. The accepted rental rate was \$30.00 per acre. The Trust was owed half of the rent, as it owned a one-half interest in the Barnes property. The Trust's share of rent was \$3,402.00 (226.8 acres, multiplied by \$30.00 per acre, multiplied by the Trust's 1/2 share). The CRP payment due was \$1,071.26 (81.3 acres, multiplied by \$39.53 per acre, multiplied by the Trust's 1/2 share, and again multiplied by a 2/3 equitable share — 1/3 to Rodney for maintaining the land — as found by Judge Irby). The Trust did not receive any of the CRP share. Therefore, the total due to the Trust was \$4,473.26 (\$3,402.00 share proceeds plus \$1,071.26 CRP share). However, Rodney paid the Trust \$7,825.54 for the year in total rent, attempting to offset the difference between the crop-share agreement (below) and cash rent agreement, and thus the Trust owes Rodney **\$3,352.28**.

[¶47] In 2007, for the 393.1 tillable acres of crop-share Cass County farmland, Judge Irby found the Estate's 1/6 crop-share was \$10,407.89; therefore, the Trust is

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owed the same. The Trust was paid \$7,492.23 (1/6 share equaling \$627.84 for wheat, \$4,653.95 for soybeans, and \$2,210.44 for corn). This leaves a crop-share shortage of \$2,914.77. The average input cost per acre was \$59.99, putting the Trust's expense share at \$3,930.35 (393.1 acres, multiplied by \$59.99 per acre, multiplied by the Trust's 1/6 share). According to the Trust's 2007 tax return, it paid \$8,366.00 in operating expenses. The Trust was also owed \$404.00 for CRP payments ($\frac{1}{2}$ of 21.7 acres, multiplied by \$55.85 per acre, multiplied by 2/3 for an equitable share to the Trust). In total, the Trust is owed **\$7,754.42** (\$2,914.77 shortage, plus \$4,435.65 overcharged expenses, plus \$404.00 CRP payment).

[¶48] In 2008, as found by Judge Irby in the Estate proceedings, the 308.1 tillable acres of Barnes County land was cash rented by Rodney. 81.3 acres were under the CRP umbrella, and therefore must be excluded. The accepted rental rate was \$30.00. The Trust was owed half of the rent, as it owned a one-half interest in the Barnes property. The Trust's share of rent was \$3,402.00 (226-.8 acres, multiplied by \$30.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). The CRP payment due was \$1,071.26 (81.3 acres, multiplied by \$39.53 per acre, multiplied by the Trust's $\frac{1}{2}$ share, and again multiplied by a 2/3 equitable share). The Trust did not receive any of the CRP share. Therefore, the total due to the Trust was \$4,473.26 (\$3,402.00 share proceeds plus \$1,071.26 CRP share). However, Rodney paid the Trust \$7,875.00 for the rent, again attempting to offset the difference between the crop-share rent and the cash rent, and thereby the Trust owes Rodney **\$3,401.74**.

[¶49] In 2008, for the 393.1 tillable acres of crop-share Cass County farmland, Judge Irby found the Estate's 1/6 crop-share was \$16,149.71; therefore, the Trust is owed the same. The Trust was paid \$6,640.79 (1/6 share of corn, exclusively). This leaves a crop-share shortage of \$9,508.92. The average input cost per acre was \$62.45, putting the Trust's expense share at \$4,091.52 (393.1 acres, multiplied by \$62.45 per acre, multiplied by the Trust's 1/6 share). According to the Trust's 2007 tax return, it paid \$13,505.00 in operating expenses. The Trust was also owed \$404.00 for CRP payments ($\frac{1}{2}$ of 21.7 acres, multiplied by \$55.85 per acre, multiplied by 2/3 for an equitable share to the Trust). In total, the Trust is owed **\$19,326.40** (\$9,508.92 shortage, plus \$9,413.48 overcharged expenses, plus \$404.00 CRP payment).

[¶50] In 2009, Steven and Rodney reached an agreement for Rodney to rent and farm all the available, tillable acres, regardless of location. The rate was \$55.00 per acre in Barnes County and \$60.00 per acre in Cass County. The Court here is precluded from ruling that there was no agreement, or that a different rate should apply, as this was Judge Irby's ruling in the Estate proceeding. No payments were made by Rodney into the Trust. Thus, the rental shortfall is straightforward. The amount due from Rodney to the Trust for Barnes County is \$6,237.00 (226.8 acres, multiplied by \$55.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). The CRP payment due was \$1,071.26 (81.3 acres, multiplied by \$39.53 per acre, multiplied by the Trust's $\frac{1}{2}$ share, and again multiplied by a 2/3 equitable share, as found by Judge Irby). The Trust did not receive any of the rent or

CRP. Therefore, the total amount due to the Trust was **\$7,308.26**. The amount due from Rodney to the Trust for Cass County is \$11,793.00 (393.1 acres, multiplied by \$60.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). The CRP payment due was \$404.00 (21.7 acres, multiplied by \$55.85 per acre, multiplied by the Trust's $\frac{1}{2}$ share, and multiplied again by $\frac{2}{3}$ for an equitable share). Therefore, the total amount due to the Trust was **\$12,197.00**.

[¶51] In 2010, Rodney no longer farmed the Barnes County land, and instead a third-party rented the land. The rental payment for that year was paid directly to the Trust. Rodney still received \$3,214.00 from the CRP, and half was due to the Trust: **\$1,607.00** (no equitable distribution, as Rodney did not maintain the land). Rodney did continue to personally rent and farm the Cass County land. Judge Irby found, in the Estate litigation, that there was an oral agreement for \$60.00 per acre. The Trust is due \$11,310.00 in rent from Rodney (377 acres rented, multiplied by \$60 per acre, multiplied by the Trust's $\frac{1}{2}$ share). The CRP payment due was \$288.00 (21.7 acres, multiplied by \$39.77 per acre, multiplied by the Trust's $\frac{1}{2}$ share, and multiplied again for an equitable $\frac{2}{3}$ share). Therefore, the total amount due to the Trust was **\$11,598.00**. Rodney did not make a payment to the Trust for the rent or CRP.

[¶52] In 2011, the Barnes County rent was paid directly to the Trust. Rodney still received \$3,214.00 from the CRP, and half was due to the Trust: **\$1,607.00** (no equitable distribution). The Cass County calculations were exactly the same in the

Estate proceedings, as articulated in the preceding paragraph, and remain exactly the same in this Trust litigation. Therefore, the total amount due to the Trust was **\$11,598.00**. Rodney did not make a payment to the Trust for this year.

[¶53] In 2012, the Barnes County rent was paid directly to the Trust. Rodney still received \$3,214.00 from the CRP, and half was due to the Trust: **\$1,607.00** (no equitable distribution, as Rodney did not maintain the land). The Cass County calculations varied, however, as the Estate Court found "a reasonable rental rate for the [Cass County] property would be \$95.00 per acre." The Trust is due \$16,722.00 in rent from Rodney (377 acres rented, multiplied by \$95.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). The CRP payment due was \$288.00 (21.7 acres, multiplied by \$39.77 per acre, multiplied by the Trust's $\frac{1}{2}$ share, and multiplied again for an equitable $\frac{2}{3}$ share). Therefore, the total amount due to the Trust was **\$17,010.00**. No payments were made to the Trust for these rents.

[¶54] In 2013, the Barnes County rent was paid directly to the Trust. Rodney still received \$3,214.00 from the CRP, and half was due to the Trust: **\$1,607.00** (no equitable distribution, as Rodney did not maintain the land). The Cass County calculations varied, however, as the Estate Court found "a reasonable rental rate for the Cass County farm property would be \$125.00 per acre." The Trust is due \$21,497.00 in rent from Rodney (377 acres rented, multiplied by \$125.00 per acre, multiplied by the Trust's $\frac{1}{2}$ share). The CRP payment due was \$288.00

(21.7 acres, multiplied by \$39.77 per acre, multiplied by the Trust's $\frac{1}{2}$ share, and multiplied again for an equitable 2/3 share). Therefore, the total amount due to the Trust was **\$21,785.00**.

[¶55] In 2014, Rodney directly received some of the Barnes County rent, with half due to the Trust: \$6,242.50 ($\frac{1}{2}$ share of \$12,485.00 received). Rodney also received \$3,214.00 from the CRP, and half was due to the Trust: \$1,607.00 (no equitable distribution, as Rodney did not maintain the land). These amounts total **\$7,849.50**.

[¶56] In 2014, for Cass County, the calculation methodology changed when expert witness Kyle Nelson testified. However, the result is still an accurate accounting for what Rodney owes the Trust; it is simply arrived at by splitting the acreage into Trust land and Estate land first, as opposed to multiplying by $\frac{1}{2}$ after a total is arrived at. As testified to by Kyle Nelson, a reasonable rate for Cass County tillable land in 2014 would remain at \$125.00 per acre. As testified by expert Witness Kyle Nelson and Rodney, only 210.07 tillable acres were rented by Rodney (393.1 tillable acres, split 71.5% of Tract A, 50% of Tract B, 50% of Tract C, 50% of Tract D, reduced by the CRP land and non-tillable acres). The Trust is due \$26,258.75 in rent from Rodney (210.07 acres, multiplied by \$125.00 per acre). Rodney also received \$985.00 for his annual CRP rental for the Cass County land. The Trust is owed \$328.33 ($\frac{1}{2}$ share, multiplied by 2/3 equitable share). Therefore, the total amount due to the Trust was **\$27,243.75**. Rodney has not made a payment to the Trust for the

rent or CRP.

[¶57] In 2015, Rodney directly received some of the Barnes County rent, with half due to the Trust: **\$6,242.50** (½ share of \$12,485.00 received). There was no longer a CRP contract with the U.S. Government. Rodney subletted the Cass County land. As testified to, a reasonable rate for Cass county tillable land in 2015 was \$110.00 per acre. The Trust is due \$23,107.70 in rent from Rodney (210.07 acres rented/subletted, multiplied by \$110.00 per acre). There was insufficient evidence presented for this Court to find Rodney kept any CRP payment. Therefore, the total amount due to the Trust was **\$23,107.70**.

[¶58] In 2016, this Court's Order overseeing the administration of this Trust resulted in the Barnes County rent being put into the Ohnstad Twichell, P.C., IOLTA trust account. However, Rodney continued to sublet the Cass County land. As testified to, Rodney agreed to rent the tillable land in Cass County at \$97.50 per acre. The Trust is due \$20,481.83 in rent from Rodney (210.07 acres rented/subletted, multiplied by \$97.50 per acre, multiplied by the Trust's ½ share). Again, insufficient evidence was presented for a finding on the CRP payment. Therefore, the 2016 total due to the Trust from Rodney is **\$20,481.83**.

[¶59] The above totals end the inquiry into the amount due from Rodney to the Trust — now a Court found asset of the Trust. As Judge Irby applied a 6 percent per annum rate in the Estate proceedings,

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this Court now applies interest at 6 percent per annum. The resulting interest, and total for amount due by Rodney to the Trust, is as follows:

<u>Year</u>	<u>Property</u>	<u>Amount Due</u>	<u>Years at 6% (LW)</u>	<u>Total</u>
2004	Barnes	\$3,402.00	13 (\$2,653.56)	\$6,055.56
	Cass	\$4,430.87	13 (\$3,456.08)	\$7,886.95
2005	Barnes	\$3,402.00	12 (\$2,449.44)	\$5,851.44
	Cass	\$5,455.23	12 (\$3,927.77)	\$9,383.00
2006	Barnes	\$3,402.00	11 (\$2,245.32)	\$5,647.32
	Cass	\$880.35	11 (\$581.03)	\$1,461.38
2007	Barnes	\$(3,352.28)	10 (\$2,011.37)	(\$5,363.65)
	Cass	\$7,754.42	10 (\$4,652.65)	\$12,407.07
2008	Barnes	\$(3,401.74)	9 (\$1,836.94)	(\$5,238.68)
	Cass	\$19,326.40	9 (\$10,436.25)	\$29,762.65
2009	Barnes	\$7,308.26	8 (\$3,507.96)	\$10,816.22

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			—	
	Cass	\$12,197.00	8 (\$5,854.56)	\$18,051.56
2010	Barnes	\$1,607.00	7 (\$674.94)	\$2,281.94
	Cass	\$11,598.00	7 (\$4,871.16)	\$16,469.16
2011	Barnes	\$1,607.00	6 (\$578.52)	\$2,185.52
	Cass	\$11,598.00	6 (\$4,175.28)	\$15,773.28
2012	Barnes	\$1,607.00	5 (\$482.10)	\$2,089.10
	Cass	\$17,010.00	5 (\$5,103.00)	\$22,113.00
2013	Barnes	\$1,607.00	4 (\$385.68)	\$1,992.68
	Cass	\$21,785.00	4 (\$5,228.40)	\$27,013.40
2014	Barnes	\$7,849.50	3 (\$1,412.91)	\$9,262.41
	Cass	\$27,243.75	3 (\$4,903.88)	\$32,147.63
2015	Barnes	\$6,242.50	2 (\$749.10)	\$6,991.60
	Cass	\$23,107.70	2 (\$2,772.92)	\$25,880.62
2016	Barnes	N/A	N/A	N/A
	Cass	\$20,481.83	1 (\$1,228.91)	\$21,710.74
			TOTAL:	\$282,631.90

Purloining Claim

[¶60] A total of **\$23,329.75** was purloined from the Trust checking account for the direct benefit of Rodney, a family member, or some other individual/entity. Steven testified that he, as a cotrustee, did not sign off on, nor otherwise consent to any of these checks or transfers. Therefore, these withdrawals and transfers are another instance of self-dealing and personal benefit executed by Rodney. The total must be repaid back into the Trust account so that the Trust may be properly distributed.

FINDING OF TRUST ASSETS AND
ATTORNEY'S FEES

[¶61] The Trust corpus, assets, and encumbrances as found today, are as follows:

1. Farmland in both Barnes and Cass County, North Dakota, the value of which will be determined in this Court's contemporaneous Order;
2. Choses in Action against Rodney Hogen:
 - a. \$282,631.90 in fiduciary breaches, interest included, and
 - b. \$23,329.75 in purloining, as a fiduciary breach, for
 - c. A total of **\$305,961.65**;
3. Miscellaneous Trust assets, such as the farm equipment and other property

connected to the Trust.

[¶62] The issue of attorney's fees will be reserved to a later date. Counsel shall compile for the Trust its requests for attorney's fees with supporting documentation and submit the same to the Court and to opposing counsel within 15 days from the date of this Order. Steven Hogen's fee request must also be submitted at that time. The Court will schedule a hearing for approval or disapproval of attorney's fees and the Trust's attorney's fees. Upon determination of any fee issue, cotrustee Steven Hogen will submit an amended final account consistent with this order which will be ruled upon by the Court without further hearing.

[¶63] Dated this 7th day of March, 2017.

BY THE COURT:

"s/"

Honorable Steven E. McCullough
District Judge
East Central Judicial District

APPENDIX R

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

In the Trust of Curtiss A. Hogen Trust B, created under the Last Will and Testament of Curtiss A. Hogen,

File No. 09-2015-CV-01717

ORDER GRANTING PETITION FOR APPROVAL OF FINAL REPORT AND ACCOUNT

[¶1] This matter is before the Court on Steven C. Hogen's PETITION FOR APPROVAL OF AMENDED FINAL REPORT AND ACCOUNT, filed July 14, 2017. Rodney Hogen responded, with RESPONDENT'S OBJECTION TO STEVEN C. HOGEN'S AMENDED FINAL REPORT AND ACCOUNT, submitted August 22, 2017. Steven filed a REPLY BRIEF IN SUPPORT OF PETITION FOR APPROVAL OF AMENDED FINAL REPORT AND ACCOUNT on September 1, 2017. Based on the following, the Court grants Steven

Hogen's PETITION FOR APPROVAL OF AMENDED FINAL REPORT AND ACCOUNT.

BACKGROUND

[¶2] Curtiss A. Hogen created the CURTISS A. Hogen TRUST B ("Trust"), by the LAST WILL AND TESTAMENT OF CURTISS A. Hogen, executed in 1984. Curtiss passed away in 1993. Curtiss primarily owned farmland, roughly half of which was put into the Trust and the other half to be paid to his wife Arline for her life. After Arline's death, the Trust required the Co-Trustees to divide the property of the Trust into equal shares and distribute them to Curtiss' living children, Steven and Rodney. The WILL named and appointed Steven and Rodney as Co-Trustees.

[¶3] After Curtiss' death, Rodney continued farming the land under cash rent and crop-share arrangements. Arline's LAST WILL AND TESTAMENT equally divided her property to Steven and Rodney. In April 2007, Steven initiated an informal probate of Arline's WILL, which led to protracted legal proceedings in both the District Court and the Supreme Court. Issues raised in the estate proceeding led to the initiation of these proceedings.

[¶4] Steven Hogen ("Steven"), in his capacity as Co-Trustee of the Trust, petitioned the Court for a complete settlement and distribution of the Trust, requesting (1) an allocation of the Trust's real property between the two beneficiaries, Steven Hogen and Rodney Hogen ("Rodney"), to facilitate payment

of outstanding debts owed by the beneficiaries and for eventual distribution after the payments; and (2) for the sale of real property to satisfy the outstanding obligations of the beneficiaries. The Court granted the Petition. The Court permanently suspended Rodney as Co-Trustee of the Trust and ordered Steven to allocate the Trust property, authorized him to sell in order to pay debts, and instructed him to effect a final settlement and distribution.

[¶5] In a separate Order, on the same date as the Order granting the Petition the Court entered a POST-TRIAL OPINION AND ORDER, which determined amounts owed to the Trust by Rodney Hogen in the amount of \$305,961.65. The Court also ordered the Trust to compile its attorney's fees and submit for a final approval within 15 days. The parties submitted their request for fees and attorney's fees within 15 days from that ORDER. Rodney Hogen appealed the Court's Orders.

[¶6] On August 2, 2017, the North Dakota Supreme Court remanded the case, instructing the Court to consider and dispose of the PETITION FOR APPROVAL OF AMENDED FINAL REPORT AND ACCOUNT and the requests for attorney's fees and Trustee's fees within 60 days.

ISSUES

1. Whether the Court should grant Steven's Petition for Approval of Amended Final Report and Account.

2. Whether the Court should award attorney's and trustee's fees to Steven, and if so, in what amount.
3. Whether the Court may clarify its earlier ruling, given the scope of jurisdiction on remand.

LAW AND ANALYSIS

[¶7] The matter before the Court is whether to approve Steven's AMENDED FINAL REPORT AND ACCOUNT, and to determine the amount of attorney's and Trustee's fees. Steven completed the allocation and sale of Trust property as ordered by the Court. He submitted an AMENDED FINAL REPORT AND ACCOUNT. He seeks to have his attorney's fees approved, and to clarify the Court's ORDER with regard to capital gains taxes.

Final Amended Report and Account

[¶8] The Court finds that the allocation of Trust property is fair and proper. Steven and Rodney agreed to a particular split of the Trust and Estate property. The agreement is evidenced by emails introduced to the record during Rodney's testimony. Steven allocated the Trust property in accordance with that agreement. The sale of Trust property by auction was also appropriate. In his duty as Co-Trustee, and as ordered by the Court, Steven employed Pifer's Auction and Realty to sell sufficient property allocated to each beneficiary in order to pay debts responsible to each. In the Final Amended Report and Account, Steven

corrected an error in this Court's prior Order that erroneously added one year's interest on unpaid rent to the property.

[¶9] Rodney did not object to the proposed allocation or sale, during the Trust matter or the Estate matter. At the prior trial in this matter, Rodney testified that he had an agreement with Steven as to the allocation of the Trust and Estate property, and introduced emails reflecting this agreement. Steven's January Petition indicated his intent to follow this agreement. The following allocation and sale reflected this agreement. As a result, it is hard to say that the allocation was unfair or improper. Rodney argues that the property should be appraised within 30 days of the distribution. Steven and Rodney appraised the property at Arline's death, as they were allowed to do as Co-Trustees of the Trust.

[¶10] The Court finds that Rodney's other objections to the Amended Final Report and Account have either already been decided upon or lack merit.

Attorney's and Trustee's Fees

[¶11] North Dakota statutes relating to fee requests for trustee's and attorney's fees are found in Title 59, North Dakota's adoption of the Uniform Trust Code. The statutes provide, in part as follows:

**59-09-06. (106) Common law of trusts
— Principles of equity.**

The common law of trusts and principles

of equity supplement [these chapters], except to the extent modified by [these chapters] or another statute of this state.

59-15-08. (708) Compensation of Trustee.

8. If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

59-15-09. (709) Reimbursement of Expenses.

1. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for expenses that were properly incurred in the administration of the trust.

59-16-05. (805) Costs of Administration.

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

59-16-16. (816) Specific powers of trustee.

Without limiting the authority conferred by section 59-16-15 [general powers of trustee], a trustee may:

15. Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust.
24. Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties.
29. Employ persons, including attorneys, auditors, investment advisers or agents, to advise or assist the trustee in the performance of administrative duties.

[¶12] North Dakota case law also supports the possibility of an award of fees to trustees. The In re Estate of Amundson North Dakota Supreme Court decision states: "Personal representatives of estates or trusts are entitled to receive reasonable compensation for the services they provide." 2015 ND 253, ¶ 7, 870

N.W.2d 208. "The personal representative is also 'authorized to hire attorneys to assist in administration of the estate and to defend or prosecute proceedings.' Id. Trustees are also allowed to pay attorneys out of trust assets: "[a]s a general rule a trustee is entitled to be reimbursed for the reasonable fees of an attorney properly employed in connection with the administration of the trust estate, where the employment was for the benefit of the estate." Raszler v. Raszler, 81 N.W.2d 120, 123. Here, the attorney's fees and costs were accrued in the defense of Trust assets. As such, it is well within this Court's authority to grant attorney's fees and costs out of the Trust assets. Rodney argues the general rule in North Dakota is for each party to pay its own fees and costs, the general rule here is modified by the listed statutes. The Court finds that the awarding of attorney's and Trustee's fees out of the Trust assets is appropriate. Steven Hogen requested \$13,750 in Trustee's fees. This is a reasonable amount, based on his efforts to manage and administer the Trust and totals to about \$380 per month he has served as Trustee during contentious and protracted litigation.

[¶13] The issue then is the amount of attorney's fees. Across the initial request and a supplemental request, Steven has requested a total of \$401,916.50 in attorney's fees and an additional \$26,325.35 in associated costs and expenses. The general guidelines for determining reasonable attorney's fees in North Dakota were set forth and adopted in Hughes v. North Dakota Crime Victims Reparations Board, and state as follows:

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(1) time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

246 N.W.2d 774, 777 (N.D. 1976). These guidelines were later approved for use in probate proceedings in In re Estate of Ridl, 455 NW.2d 188, 193-94 (N.D. 1990). In recent cases, the North Dakota Supreme Court has pointed district courts to the North Dakota Rules of Professional Conduct:

The factors listed in N.D.R.Prof.Conduct 1.5(a) are intended to guide a district court in determining the reasonableness of an award of attorney fees.

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Heng v. Rotech Medical Corp., 2006 ND 176, ¶ 30, 720 N.W.2d 54. All factors must be considered, and no factor controls. Id.

[¶14] (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill

requisite to perform the legal service properly; this factor tends to increase the award. This case is complicated and difficult. There have been a large number of issues stretched across multiple proceedings. It has required the diligence and professional work of two attorneys and occasional support staff for hundreds of hours. This case has proceeded through both this action and a prior action to settle the Estate of Arline Hogen. See In re Estate of Hogen, 2015 ND 125, 863 N.W.2d 876. It has required more than rudimentary skill to maneuver.

[¶15] (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; this factor also tends to increase the award. The case has required an immense expenditure of hours, and that necessarily would have reduced the ability of Ohnstad Twichell, P.C.'s staff to take on additional cases.

[¶16] (3) The fee customarily charged in the locality for similar legal services; Steven submitted an Affidavit and Exhibit which indicated that the standard hourly rate for "senior litigators in the area" is \$200-\$250 per hour. This same rate was approved by this Court through Judge Irby in the prior case, In re Estate of Hogen.

[¶17] (4) The amount involved and the results obtained; as of the Court's March 7, 2017 Order, Steven obtained nearly the entire amount at issue in the case, \$305,961.65. He prevailed in the suit. The Ohnstad Twichell firm estimated to Steven that an ordinary case of this type would cost about \$120,000

for attorney's fees. However, the litigation in this case has extended onward for years, in no small part due to the vigorous and aggressive tactics of Rodney.

[¶18] (5) The time limitations imposed by the client or the circumstances; this factor does not affect the award. There were no unusual or unordinary time limitations outside the normal limitations of procedure.

[¶19] (6) The nature and length of the professional relationship with the client; Steven has worked with Ohnstad Twichell for the entire pendency of the estate, since 2007.

[¶20] (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; the litigators at Ohnstad Twichell have the requisite experience, reputation, and ability to support the reasonableness of the fees and expenses sought. The litigators involved in the case are deserving of a "senior litigator" designation.

[¶21] (8) Whether the fee is fixed or contingent; this factor is not applicable here. Ohnstad Twichell charged an hourly fee based on the number of hours worked.

[¶22] It is also helpful to examine the prior case. In In re Estate of Hogen, this Court, through Judge Irby, awarded Steven \$333,272.23 in attorney's fees, costs, and expenses. It was also affirmed on appeal, for many of the same reasons already expressed.

[¶23] In determining the total amount of the fee, typically a "lodestar" formula is used. Hours expended are multiplied by an hourly rate. Heng, 2006 ND 176, ¶ 31, 720 N.W.2d 54. The lodestar hourly rate is "based upon the attorney's experience and reputation." City of Bismarck v. Thorn, 261 N.W.2d 640, 646 (N.D. 1977). "The hourly rate can be adjusted upwards or downwards on the basis of objective evaluation of the complexity and novelty of the litigation and the corresponding degree of skills displayed by the attorney." Id. In the Heng, case, counsel for the prevailing party used a "blended" rate in computing a per hour charge, which consisted of total fees that would normally be billable by her over time, divided by the number of hours. Heng, 2006 ND 176, ¶ 31, 720 N.W.2d 54. Both attorney time and paralegal time were computed, separately, to come up with a "blended" rate. Id. In the present case, Steven's attorneys submitted a number of Ohnstad Twichell billing statements. The request for fees was first made on March 22 2017, and then supplemented August 31, 2017, after remand by the North Dakota Supreme Court. In reviewing both of those filings, the Court has found the approximate number of hours worked and calculated the requested "blended" rate based on the following equations:

Attorney hours worked = 1,435.15

Attorney fees requested = \$386,899.53

Blended rate requested = \$269.59 per attorney
hour

Paralegal hours worked = 110.33

Paralegal fees requested = \$15,1016.97

Blended rate requested = \$136.11 per paralegal hour

[¶24] The Court finds these are reasonable attorney's fee rates in this case. As already discussed, this was an extremely complicated and tenacious case that stretched on for years. As a result, a slight deviation upwards from the local standard of "\$200-250 senior litigator in the area" standard is reasonable and warranted. Based on the 1,545 hours expended and the \$269.59 and \$136.11 hourly rates, the Court will grant Steven attorney's fees in the amount of \$401,916.50 from the Trust property.

[¶25] Steven requested additional funds be withheld for the payment of future Trust expenses, in light of the appeal before the North Dakota Supreme Court. Based on the previously calculated hourly rates, the Court will withhold \$10,000 for those future expenses.

[¶26] Steven requested that \$208,000 of the attorney's fees be taken from Rodney's share of the Trust property. In North Dakota, "[a]ttorney's fees are not recoverable in an action unless expressly authorized by law." State Bank of Burleigh County Trust Co. v. City of Bismarck, 316 N.W.2d 85, 95 (N.D. 1982). As discussed above, it is appropriate in this Trust context that attorney's fees be paid out of the Trust assets for litigation in defense of Trust assets. However, it is unclear that allocating a portion of that expense out of

a specific beneficiary's portion is appropriate.

[¶27] North Dakota has adopted the Uniform Trust Code. As stated in the above-listed statutory provisions of North Dakota's Uniform Trust Code, "the common law of trusts and principles of equity supplement [the North Dakota Uniform Trust Code chapters], except to the extent modified by [those chapters] or another statute of this state." N.D. Cent. Code 59-09-06. Steven argues that case law from other UTC jurisdictions allows for the allocation of fees against a specific beneficiary, particularly when that beneficiary's actions resulted in the fee accrual. Steven cites a long list of cases from other jurisdictions which support this conclusion. See In re Trust of Hill, 499 N.W.2d 475 (Minn. Ct. App. 1993); Dardovitch v. Haltzman, 190 F.3d 125, 145-46 (3rd Cir. 1999); Reynolds v. First Alabama Bank of Montgomery, N.A., 471 So.22 1238 (Ala. 1985); Feinberg v. Adolph K. Feinberg Hotel Trust, 922 S.W.2d 21, 26-27 (Mo.App. 1996). The Court is persuaded that such an award is appropriate in this action resulting from its equitable powers.

[¶28] Steven argues that Rodney's breaches of his duties as a Co-Trustee, as well as a "burdensome litigation" strategy, demand that Rodney pay a share of these attorney's fees out of his apportionment. Rodney's failures as a Co-Trustee were well covered by the Court's prior Order, and the Court agrees that Rodney's strategy has been burdensome, vigorous, and expensive. Rodney has taken unauthorized actions with the Trust property, filed pleadings not authorized by the rules of procedures, continually

argued points that have already been decided upon, and clouded legal titles. The Court finds that allocating a portion of attorney's fees against Rodney would be appropriate in this case.

Capital Gains Taxes

[¶29] In the original Order, the Court noted that any capital gains associated with the sale of Trust assets should be paid "by the new, outright property owner." Steven requested clarification on that portion of the Order, asking the Court to state specifically that the capital gains taxes are to be borne by the beneficiary to whom such property is allocated. The issue is whether or not the Court can make such clarification given the limited scope of jurisdiction on remand from the Supreme Court. The Supreme Court remanded so the Court might make findings on Steven's "Petition for Approval of Amended Final Report and Account and a request for attorney's fees and Trustee's fees." In this matter, the Court believes that this is not a new ruling, but merely the clarification of the wording of the original Order. Additionally, N.D. Cent. Code 59-10-01(3) states that "[a] judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions."

[¶30] The Court intended for the Order to state that the capital gains associated with the sale would be borne by the beneficiary to whom such property is allocated.

ORDER

[¶31] Based on the foregoing, IT IS HEREBY ORDERED as follows:

1. Steven C. Hogen's PETITION FOR APPROVAL OF AMENDED FINAL REPORT AND ACCOUNT is **GRANTED**.
2. Steven C. Hogen is **AWARDED** Trustee's fees in the amount of \$13,750.00.
3. Steven C. Hogen is **AWARDED** attorney's fees in the total amount of \$401,916.50, \$208,000 of which is to be withheld from Rodney Hogen's portion of the Trust assets.
4. Steven C. Hogen is **AWARDED** litigation associated fees, costs, and expenses in the total amount of \$26,325.35.
5. Steven C. Hogen shall **WITHOLD** \$10,000 for continuing fees and expenses from the Trust property, for payment of ongoing attorney's fees and capital gains taxes on the land sale.

[¶32] The Court would also clarify the March 7, 2017, order regarding capital gains taxes. The Order stated that any capital gains associated with the sale of Trust assets should be paid "by the new, outright property owner." Those capital gains taxes associated

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with the sale of Trust assets will be borne by the beneficiary to whom such property is allocated.

Dated this 14th day of September, 2017.

BY THE COURT:

“s/”

Honorable Steven E. McCullough
District Court Judge
East Central Judicial District

APPENDIX S

Filing Date: July 6, 2017, in Barnes County District Court; Docket Entry #22

Document Number 277183

Barnes County Recorder

Recorded 2/26/2014 at 9:50 AM

QUIT CLAIM DEED

THIS INDENTURE, Made this 20th day of February, 2014, between Rodney Hogen, Co-Trustee of the Curtiss A. Hogen Trust B as created under Last Will and Testament of Curtiss A. Hogen dated June 25, 1984, grantor, whether one or more, and Rodney Hogen and Steven Hogen, grantees, whether one or more, whose post office address is 3144 10th Street North, Fargo, North Dakota 58102.

For and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, grantor does hereby QUIT CLAIM to the grantees, all of the following real property lying and being in the County of Barnes, and State of North Dakota, and described as follows, to-wit:

TRACT ONE: An undivided one-half

interest in and to the Northwest Quarter (NW1/4) and the South Half of the Southwest Quarter (S1/2SW1/4) of Section Five (5), Township One Hundred Forty (140) North of Range Fifty-six (56) West of the Fifth Principal Meridian, Barnes County, North Dakota.

TRACT TWO: An undivided one-half interest in and to the North Half of the Southwest Quarter (N1/2SW1/4) of Section Five (5), Township One Hundred Forty (140) North of Range Fifty-six (56) West of the Fifth Principal Meridian, Barnes County, North Dakota, subject to existing highways, easements and rights of way of record, EXCEPTING the following tract, to-wit: Commencing at the West Quarter corner of said Section Five (5), Township One Hundred Forty (140), Range Fifty-six (56), Barnes County, North Dakota, thence South 46°01'57" East for a distance of 945.90 feet to the point of beginning of said tract of land to be described; thence East for a distance of 525 feet; thence South for a distance of 550 feet; thence West for a distance of 395 feet; thence South for a distance of 170 feet; thence West for a distance of 400 feet; thence North for a distance of 400 feet; thence East for a distance of 195 feet; thence North for a distance of 320 feet; thence East for a distance of 75 feet to the point of

beginning.

TRACT THREE: A tract of land situated in the W1/2SW1/4 of Section 5, Township 140 North, Range 56 West, of the Fifth Principal Meridian, Barnes County, North Dakota, being more particularly described as follows:

Commencing at the West quarter corner of said Section 5; thence South 46°01'57" East for a distance of 945.90 feet to the point of beginning of said tract of land to be described; thence East for a distance of 525.00 feet; thence South for a distance of 550.00 feet; thence West for a distance of 395.00 feet; thence South for a distance of 170.00 feet; thence West for a distance of 400.00 feet; thence North for a distance of 400.00 feet; thence East for a distance of 195.00 feet; thence North for a distance of 320.00 feet; thence East for a distance of 75.00 feet to the point of beginning.

The tract of land herein described

contains 10.17 acres, more or less.

Together with the following Easement

TRACT FM-500E-1

ACCESS ROAD AND UTILITY
EASEMENT

A tract of land variable in width situated in the NW1/4SW1/4 of Section 5, Township 140 North, Range 56 West of the Fifth Principal Meridian, Barnes County, North Dakota, lying at various distances on each side of the following described centerline:

Commencing at the West quarter corner of said Section 5; thence South 46°01'57" East for a distance of 945.90 feet; thence West for a distance of 75.00 feet; thence South for a distance of 136.00 feet to the point of beginning of said centerline to be described; thence West with 50.00 feet on each side of said centerline for a distance of 31.00 feet; thence North 89°53'33" West with 50.00 feet on each side of said centerline

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for a distance of 525.00 feet; thence continuing North 89°53'33" West with 75.00 feet on each side of said centerline to the intersection with the West line of said Section 5.

The tract of land herein described contains 1.45 acres, more or less, all of which is included in Tract FM-500E-2.

This is a perpetual and assignable easement and right-of-way to locate, construct, operate, maintain, repair and remove a roadway, overhead and/or underground utility lines and a water pipeline, in, upon, over, and across the immediately above described land, together with the right to trim, cut, fell, and remove therefrom, all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right of way as described in Grant of Easement dated November 25, 1964, in Book B-5 of Miscellaneous, Page 157, Register of Deeds of Barnes County, North Dakota.

WITNESS, The hand of the grantor:

“s/”
Rodney Hogen, Co-Trustee

State of North Dakota

County of Cass

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On this 20th day of February, 2014, before me personally appeared Rodney Hogen, Co-Trustee of the Curtiss A. Hogen Trust B as created under Last Will and Testament of Curtiss A. Hogen dated June 25, 1984 , known to me to be the person who is described in, and who executed the within and foregoing instrument, and acknowledged that he executed the same on behalf of the Curtiss A. Hogen Trust B as created under Last Will and Testament of Curtiss A. Hogen dated June 25, 1984.

“s/”

Jonathan T. Garaas

Notary Seal

Notary Public

Grantee hereby certifies that this deed is exempt from requirements of filing a report of the full consideration paid for the property under North Dakota Century Code Section 11-18-02.2 paragraph 7(i). Dated this 20th day of February, 2014.

“s/”

Jonathan T. Garaas, Agent

The legal description was obtained from a previously recorded instrument.

Document Number 1411517

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Cass County Recorder

Recorded on 2/24/2014 at 12:12 PM

QUIT CLAIM DEED

THIS INDENTURE, Made this 20th day of February, 2014, between Rodney Hogen, Co-Trustee of the Curtiss A. Hogen Trust B as created under Last Will and Testament of Curtiss A. Hogen dated June 25, 1984, grantor, whether one or more, and Rodney Hogen and Steven Hogen, grantees, whether one or more, whose post office address is 3144 10th Street North, Fargo, North Dakota 58102.

For and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, grantor does hereby QUIT CLAIM to the grantees, all of the following real property lying and being in the County of Cass, and State of North Dakota, and described as follows, to-wit:

TRACT ONE. An undivided 71.5% interest in and to the Northeast Quarter (NE1/4) of Section Twenty-one (21), EXCEPT the East 572 feet of the South 762 feet of the Northeast Quarter (NE1/4) of Section Twenty-one (21), Township One Hundred Forty (140) North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, subject to highways, easements and rights of way of record.

TRACT TWO. An undivided one-half interest in and to the Northeast Quarter (NE1/4) of Section Thirty-three (33), in Township One Hundred Forty (140) North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, EXCEPTING the following described tract, to-wit: The East Half of the East Half of the Northeast Quarter (E1/2E1/2NE1/4) of Section 33, Township 140, Range 54, Cass County, North Dakota, subject to highways, easements and rights of way of record.

TRACT THREE. An undivided one-half interest in and to the Northwest Quarter (NW1/4) of Section Thirty-four (34), in Township One Hundred Forty (140) North of Range Fifty-four (54) West of the Fifth Principal Meridian, situate in the County of Cass and the State of North Dakota, subject to highways, easements and rights of way of record, EXCEPTING the following tracts, to-wit:

That part of the Northwest Quarter of Section Thirty-four, in Township One Hundred Forty North of Range Fifty-four West of the Fifth Principal

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Meridian, situate in the County of Cass and the State of North Dakota, described as follows, to-wit: Commencing at the Northwest corner of said Northwest Quarter; thence South $00^{\circ}52'48''$ East, assumed bearing along the West line of said Northwest Quarter, a distance of 549.67 feet to the point of beginning of the tract to be described; thence North $88^{\circ}54'30''$ East 388.17 feet; thence South $02^{\circ}51'55''$ East 548.01 feet; thence South $88^{\circ}54'23''$ West 407.12 feet to the West line of said Northwest Quarter; thence North $00^{\circ}52'48''$ West 547.77 feet to the point of beginning.

AND

A tract of land situated in the Northwest Quarter of Section Thirty-four, Township One Hundred Forty North of Range Fifty-four West of the Fifth Principal Meridian, Cass

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County, North Dakota,
more particularly described
as follows: Commencing at
the Northwest corner of the
Northwest Quarter of said
Section Thirty-four; thence
North $89^{\circ}52'47''$ East along
the Section line and the
North line of Hogen
Subdivision a distance of
708.89 feet to a point;
thence South $00^{\circ}52'47''$
East along the East line of
Lot One, Block One, Hogen
Subdivision a distance of
537.60 feet to an iron pin
at the Southeast corner of
said Lot One, the point of
beginning; thence
continuing South $00^{\circ}52'47''$
East a distance of 239.48
feet to an iron pin; thence
South $88^{\circ}38'54''$ West a
distance of 312.42 feet to
an iron pin on the East line
of Lot Two, Block One,
Hogen Subdivision; thence
North $02^{\circ}51'55''$ West along
the East line of said Lot
Two a distance of 241.00
feet to an iron pin at the
Northeast corner of said
Lot Two and on the South
line of said Lot One; thence

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North 88°54'23" East along
the South line of said Lot
One a distance of 320.69
feet to the point of
beginning.

AND

Lot One (1), Block One (1),
Hogen Subdivision, Cass
County, North Dakota.

TRACT FOUR. An undivided one-half
interest in and to Lot One (1), Block One
(1), Hogen Subdivision, Cass County,
North Dakota.

WITNESS, The hand of the grantor:

“S/”

Rodney Hogen, Co-Trustee

State of North Dakota

County of Cass

On this 20th day of February, 2014, before me personally appeared Rodney Hogen, Co-Trustee of the Curtiss A. Hogen Trust B as created under Last Will and Testament of Curtiss A. Hogen dated June 25, 1984, known to me to be the person who is described in, and who executed the within and foregoing instrument, and acknowledged that he executed the

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same on behalf of the Curtiss A. Hogen Trust B as created under Last Will and Testament of Curtiss A. Hogen dated June 25, 1984.

“s/” Jonathan T. Garaas

Notary Seal Notary Public

Grantee hereby certifies that this deed is exempt from requirements of filing a report of the full consideration paid for the property under North Dakota Century Code Section 11-18-02.2 paragraph 7(i). Dated this 20th day of February, 2014.

“s/” Jonathan T. Garaas, Agent

The legal description was obtained from a previously recorded instrument.

APPENDIX T

Filing Date: July 6, 2017, in Barnes County District Court; Docket Entry #23

Document Number 277184

Barnes County Recorder

Recorded 2/26/2014 at 9:55 AM

QUIT CLAIM DEED

THIS INDENTURE, Made this 20th day of February, 2014, between Rodney Hogen and Susan Hogen, husband and wife, grantor, whether one or more, and Marby Hogen, 3114 Link Drive, Bismarck, North Dakota 58503, grantee, whether one or more.

For and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, grantor does hereby QUIT CLAIM to the grantee all of grantors' right, title and interest in and to all of the following real property lying and being in the County of Barnes, and State of North Dakota, and described as follows, to-wit:

TRACT ONE: * * *

TRACT TWO: * * *

TRACT THREE: * * *

Grantors Rodney Hogen and Susan Hogen reserve a life estate unto Rodney Hogen and Susan Hogen in and to all of the above-described real property for the duration of Grantors Rodney Hogen's and Susan Hogen's natural lives. If Grantor Rodney Hogen dies before Grantor Susan Hogen, Susan Hogen shall enjoy only 25% of the net income from said real property and the remaining 75% net income from said property shall be vested in Grantee Marby Hogen. If Grantor Rodney Hogen dies after Grantor Susan Hogen, Grantor Rodney Hogen shall enjoy 100% of the net income from said real property during the duration of his natural life.

WITNESS, The hand of the grantor:

“s/”

Rodney Hogen

“s/”

Susan Hogen

State of North Dakota

County of Cass

On this 20th day of February, 2014, before me personally appeared Rodney Hogen and Susan Hogen, husband and wife, known to me to be the persons who are described in, and who executed the within and

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foregoing instrument, and acknowledged that they executed the same.

“s/” Jonathan T. Garaas

Notary Seal Notary Public

Grantee hereby certifies that this deed is exempt from requirements of filing a report of the full consideration paid for the property under North Dakota Century Code Section 11-18-02.2 paragraph 7(i). Dated this 20th day of February, 2014.

“s/” Jonathan T. Garaas, Agent

The legal description was obtained from a previously recorded instrument.

Document Number 1411518

Cass County Recorder

Recorded 2/24/2014 at 12:12 PM

QUIT CLAIM DEED

THIS INDENTURE, Made this 20th day of February, 2014, between Rodney Hogen and Susan Hogen, husband and wife, grantor, whether one or more, and Marby Hogen, 3114 Link Drive, Bismarck,

North Dakota 58503, grantee, whether one or more.

For and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, grantor does hereby QUIT CLAIM to the grantee all of grantors' right, title and interest in and to all of the following real property lying and being in the County of Cass, and State of North Dakota, and described as follows, to-wit:

TRACT ONE. * * *

TRACT TWO. * * *

TRACT THREE. * * *

TRACT FOUR. * * *

Grantors Rodney Hogen and Susan Hogen reserve a life estate unto Rodney Hogen and Susan Hogen in and to all of the above-described real property for the duration of Grantors Rodney Hogen's and Susan Hogen's natural lives. If Grantor Rodney Hogen dies before Grantor Susan Hogen, Susan Hogen shall enjoy only 25% of the net income from said real property and the remaining 75% net income from said property shall be vested in Grantee Marby Hogen. If Grantor Rodney Hogen dies after Grantor Susan Hogen, Grantor Rodney Hogen shall enjoy 100% of the net income from said real property during the duration of his natural life.

WITNESS, The hand of the grantor:

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“s/”

Rodney Hogen

“s/”

Susan Hogen

State of North Dakota

County of Cass

On this 20th day of February, 2014, before me personally appeared Rodney Hogen and Susan Hogen, husband and wife, known to me to be the persons who are described in, and who executed the within and foregoing instrument, and acknowledged that they executed the same.

“s/” Jonathan T. Garaas

Notary Seal

Notary Public

Grantee hereby certifies that this deed is exempt from requirements of filing a report of the full consideration paid for the property under North Dakota Century Code Section 11-18-02.2 paragraph 7(i). Dated this 20th day of February, 2014.

“s/” Jonathan T. Garaas, Agent

The legal description was obtained from a previously recorded instrument.

APPENDIX U

Filing Date: June 30, 2017, in Barnes County District Court; Docket Entry #14

IN DISTRICT COURT, COUNTY OF BARNES,
STATE OF NORTH DAKOTA

Marby Hogen and Susan Hogen,
Plaintiffs,

vs.

Steven C. Hogen, as Personal Representative
of the Estate of Arline H. Hogen, Deceased;
Steven C. Hogen, as a Trustee of the Curtiss
A. Hogen Trust B, as created under the Last
Will and Testament of Curtiss A. Hogen; and
Steven C. Hagen, individually,
Defendants.

Civ. No. 02-2017-CV-00116

ANSWER AND COUNTERCLAIM

Defendant Steven C. Hagen, individually, and
as Personal Representative of the Estate of Arline H.
Hogen, Deceased, and as sole remaining Trustee of
the Curtiss A. Hogen Trust B, by and through
undersigned counsel, for his Answer to the Complaint
of Plaintiffs Marby Hogen and Susan Hogen, hereby
states and alleges as follows:

[¶1] The Defendant denies each and every allegation, thing and matter alleged in the Complaint, except as may hereinafter be admitted, qualified, or otherwise explained.

[¶2] Paragraph 1 does not call for an admission or denial.

[¶3] The Defendant denies the allegations in paragraph 2 and 3 which allege Plaintiffs have some lawful right, title, interest, or encumbrance upon the subject real property.

[¶4] As to paragraph 4, the Defendant admits N.D.C.C. § 28-04-01 allows the filing of one action when the subject matter is situated in more than one county. The Defendant denies this action should be venued in Barnes County, North Dakota. The Defendant alleges venue is proper in Cass County, North Dakota, under N.D.C.C. § 28-04-01, because the subject matter of the action is situated, in part, in Cass County, and proceedings relating to the subject property have already taken place and continue in Cass County. The Defendant further alleges venue is proper in Cass County under N.D.C.C. § 28-04-07 based on, among other things, the convenience of witnesses and ends of justice. Upon information and belief, none of the parties, witnesses, or counsel reside in Barnes County.

[¶5] The Defendant admits the allegations in paragraph 5 and states affirmatively that the real property which is the subject of this proceeding is owned by the Curtiss A. Hogen Trust B and the

Estate of Arline H. Hogen, each of which has an undivided interest in the property.

AFFIRMATIVE DEFENSES

[¶6] The Complaint fails to state a claim upon which relief may be granted.

[¶7] The Complaint fails for improper venue.

[¶8] Plaintiffs' claims are barred by the doctrines of estoppel, laches, and/or waiver.

[¶9] Plaintiffs' claims are barred by collateral estoppel and/or res judicata.

[¶10] Pending completion of discovery, the Defendant hereby asserts and preserves all defenses available pursuant to the North Dakota Rules of Civil Procedure.

COUNTERCLAIM

For his Counterclaim against Plaintiffs, the Defendant states and alleges as follows:

[¶11] The real property which is the subject matter of this proceeding is also at issue in pending judicial proceedings entitled In the Matter of the Estate of Arline H. Hogen, Cass County Case No. 09-07-P-00100, and In the Trust of Curtiss A. Hogen Trust B. created under the Last Will and Testament of Curtiss A. Hogen, Cass County Case No. 09-2015-CV-01717. Each of these proceedings involves

Rodney Hogen, the father of Plaintiff Marby Hogen and the husband of Plaintiff Susan Hogen. Counsel for the Plaintiffs also represents Rodney Hogen in those pending proceedings.

[¶12] On March 7, 2017, the district court in Cass County Case No. 09-2015-CV-01717 entered an Order declaring certain Quit Claim Deeds executed by Rodney Hogen were void and invalid. A copy of that Order is attached to this Counterclaim as Exhibit "A."

[¶13] The Plaintiffs' purported interest in the subject property derives from the void and invalid Quit Claim Deeds executed by Rodney Hogen.

[¶14] Upon information and belief, Plaintiffs commenced this lawsuit, and recorded Lis Pendens upon all parcels of the subject real property, only days before a public sale of certain parcels of the subject property in an attempt to stop, hinder, or interfere with that sale or the lawful conveyance of title by the Estate and Trust. And, to cause additional delay and disruption, this lawsuit was venued in Barnes County, rather than Cass County where the invalidity of the Quit Claim Deeds executed by Rodney Hogen has already been determined.

[¶15] The claims asserted in this action by the Plaintiffs are frivolous, without reasonable cause, not made in good faith, and there is such a complete absence of actual facts or law in support thereof that a reasonable person could not have thought a court would render judgment in their favor.

[¶16] The Defendant is entitled to an award of reasonable actual and statutory costs, including reasonable attorney's fees, pursuant to N.D.C.C. §§ 28-26-01 and 28-26-31.

WHEREFORE, the Defendant prays for Judgment as follows:

[¶17] That the Complaint be dismissed with prejudice.

[¶18] That the Plaintiffs' claims to the subject property be determined to be null and void, and that Plaintiffs, and any persons or entities claiming by or through them, be deemed to have no estate or interest in or encumbrance upon the real property which is the subject of this action.

[¶19] That the Defendant be awarded his costs, disbursements, and attorney's fees as allowed by law.

[¶20] For such other and further relief the Court deems just and proper.

Dated: June 30, 2017.

“s/”

Robert G. Hoy, ND ID 3 03527
Sara K. Sorenson, ND ID #0582
Attorneys for Steven C. Hogen,
individually, and as Personal
Representative of the Estate of Arline H.
Hogen, Deceased, and as Trustee of the
Curtiss A. Hogen Trust B, as created

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under the Last Will and Testament of
Curtiss A. Hogen

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EXHIBIT A

[Exhibit A is the same document as Appendix P,
Appendix pages 129 through 134.]

APPENDIX V

Filing Date: August 3, 2017, in Barnes County District Court; Docket Entry #30

Paragraphs III and VI of the Last Will and Testament of Curtiss A. Hogen executed June 25, 1984:

Last Will and Testament

I, Curtiss A. Hogen, a resident of Cass County, North Dakota, do hereby make, publish, and declare this to be my Last Will and Testament, and hereby revoke all former wills and codicils heretofore made by me.

* * *

III.

I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situate and whether acquired before or after the execution of this Will, to my Trustee hereinafter named. This Trust shall be known as "Trust B" and shall be held, administered and distributed as follows:

- (1) If my said spouse shall survive me, then

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commencing with the date of my death, my Trustee shall pay to my said spouse during my spouse's lifetime all the net income from Trust B in convenient installments but no less frequently than annually.

(2) If my said spouse shall survive me, my Trustee may pay to or apply for the benefit of my said spouse during my spouse's lifetime, such sums from the principal of Trust B as in its sole discretion shall be necessary or adviseable from time to time for the medical care, education, support and maintenance in reasonable comfort of my said spouse, taking into consideration to the extent my Trustee deems adviseable, any other income or resources known to my Trustee.

(3) Upon the death of the survivor of my said spouse and me, my Trustee shall divide this Trust into equal separate shares so as to provide One (1) share for each then living child of mine and One (1) share for each deceased child of mine who shall leave issue then living.

(a) Each share provided for a living child of mine shall be distributed to such child. Each share provided for a deceased child of mine who shall leave issue then living, shall be distributed by representation to such issue.

* * *

VI.

I hereby nominate and appoint Steven Hogen and Rodney Hogen as co-Trustees of all the trusts created under this Will. If either of said parties is unable or unwilling to be said co-Trustee or to continue as such co-Trustee, then I do hereby provide that the other named person herein shall be the sole Trustee of all the trusts created under this Will.

APPENDIX W

Filing Date: August 3, 2017, in Barnes County District Court; Docket Entry #31

Paragraph II of the Last Will and Testament of Arline H. Hogen executed on April 5, 1994:

Last Will and Testament

I, Arline H. Hogen, of the County of Cass and State of North Dakota do hereby make, publish and declare this to be my Last Will and Testament thereby expressly revoking any and all former Wills and testamentary dispositions by me at any time heretofore made.

* * *

II.

I give, devise and bequeath all of my property and estate of every kind and nature and wheresoever situate to my children, STEVE C. HOGEN and RODNEY HOGEN, in equal shares, share and share alike.

* * *

APPENDIX X

Filing Date: August 3, 2017 in Barnes County District Court; Docket Entry #33

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

In the Trust of Curtiss A. Hogen Trust B created under the Last Will & Testament of Curtiss A. Hogen

Case No.: 09-2015-CV-1717

Memorandum Opinion and Order Granting Motion to Amend Petition

[¶1] Curtiss A. Hogen (Curtiss) created the CURTISS A. HOGEN TRUST B ("TRUST"), by the LAST WILL AND TESTAMENT OF CURTISS A. HOGEN ("WILL"), executed in 1984. Curtiss passed away in 1993. Curtiss was survived by his wife, Arline H. Hogen ("Arline"), and their two adult children, Steven (the present Petitioner) and Rodney (the present Respondent). At the time of his death, Curtiss owned several parcels of farmland. Upon his death, a roughly one-half undivided interest of that farmland was placed into the TRUST. Arline remained as owner of the other roughly one-half undivided interest in the farmland. The income from the TRUST was to be paid to Arline for her life. After

Arline's death, the TRUST required the co-Trustees to divide the corpus of the TRUST into equal shares and to distribute those shares to Curtiss' living children (Steven and Rodney). Article VI of the WILL named and appointed Steven and Rodney as co-Trustees of the TRUST.

[¶2] After Curtiss' death, Rodney continued farming the land under cash rent and crop-share rental arrangements. Arline died on March 23, 2007. Arline's LAST WILL AND TESTAMENT equally devised all her property to Steven and Rodney. In April 2007, Steven initiated an informal probate of Arline's LAST WILL AND TESTAMENT, which eventually led to protracted litigation proceedings in both the District Court and the Supreme Court (09-07-P-0010). Issues raised in the estate proceeding, led to the initiation of this instant proceeding.

[¶3] The primary asset in the TRUST is its interest in the farmland. However, there are other assets of the TRUST in the form of choses in action (by Steven against Rodney, for his alleged actions and omissions as a co-Trustee, and by Rodney against Steven, for his alleged actions and omissions as a co-Trustee). The Estate has been open since 2007. Active hostilities between the parties commenced in the Estate at least as early as 2010 (with the filing in the Estate of Rodney's PETITION OF AN HEIR TO REMOVE PERSONAL REPRESENTATIVE AND THE ESTATE'S LEGAL COUNSEL & OPPOSITION TO PENDING MOTIONS & PETITION FOR SUPERVISED ADMINISTRATION.) The Estate litigation has been to the North Dakota Supreme

Court twice, and likely will be there a third time. See In re Estate of Hogen, 2015 ND 125, 863 N.W.2d 876; and In re Estate of Hogen, 2016 ND 97 (appeal dismissed for lack of Rule 54(b) certification).

[¶4] This gets us to the case at bar. On July 13, 2015, Steven filed his PETITION in this matter. In his PETITION, Steven seeks primarily the following relief:

1. Supervised administration of the TRUST;
2. An offset against Rodney's share of the TRUST for any amount he is found to owe the TRUST (plus interest) for any actions taken by Rodney which lessened the amount of the TRUST corpus, including but not limited to farming the land without paying fair market value, and other alleged inappropriate self-dealing from 2004 to the present;
3. Voiding of Quit Claim Deeds issued solely by Rodney (purportedly as a Trustee of the TRUST) to Steven and Rodney as beneficiaries of the TRUST;
4. An injunction preventing Rodney, both directly and through any agent, from entering upon TRUST property, from contacting renters of TRUST property without Steven's prior written consent, and from receiving any rents of TRUST property without Steven's prior written consent;
5. Removal of Rodney as a co-Trustee of the

TRUST; and

6. All other appropriate relief as set forth in Section 59-18-01(2) of the North Dakota Century Code.

[¶5] On December 30, 2015, the Court issued a MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT. Through that ORDER, the Court denied Rodney's request for summary judgment and, in part, granted summary judgment in favor of Steven. Specifically, the Court granted summary judgment as follows:

1. That the TRUST did not automatically terminate upon Arline's death, and has not yet been terminated;

2. That the statute of limitations had not expired prior to the filing of Steven's PETITION in this case and, therefore, did not bar Steven's claims against Rodney for possible breaches of fiduciary duty; and

3. That Rodney's acts of purporting to deed real property from the TRUST were not merely ministerial acts, but rather were discretionary acts which required Steven's consent as co-Trustee in order to be effective.

[¶6] Steven has now filed a MOTION FOR LEAVE TO FILE AN AMENDED VERIFIED PETITION. According to Steven's MOTION, the AMENDED PETITION incorporates the following changes:

1. Making minor changes to correct facts and citations (throughout the body of the AMENDED PETITION);

2. Requesting the entire transaction by which Rodney attempted to deed a share of the real property in the TRUST to himself (and then to his daughter) without the signature of Steven as a co-Trustee, specifically including expunging four Quit Claim Deeds involved in the transaction (¶ 14 on page 9; and ¶25 on page 12 of the AMENDED PETITION);

3. Specifically requesting the Court offset, as against Rodney's share of the TRUST, loan payment amounts (for loans which Rodney allegedly secured by mortgages taken by Rodney on TRUST farmland) and other specified amounts (item (g) of ¶2 on pages 2 & 3 of the AMENDED PETITION); and

4. Including references in the body of the AMENDED PETITION seeking relief under Section 59-18-01(2) (item (h) of ¶2 on page 3 and ¶18 on page 11 of the AMENDED PETITION).

[¶7] Rodney opposed the MOTION on several grounds. While obtuse, Rodney's response to the MOTION contains several arguments (all of them apparently based upon the premise that the amendments would be futile), including:

1. That all farm rents prior to Arline's death in 2007 were owed to her and that Steven has no injury or standing in this case to assert a claim thereon;

2. That since the TRUST terminated automatically at Arline's death, nothing Rodney did after that date to farm the land or unilaterally distribute the TRUST renders him liable;

3. That the law does not allow the Court, under the guise of supervised administration, to look backwards to events that have already taken place concerning the TRUST;

4. That the statute of limitations bars any judicial review of Rodney's actions as a Trustee; and

5. That Rodney's issuance of deeds without Steven's signature was merely a ministerial act which he was legally authorized to accomplish.

[¶8] Rule 15 of the North Dakota Rules of Civil Procedure provides that at this stage of the proceedings "a party may amend its pleading only with the opposing party's written consent or the court's leave. Leave shall be freely given when justice so requires." N.D.R. Civ. P. 15(aX2). It is well settled that a trial court has broad discretion to grant leave to file an amended pleading. Hansen v. First American Bank & Trust, 425 N.W.2d 770, 772 (N.D. 1990). Further, the North Dakota Supreme Court has stated of Rule 15:

Our rule, providing that amendment of pleadings should be freely allowed when justice so requires, demands that trial courts should be very liberal in allowing amendments in the interests of justice.

C.I.T. Corp. v. Hetland, 143 N.W.2d 94, 101. However, a trial court does not abuse its discretion when it denies a requested amendment which would be futile. Bernabucei v. Huber, 2006 ND 71, ¶ 30, 712 N.W.2d 323, 333.

[¶9] Most of the arguments raised by Rodney relate to issues already decided by this Court against him. See MEMORANDUM OPINION AND ORDER FOR SUMMARY JUDGMENT dated December 30, 2015 (Docket No. 83). The majority of Rodney's arguments are directly foreclosed by the prior Order of the Court. His arguments which are not foreclosed by the Court's prior ruling deal with the failure to name indispensable parties and with the time period before Arline's death in 2007. Each of these arguments will be examined in turn.

[¶10] Rodney argues that to allow Steven to amend the Petition to seek expungement of deeds to his daughter would require this Court to adjudicate those claims when she is not a party to this proceeding. This brings the full panoply of joinder rules into play. See N.D.R.Civ.P. 18-22. Basically, Rodney argues that if the amendment is allowed then his daughter becomes an "indispensable party" whom Steven has failed to join. Rodney's position makes logical sense. This case deals with an adjudication of the rights, obligations and liabilities of Rodney and Steven solely as it relates to the TRUST. (For example, this case does not deal with Rodney's or Steven's interests in the underlying real property as a result of Arline's Estate.) The Quit Claim Deeds from Rodney to his daughter do not purport to be from the TRUST or

involve Rodney's duties as Trustee. For example, the opening paragraph of the Quit Claim Deed to Rodney's daughter dealing with Cass County property reads as follows:

THIS INDENTURE, Made this 20th day of February, 2014, between Rodney Hagen and Susan Hagen, husband and wife, grantor, whether one or more, and Marby Hogen, 3114 Link Drive, Bismarck, North Dakota 58053, grantee, whether one or more.

Docket No. 8 (emphasis in original). Similar language is found in the Barnes County Quit Claim Deed to Rodney's daughter. Docket No. 9. Further, nowhere in either Quit Claim Deed does Rodney purport to act as a Trustee of the TRUST, and Rodney's signatures are in an individual, and not representative, capacity. That portion of the proposed AMENDED PETITION which requests the Court adjudicate the validity of the Quit Claim Deeds to Marby Hogen (or any rights she may have in the property) are not allowed.

[¶11] Rodney also argues that the amendments concerning Steven's requested offset amounts should be denied because they seek to reduce Rodney's share of the TRUST corpus by amounts that, if anything, should have been paid to Arline. Rodney's argument proceeds that since these amounts should have been paid to Arline, Steven has no standing in this case to complain, and that any amendment would be futile. This may or may not be true. The Court has not ruled upon this issue (as it has with the statute of limitations, claims of automatic termination of the

TRUST at Arline's death and the ministerial act arguments). More importantly, however, Rodney did not identify any specific language in the proposed amendments against which he raises this argument. Further, the language of Steven's proposed amendments does not neatly separate itself into these separate time periods (pre-Arlene's death and post-Mine's death). The North Dakota Supreme Court has held that a proposed amendment is not futile as long as it sets forth a general scenario which, if proven, would entitle the plaintiff to relief against the defendant on some cognizable theory. Border Resources L.L.C. v. Irish Oil & Gas Inc., 2015 ND 238, ¶17, 869 N.W.2d 758, 769, quoting Johnson v. Hovland, 2011 ND 64, ¶9, 795 N.W.2d 294. Because the proposed amendments could possibly entitle Steven to relief for Rodney's actions after Arline's death in 2007, this Court does not need to decide at this time whether Steven may make such claims for periods prior to her death. Rodney's argument that these amendments would be futile is not supportable. The Court allows the amendments.

[¶12] As to the remainder of Rodney's arguments, they are foreclosed by the prior ruling of the Court. The Court realizes that Rodney sincerely believes the Court erred in that earlier ruling. However, nothing Rodney has presented in his response to this Motion convinces the Court it has so erred. The remainder of Rodney's claims are, therefore, without merit and denied. Based upon the foregoing, it is

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[¶13] ORDERED AND DECREED that Petitioner Steven Hogen's MOTION FOR LEAVE TO FILE AN AMENDED VERIFIED PETITION be, and the same hereby is, **GRANTED IN PART** and **DENIED IN PART** as set forth herein.

[¶13] Dated this 13th day of July, 2016.

BY THE COURT:

“s/f”

Honorable Steven E. McCullough

Judge of the District Court

East Central Judicial District