

APPENDIX

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APPENDIX A

927 N.W.2d 474
Supreme Court of North Dakota.

In the MATTER OF the ESTATE OF Arline H.
HOGEN, Deceased

Steven C. Hogen,

Petitioner and Appellee

v.

Rodney Hogen, Respondent and Appellant

and

Susan Hogen and Marby Hogen, Purported
Interested Persons and Appellants

No. 20180325

Filed 5/16/2019

Appeal from the District Court of Cass County, East
Central Judicial District, the Honorable John C. Irby,
Judge.

Attorneys and Law Firms

Sara K. Sorenson, West Fargo, ND, for petitioner and

appellee.

Jonathan T. Garaas, Fargo, ND, for appellants.

Opinion

Jensen, Justice.

[¶1] Susan and Marby Hogen, as purported interested persons, and Rodney Hogen (collectively “appellants”) appeal from probate court orders settling the Arline Hogen Estate and discharging Steven Hogen as personal representative of the Estate. The appellants generally argue that the probate court did not have jurisdiction to enter an order for the complete settlement and distribution of the Estate and that the court lacked authority or abused its discretion in requiring Rodney Hogen to pay from his share of the Estate property all attorney fees incurred by the Estate after this Court’s remand in *Estate of Hogen*, 2015 ND 125, 863 N.W.2d 876. We affirm.

I

[¶2] When Arline Hogen died in 2007, she was survived by her two sons, Steven and Rodney Hogen, and all of her property was devised equally to her two sons under her will. Arline Hogen and her deceased husband, Curtiss Hogen, owned farmland in Barnes and Cass Counties, and Rodney Hogen had farmed the land with Curtiss Hogen. When Curtiss Hogen died in 1993, his undivided half interest in the farmland was distributed to the Curtiss Hogen Trust. After his father’s death, Rodney Hogen farmed the land under a rental

agreement with the Trust and with Arline Hogen, the owner of the other half interest in the farmland. After Arline Hogen's death in 2007, Steven Hogen was appointed personal representative of her Estate. According to Steven Hogen, he discovered evidence indicating the Estate may be entitled to an offset from Rodney Hogen's share of the Estate as compensation for Rodney Hogen's failure to make certain payments to his mother.

[¶3] Steven Hogen petitioned the probate court for an offset against Rodney Hogen's share of the Estate and a final accounting. After an evidentiary hearing, the court determined Rodney Hogen owed the Estate certain farmland rent, conservation reserve program payments, and interest. The court also approved Steven Hogen's request for personal representative fees and for attorney fees, costs, and expert witness fees.

[¶4] In *Estate of Hogen*, 2015 ND 125, ¶ 1, 863 N.W.2d 876, we affirmed the probate court's decision in part, reversed in part as to the calculation of payments attributable to Barnes County conservation reserve program land, and remanded for further proceedings. In a related case involving the Curtiss Hogen Trust, we affirmed a district court decision determining Rodney Hogen breached fiduciary duties to the Trust and authorizing Steven Hogen, as trustee, to sell Trust land to offset against Rodney Hogen's share of the land. *Matter of Curtiss A. Hogen Trust B*, 2018 ND 117, ¶ 1, 911 N.W.2d 305. More recently, we affirmed a summary judgment dismissing an action by Marby and Susan Hogen against Steven Hogen personally and as personal representative of the Estate and as trustee of

the Trust to quiet title to certain land involved in the Estate and the Trust proceedings. *Hogen v. Hogen*, 2019 ND 17, ¶ 1, 921 N.W.2d 672.

[¶5] On remand in the probate proceeding, the probate court ultimately issued an order approving Steven Hogen's petition as personal representative for the complete settlement and distribution of the Estate, including the sale of certain land to pay for administration costs, expenses, and attorney fees, and discharging Steven Hogen as personal representative of the Estate. The court ordered payment of \$50,000 from each of Steven and Rodney Hogen's share of the Estate for the personal representative's attorney fees and expenses incurred before the remand in *Estate of Hogen*, 2015 ND 125, 863 N.W.2d 876, and payment of \$200,000 entirely from Rodney Hogen's share of the Estate for the personal representative's attorney fees and expenses after the remand. The court also ordered a withholding of \$23,000 from Rodney Hogen's share of the Estate for the personal representative's attorney fees related to remaining work in the then pending appeal in the quiet title action and for an expected appeal in this case, with any unused funds distributed to Rodney Hogen. The court discharged Steven Hogen as personal representative of the Estate, but stayed the discharge until the expiration of the time for appeal or until the proceeding was finally resolved on appeal.

II

[¶6] The appellants generally argue the probate court failed to substantially comply with its statutory jurisdiction, acted in excess of its statutory jurisdiction,

or acted without jurisdiction in entering an order on the petition for complete settlement and distribution of the Estate after this Court's remand in *Estate of Hogen*, 2015 ND 125, 863 N.W.2d 876. They claim the probate proceedings concluded with the order for final accounting and settlement that was appealed in *Estate of Hogen*. They argue that order was final under N.D.C.C. § 30.1-21-01 for distribution of all the Estate land and terminated Steven Hogen's power and authority as personal representative under N.D.C.C. § 30.1-17-10(2). They claim the probate court's post-remand decisions failed to comply with several jurisdictional statutory provisions, including N.D.C.C. § 30.1-21-08 for administration of property after the Estate had been settled, N.D.C.C. § 30.1-19-03(2) for bringing claims after distribution, N.D.C.C. § 30.1-20-11 for the personal representative to allocate real property, N.D.C.C. § 30.1-03-01 for the sale of real property, N.D.C.C. § 30.1-20-06 for the allocation of capital gains, and N.D.C.C. §§ 30.1-18-09 and 30.1-20-03 for a retainer for the 2014 through 2016 crop years.

[¶7] In *Hogen v. Hogen*, 2019 ND 17, ¶ 16, 921 N.W.2d 672, we recently rejected the appellants' similar argument about finality and the termination of Steven Hogen's authority as personal representative. We recognized that the prior order did not terminate the Estate proceeding or discharge Steven Hogen as personal representative, and that the Estate was still subject to administration after our earlier decision in the probate proceeding. *Id.* We conclude the appellants' jurisdictional arguments in this appeal are resolved by that decision in *Hogen*.

III

[¶8] The appellants argue the probate court abused its discretion or lacked statutory authority to require Rodney Hogen to pay all post-remand attorney fees from his share of the Estate. They argue the court failed to follow the procedural protections in N.D.R.Civ.P. 11 for awarding attorney fees and that none of his claims were frivolous under N.D.C.C. § 28-26-01(2). They also claim the court's inherent power did not justify the punishment in the form of the award of attorney fees and that the personal representative and his attorneys had conflicts of interest that precluded payment of all attorney fees from Rodney Hogen's share of the Estate. They argue the probate court erred in not applying the "American Rule" for payment of attorney fees.

[¶9] In requiring Rodney Hogen to pay all post-remand attorney fees from his share of the Estate, the probate court explained:

The Court finds that the litigation following the remand from the North Dakota Supreme Court was occasioned by Rodney's stubborn refusal to comply with court orders and to follow standard probate procedures. Rodney exercised unauthorized control over the land and interfered with the personal representative's ability to manage estate resources including the receipt of appropriate farm rent. Further, Rodney continued to obstruct the personal

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representative in his efforts to complete the estate proceedings. Pursuant to *Estate of Kjørvestad*, 375 N.W.2d 160, 171 (N.D. 1985) personal representative's and attorney's fees and costs following the remand of this matter by the Supreme Court are awarded against Rodney Hogen and Rodney Hogen's distribution from the estate rather than from the estate as a whole. Rodney Hogen's continued objections to and obstruction of the probate process and his actions in convoluting the title to the real property have been unreasonable and unjustified. Of particular note is the recording a *lis pendens* in a direct violation of this Court's February 2, 2016 Order.

[¶10] In *Estate of Kjørvestad*, 375 N.W.2d 160, 171 (N.D. 1985), this Court awarded the personal representative attorney fees and costs on appeal from the appellant's share of an estate under N.D.R.App.P. 38 for the appellant's sweeping and unsubstantiated accusations on appeal. We said that the public airing of the appellant's "private obsession ought to be at her personal expense" and that " 'the probate code should not be construed so as to permit one heir or devisee to finance his or her lawsuit against another heir or devisee out of the funds of the estate.' " *Id.* (quoting *In re Estate of Kesting*, 220 Neb. 524, 371 N.W.2d 107, 109 (1985)). We exercised our powers under N.D.R.App.P. 38 and directed that the personal representative be paid its attorney fees out of the appellant's share of the estate only, rather than from

the total estate. *Kjorvestad*, at 171. *See First Trust Co. v. Conway*, 423 N.W.2d 795, 796 (N.D. 1988) (affirming district court's award of amount of attorney fees for prior appeal).

[¶11] The attorney fee award in *Kjorvestad*, 375 N.W.2d at 171, was premised on N.D.R.App.P. 38, which authorizes this Court to award attorney fees for frivolous appeals. Although *Kjorvestad* recognizes an appropriate concern about precluding a construction of the probate code to permit one heir or devisee to finance his or her lawsuit against another heir or devisee out of funds of an estate, N.D.R.App.P. 38 is a rule of appellate procedure and does not apply to proceedings like this in the district court. In *Estate of Nohle*, 2017 ND 100, ¶¶ 22-24, 893 N.W.2d 755, however, we recently affirmed a district court decision ordering a probate litigant to pay attorney fees incurred by personal representatives in district court proceedings. We explained that parties are generally responsible for their own attorney fees, but:

The district court has authority to stem abuses of the judicial process, which comes not only from applicable rules and statutes, such as N.D.R.Civ.P. 11, but “from the court’s inherent power to control its docket and to protect its jurisdiction and judgments, the integrity of the court, and the orderly and expeditious administration of justice.” *Federal Land Bank v. Ziebarth*, 520 N.W.2d 51, 58 (N.D. 1994). A district court has discretion under N.D.C.C. § 28-26-01(2) to decide whether a claim is frivolous and the amount and reasonableness of

an award of attorney fees, but when the court decides a claim is frivolous, the court must award attorney fees. *See Strand v. Cass Cnty.*, 2008 ND 149, ¶¶ 12-13, 753 N.W.2d 872. “A claim for relief is frivolous under N.D.C.C. § 28-26-01(2) only if there is such a complete absence of actual facts or law a reasonable person could not have expected a court would render a judgment in that person’s favor.” *[In re/ Estate of Dion]*, 2001 ND 53, ¶ 46, 623 N.W.2d 720. We review the district court’s decision under the statute for an abuse of discretion. *Id.*

Rath v. Rath, 2016 ND 46, ¶ 26, 876 N.W.2d 474 (quoting *Estate of Pedro*, 2014 ND 237, ¶ 14, 856 N.W.2d 775). A court also has authority to award attorney’s fees for “[a]llegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue. ...” N.D.C.C. § 28-26-31. An award of attorney’s fees under N.D.C.C. § 28-26-31 is within the court’s discretion. *Rath*, at ¶ 26.

Nohle, at ¶ 23. In *Nohle*, at ¶ 24, we affirmed a district court decision ordering a probate litigant to pay \$26,175.50 to personal representatives for attorney fees and costs incurred in the district court for responding to motions the court found were frivolous and contained allegations not made in good faith. We said the litigant’s actions unnecessarily drove up the costs of the proceeding and concluded the district court did not abuse its discretion in ordering the litigant to personally pay the personal representatives reasonable attorney fees. *Id.*

[¶12] Here, the probate court made findings about Rodney Hogen’s litigation strategy on remand and those findings are supported by the record. As in *Nohle*, 2017 ND 100, ¶¶ 22-24, 893 N.W.2d 755, a probate court has inherent authority to provide for the orderly and expeditious administration of justice and also has authority to award attorney fees under N.D.C.C. § 28-26-31. Here, the probate court’s decision is consistent with the good faith and reasonable cause requirements of N.D.C.C. § 28-26-31 and the court’s inherent authority to provide for an orderly and expeditious administration of the Estate while ensuring that an heir or devisee does not finance his or her lawsuit against another heir or devisee out of the Estate funds. On this record, we cannot say the district court abused its discretion in its award of attorney fees.

IV

[¶13] We have considered the remaining issues raised by the appellants and conclude they are either unnecessary to our decision or without merit. We affirm the probate court’s orders.

[¶14] Jon J. Jensen
Lisa Fair McEvers
Daniel J. Crothers
Jerod E. Tufte
Gerald W. VandeWalle, C.J.

APPENDIX B

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

IN THE MATTER OF THE ESTATE OF ARLINE H.
HOGEN, DECEASED.

File No. 09-07-P-100

ORDER ON PETITION FOR COMPLETE
SETTLEMENT AND DISTRIBUTION OF ESTATE

INTRODUCTION

[¶1] The background. for this estate litigation has been set forth by prior orders including the Judgment of the North Dakota Supreme Court. In the Matter of the Estate of Arline H. Hogen. Deceased, 2015 N.D. 125. The background was also set forth in this Court's Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate also sets forth the background of this case. That background will not be repeated here but will be referred to by reference to those other documents.

[¶2] With the exception of some miscalculation of rent owed on CRP property, the North Dakota Supreme Court upheld this Court's Findings and Order. The personal representative pursued a right of retainer against devisee. Rodney Hogen. This Court's basic

Findings were that Rodney did not owe the estate for cash rent or crop share proceeds before Arline Hogen's death in March of 2007, but he did owe the estate for cash rent and crop share proceeds and for CRP program payments, post death, in the amount of \$116,308.00 as of November 1, 2013. Interest was accruing on the various components that comprised the total amount due.

[¶3] Probating an estate is supposed to be a relatively simple process. The personal representative is to gather the assets of the estate, pay the debts and expenses of administration and distribute the balance to the heirs and devisees. That, of course, is not what happened in this case. The Court cautioned the parties and counsel, early on, that unless they chose a different course, administration expenses could consume a substantial amount of the estate. In a hearing held March 29, 2011, the Court stated:

I think there is some stubbornness here on your client's part that we need to get past here to get this thing over with, before these guys have to start selling farmland to pay the legal fees. That would be a real tragedy here, and it would be embarrassing to the legal system if that is what happened. (Page 13, lines 15-20, March 29 hearing transcript).

That was 6 years ago. The Court's file contains 701 document filings consisting of 11,087 pages. The companion case, Trust of Curtis A. Hogen Trust B, 09-2017-CV-01717, contains over 3,200 pages of filings.

[¶4] The personal representative has previously petitioned for delivery of possession and control of estate real property. This Court, by ordered dated February 2, 2016 ordered Rodney Hogen to surrender and abandon to the personal representative and immediately deliver to the personal representative complete possession and control over all of the estate's real property. The Court further ordered "consistent with the immediately proceeding ¶8 of this order and N.D.C.C. § 30.1-18-09, neither Rodney Hogen nor his agents or attorneys shall interfere in any manner with the complete possession and complete control of the estate's real property, or with the personal representative's power over title to the estate's real property which the PR has under N.D.C.C. § 30.1-18-11."

[¶5] On the day following the entry of this Court's Order of February 2, 2016 which ordered Rodney Hogen to surrender the property to the personal representative, Rodney signs a lis pendens presumably prepared by his attorney, covering all of the real property. The lis pendens was recorded with the Cass County Recorder on February 4, 2016 as Document Number 1469575. Previously, in what can only be concluded as an attempt to convolute the title to the subject real estate, Rodney Hogen signed and recorded a series of quit claim deeds purporting to deed the estate property to an individual named Marby Hogen and reserve a life estate to himself and his wife, Susan Hogen. These deeds appear to have been prepared by his attorney. Although not the subject of these proceedings, Rodney Hogen executed similar deeds for

the property held by the Curtis A. Hogen trust.

[¶6] Rodney, apparently, still clings to the misguided notion that the personal representative, Steven Hogen, has no authority over the property in this estate. That is plainly wrong. In a lengthy opinion the North Dakota Supreme Court carefully went over N.D.C.C. 30.1-12-01 which was taken from Section 3-01 of the Uniform Probate Code. It is from this statute that Rodney continues to argue that because the statute states "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 of testamentary 'disposition, to the decedent's heirs ... subject to ... administration" that the real property involved is no longer subject to administration. This statute, of course, has to be read in context with the statutes regarding a personal representative's powers and duties. Under, N.D.C.C. § 30.1-18-11 a personal representative has broad power over the property of the decedent's estate until termination of the personal representative's appointment. The personal representative's appointment has not been terminated despite Rodney's arguments to the contrary. Any contention to the contrary is wrong. This statute provides:

Until termination of the personal representative's appointment, a personal representative has the same power over the title to the property of the estate that an absolute owner would have, in trust, however, for that benefit of the creditor's and others interests in the estate. This

power may be exercised without notice, hearing, or order of the Court.

[¶7] Obviously, this estate is in need of further administration. The devolution of the property upon death to the successors is expressly subject to administration which is still continuing. In its lengthy opinion In the Matter of the Estate of Arline Hogen, 2015 N.D. 125, the North Dakota Supreme Court quoted extensively from a "noted manual for the U.P.C." authored by Richard V. Wellman. Uniform Probate Code Practice Manual (2d ed. 1977).

As Professor Bellman explains:

The code provides in [U.P.C.] Section 3-101 for devolution of title upon death to the successors. . . . He (PR) 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 purpose of administration ...

Estate of Hogen ¶20. There can be no more clearer of a request for possession of the assets, the estate's farmland, than the motion made by the PR to have Rodney Hogen surrender the property to him. Rodney Hogen's contention that this Court's previous Order on Approval of Final Account, Determination of Testacy Status and for Settlement of Estate somehow

terminated the administration of the estate and with it the P.R.'s authority to administer the estate is an incorrect interpretation of this Court's Order and the law. Among the Findings and Orders of this Court, which were upheld by the Supreme Court was ¶28 of 'the Court's Order on Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate. " ... The Estate will proceed to a formal close." The PR's present petition is part of that process.

[¶8] The personal representative has set forth the condition of the estate which, in short, is not good. Among the problems that are encumbering the estate are:

a) Prior to her death, Arline Hogen, for Rodney's benefit, mortgaged her property to secure loans made to Rodney by a financial institution. Rodney has not been paying these loans and foreclosure looms as a substantial possibility.

b) Rodney is substantially indebted to the estate for unpaid rent.

c) The Court has previously approved attorney's fees and personal representative's fees. Those fee awards have been affirmed by the North Dakota Supreme Court. Those fees need to be paid.

[¶9] There has been companion litigation ongoing in the Trust of Curtis A Hogen Trust B created under the Last Will and Testament of Curtis A Hogen. This is

found in file 09-2015-CV-01717. The trust has faced similar issues with Rodney failing to make appropriate payments to the estate for farm rental and CRP payments. In that litigation, which was commenced later than the litigation in the estate, the Court determined the amounts of farm rental and CRP payments that were owed by Rodney to the trust. As the matters of appropriate rental rates have been previously litigated, in that case for the 2014, 2015 and 2016 crop years, this Court adopts those as its findings for rents and CRP payments owed to the estate for those years. See Norberg v. Norberg, 2017 N.D. 14. In the personal representative's Petition for Complete Settlement in Distribution of the Estate the personal representative has calculated the rent and CRP payments owing to the estate based on the findings of the trust litigation. The Court adopts those calculations and the methods by which those amounts owing were determined. The additional amounts owed for the 2014, 2015 and 2016 crop years, without interest, would be \$55,379.73 as calculated by the PR. Interest at 6% per year will be allowed on each component of that total.

[¶10] Further delay in the administration of this estate will result in unnecessary further deterioration of the estate's assets. Administration expenses will grow, even more, and the opportunity to sell or lease the farmland will be missed for yet another year and perhaps lost forever to foreclosure. The PR's Petition for Complete Settlement and Distribution of the estate benefits the estate. The proposal is reasonable and appropriate.

ORDER

[¶11] The Court orders as follows:

[¶12] The personal representative shall allocate the estate real property for the benefit of the particular devisees as set forth in Exhibit A to the personal representative's petition or in such other manner as may be commercially reasonable. The Court finds that the allocation proposed by the PR is reasonable and beneficial to the estate.

[¶13] The lis pendens filed by Rodney Hogen against the estate property is deemed released. The personal representative shall prepare for the Court an Order for the Release of Lis Pendens in recordable form which the Court will execute and return to the personal representative for recording.

[¶14] The personal representative shall be authorized to sell sufficient estate property at auction or other commercially reasonable manner and use the proceeds to pay:

- a) Mortgages and other monetary liens as detailed in the personal representatives "Exhibit A."
- b) Estate attorney's fees and costs as ordered by the Court.
- c) Any payments to the devisees to make an equal distribution.

[¶15] The personal representative, Steven Hogen, shall distribute the remaining real property and proceeds

from the sale of real property allocated to Rodney Hogen after the proceeds from the sale of the real property allocated to Rodney Hogen have been used to pay for:

- a) Encumbrances against the estate's real property owed by Rodney Hogen and as detailed in the personal representative's Exhibit "A"
- b) One-half of the estate's attorney's fees and costs as ordered by the Court in its previous Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate and as affirmed by the North Dakota Supreme Court.

[¶16] The Court finds that the litigation following the remand from the North Dakota Supreme Court was occasioned by Rodney's stubborn refusal to comply with court orders and to follow standard probate procedures. Rodney exercised unauthorized control over the land and interfered with the personal representative's ability to manage estate resources including the receipt of appropriate farm rent. Further, Rodney continued to obstruct the personal representative in his efforts to complete the estate proceedings. Pursuant to Estate of Kjørvestad, 375 N.W. 2d 160, 171 (N.D. 1985) personal representative's and attorney's fees and costs following the remand of this matter by the Supreme Court are awarded against Rodney Hogen and Rodney Hogen's distribution from the estate rather than from the estate as a whole.¹ [Footnote 1 - In Kjørvestad the Court stated "Indeed Mrs. Conway (the objecting heir) has paid no heed to this Court's prior warnings about

dissipating funds of the estate through rancorous litigation."] Rodney Hogen's continued objections to and obstruction of the probate process and his actions in convoluting the title to the real property have been unreasonable and unjustified. Of particular note is the recording a lis pendens in a direct violation of this Court's February 2, 2016 Order.

[¶17] The personal representative is authorized to distribute the remaining real property, cash and proceeds from the sale of real property allocated to Steven Hogen after the proceeds from the sale of the real property allocated to Steven Hogen have been used to pay for:

- a) One-half of the estate's fees and costs as ordered by the Court and affirmed by the North Dakota Supreme Court;
- b) One-half of the encumbrance owing to First State Bank of North Dakota.

[¶18] That any capital gains taxes associated with the sale of real property herein shall be assessed against and paid by the devisee to whom such property has been allocated herein.

[¶19] The personal representative shall be authorized to perform any act, sign any deed, or take any other appropriate action to carry out the terms of this order to accomplish a complete settlement and distribution of this estate.

[¶20] Upon completion of all items set forth herein, the

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personal representative shall file a sworn statement with the Court and a proposed Order Discharging the Personal Representative.

Dated this 3 day of April, 2017.

BY THE COURT:

/s/ John C. Irby

John C. Irby
District Court Judge
East Central Judicial District

APPENDIX C

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

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

Court File No.: 09-07-P-100

**ORDER DISCHARGING PERSONAL
REPRESENTATIVE AND DENYING RODNEY
HOGEN'S DECLARATION AND PETITION**

[¶1] A Petition for Discharge of Personal Representative, signed by Steven C. Hogen, as Personal Representative, and a Declaration of Interested Persons Voiding the Allocation, Partition, Sale, Encumbrance of Real Property Once Owned by the Decedent and Petition of Interested Persons for Order Voiding Personal Representative's Allocation, Partition, Sale or Encumbrance of Real Property Once Owned by the Decedent [or Order Confirming the Declaration of Interested Persons Voiding the Personal Representative's Transaction(s)] and Petition of Interested Persons to Vacate this Court's Order of April 3, 2017, filed by Rodney Hogen, Susan Hogen, and Marby Hogen, came before the Court for hearing on August 10, 2018.

[¶2] Personal Representative Steven Hogen

appeared personally with his counsel, Sara K. Sorenson and Robert G. Hot of Ohnstad Twichell, P.C. Rodney Hogen, Susan Hogen, and Marby Hogen did not appear, but were represented by Jonathan T. Garaas of the Garaas Law Firm. No testimony was taken at the hearing.

[¶3] Rodney's Declaration and Petition were filed subsequent to the Personal Representative's Petition for Discharge of Personal Representative, and Rodney's Declaration and Petition make arguments in response to the Petition for Discharge of Personal Representative. The Court therefore views Rodney's Declaration and Petition as a response to the Petition for Discharge of Personal Representative.

[¶4] Following the first appeal of Rodney Hogen in this matter which was pursuant to a Rule 54(b) certification, the North Dakota Supreme Court remanded this matter in a decision dated May 27, 2015, to "recalculate the retainer 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." Estate of Hogen, 2015 ND 125, ¶35, 863 N.W.2d 876. The Court has recalculated the retainer in accordance with the decision of the North Dakota Supreme Court. (Index # 571.) In addition, following remand, the Court has held a number of hearings and entered a number of orders following the remand in order to complete the administration of the Estate, including entering an order allocating the property between the beneficiaries such that the property could be sold to pay for Estate debts and

mortgages against Estate property. (Index # 702.)

[¶5] The Court, having considered the arguments of counsel, all the filings of record, and being fully advised in the premises, now issues the following Order.

I. Susan and Marby Hogen are not interested persons in the Estate.

[¶6] The Court finds that Susan and Marby are not interested persons in the Estate. The Court takes judicial notice of the fact that Rodney's counsel in this case brought a quiet-title action in Barnes County on behalf of Susan and Marby, alleging that Susan and Marby had an interest in the Estate property. In the Barnes County action, arguments identical to those made by Rodney in this Court and rejected, were repeated in Barnes County, and such arguments were, again, rejected. The judgment in the Barnes County case states as follows:

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.

(Judgment, ¶ 5, Marby Hogen and Susan Hogen, v. Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hogen, Deceased, Case No. 02-2017-CV-00116, Barnes County District Court, Index # 90.) As set forth in the Personal Representative's Petition, the Estate's interest in real property referred to in the Barnes County Judgment has been transferred to third parties other than Rodney Hogen.

[¶7] The term "interested person" is defined to include "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent." N.D.C.C. § 30.1-01-06(26). Susan and Marby are not heirs, devisees, children, spouses, creditors, or beneficiaries of the decedent, and they have been judicially declared to not have a property right in the Estate. The Court finds that Susan and Marby have no interest in the Estate property. Because Susan and Marby are not interested persons, they have no standing to join in Rodney's "Declaration" and "Petition."

[¶8] Susan and Marby allege they have been denied notice and opportunity to be heard as interested persons. But even if Susan and Marby were arguably interested persons, they have received whatever process was due to them by choosing to start a quiet-title action in Barnes County. Susan and Marby had notice and opportunity to be heard in the Barnes County case, and that is the remedy they chose to vindicate their alleged interests. They cannot now re-litigate their claims here. Ungar v. N.D. State Univ., 2006 ND 185, ¶ 11, 721 N.W.2d 16. ("Resjudicata, or

claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. "). Indeed, the entire "Declaration" and "Petition" is a regurgitation of the same arguments made and rejected in this case, in Barnes County, and in the Trust Case.[FN1- The Trust proceeding also referred to herein as "Trust Case" is venued in Cass County District Court as Case No. 09-2015-CV-01717.] In fact, the Affidavit of attorney Jonathan T. Garaas in support of the "Declaration" and "Petition" is verbatim to the affidavit submitted in the Trust Case. Compare Trust Case (Index. #497, Case No. 09-2018-CV -01717) with Estate Case (Index #730). And, in the Trust Case, the North Dakota Supreme Court rejected the arguments made in the Affidavit, which were incorporated by reference in Rodney Hogen's "Objection to Steven's [sic] C. Hogen's Amended Final Report and Account." (Trust Case, Index # 491, ¶ 35.) See generally, Matter of Hogen Trust B, 2018 ND 117, 911 N.W.2d 305. The arguments, made again here, are barred as res judicata and/or issue preclusion. Ungar, 2006 ND 185, ¶11.

II. Rodney cannot void the sale under N.D.C.C. § 30.1-18-13.

[¶9] Rodney argues that he is able to void the sale of real estate under N.D.C.C. § 30.1-18-13. This statute provides:

Any sale or encumbrance to the personal representative, the personal representative's spouse, agent, or attorney, or any corporation, limited

liability company, or trust in which the personal representative has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:

1. The will or a contract entered into by the decedent expressly authorized the transaction; or
2. The transaction is approved by the court after notice to interested persons.

N.D.C.C. § 30.1-18-13.

[¶10] The Court concludes this statute does not apply here because the Personal Representative did not sell the land to himself, his spouse, agent, attorney, or any entity in which he has an interest. And Rodney has offered no other evidence that the Personal Representative had a conflict of interest in selling the property. To the contrary, the Personal Representative sold the property at an auction in accordance with an order of this Court and followed this Court's instructions. (Index # 702.)

[¶11] Rodney again makes arguments pertaining to the auction procedure for selling the Estate property, which arguments have already been rejected by the North Dakota Supreme Court in the

Trust proceeding. Rodney incorporates his "Declaration" and "Petition" into his Response objecting to the Personal Representative's Petition for Discharge in this matter. The Affidavit of attorney Jonathan T. Garaas in support of the "Declaration" and "Petition," which complains about the auction procedure, is verbatim to the affidavit submitted in the Trust Case. Compare Trust Case (Index. #497, Case No. 09-2018-CV-01717) with Estate Case (Index #730).

[¶12] In the Trust Case, the district court and the North Dakota Supreme Court rejected the arguments made in the Affidavit, which were incorporated by reference in Rodney Hogen's "Objection to Steven's [sic] C. Hogen's Amended Final Report and Account" in the Trust Case. (Trust Case, Index # 491, ¶35); see Matter of Hogen Trust B, 2018 ND 117, ¶36, 911 N.W.2d 305. ("We reject Rodney Hogen's claim the sale of the Trust estate was not done in a reasonable manner under the circumstances of this case."). The arguments, made again here, are barred as res judicata and/or issue preclusion. Ungar, 2006 ND 185, ¶11, 721 N.W.2d 16.

III. The division and distribution of Estate property is approved.

[¶13] More than 18 months ago, on January 27, 2017, the Personal Representative brought a Petition for Complete Settlement and Distribution of the Estate. (Index # 668.) Steven Hogen, as the sole remaining Trustee of the Trust, brought a virtually identical petition in the Trust Case. (Index. #420, Case No. 09-2015-CV -01717). Because the land in the Trust and

the land in the Estate are jointly owned, the manner of allocation and distribution were the same in the Trust case and in the Estate case to achieve a 50% distribution to Steven and a 50% distribution to Rodney. (Compare Index # 668 with Trust Case, Index. #420, Case No. 09-2015-CV-01717.)

[¶14] As set forth in the January, 2017 petition in this proceeding, the Personal Representative indicated with citation to the record in the Trust proceeding the following: "In the companion Trust proceeding, Rodney Hogen testified and introduced emails that he and Steven Hogen agreed to a split of the Trust and Estate property as set forth in such emails." (Index # 668, ¶9.) In the Trust proceeding, the court ruled as follows: "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." (Index. # 506, ¶8, Trust Case, No. 09-2015-CV-01717.)

[¶15] The North Dakota Supreme Court then affirmed the finding of the court in the Trust Case. See Matter of Hogen Trust B, 2018 ND 117, ¶36, 911 N.W.2d 305 ("Evidence in this record supports the division and distribution of the Trust property."). The arguments concerning the division and distribution of the Estate property, made again here, are barred as res judicata and/or issue preclusion. Ungar, 2006 ND 185, ¶11, 721 N.W.2d 16.

[¶16] Rodney also argues that the Personal Representative has not accounted for his actions as the Personal Representative and has not provided any accounting for any cash rent, income, or expenditures. The Court finds this claim has no merit. On January 27, 2017, the Personal Representative filed a "Record of Receipts and Disbursements," which shows the activity in the Estate checking account from its inception in 2007 until December 22, 2016. (See Index # 673.) The Personal Representative then filed a supplement to this Record to reflect disbursements from the Estate checking account after December 22, 2016. (See Index # 712.) All of these documents were served upon Rodney, via his counsel. (See Index # 674, Index # 726.)

[¶17] Personal Representative's counsel has provided information regarding the rent received in response to inquiry from Rodney's counsel as set forth in Exhibit "B" to the Personal Representative's Petition. Moreover, the rent income and proceeds from the sale, which have been deposited into the IOLTA Trust Account of the Personal Representative's counsel, and the rent income and disbursements from such account, have been detailed in the Petition for Discharge of the Personal Representative and in Exhibit 3 of the Personal Representative's Petition, entitled "Remaining Estate Income to Steven and Rodney." (See Index # 711 (Petition), # 714 (Exhibit 3).) The Personal Representative's counsel has stated that the amount remaining in the IOLTA Trust Account for the Estate is \$407,608.05, which is the total of the amount designated as "Preliminary cash allocation prior to deduction for unpaid fees/costs and future

expenses" on the Petition for Discharge of Personal Representative (Index # 711, ¶ 6 (indicating the preliminary cash for distribution of \$119,780.52 in Steven's column and \$287,827.53 in Rodney's column, which totals \$407,608.05). The Court finds that the Personal Representative has properly accounted for Estate funds and his actions.

IV. Steven has not yet been discharged as personal representative.

[¶18] Rodney argues Steven's appointment as personal representative terminated in 2013 when this Court entered an "Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate. " The Court finds that Steven's appointment as personal representative did not terminate after this Order, which neither closed the Estate nor discharged the Personal Representative. (See Index # 436.)

[¶19] N.D.C.C. § 30.1-17-10 says that "[a]n order closing an estate as provided in section 30.1-21-01 or 30.1-21-02 terminates an appointment of a personal representative." N.D.C.C. § 30.1-17-10 (emphasis added). But N.D.C.C. § 30.1-21-01 provides that the probate court "may enter an order or orders, on appropriate conditions, ... approving settlement and... directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person." N.D.C.C. § 30.1-21-01 (emphasis added). This Court has never issued an order closing this Estate or discharging the Personal Representative. Rodney

Hogen again argues that Steven Hogen has no authority to act as the Personal Representative, claiming the Estate was terminated after Rodney's first unsuccessful appeal following a Rule 54(b) certification. (Index # 506.) Rodney's argument ignores that a Rule 54(b) certification necessarily means there were more tasks to be completed before the Estate could be closed and the personal representative discharged. Indeed, this Court has already detailed the tasks that needed to be completed following the remand and as referenced in orders prior to the appeal:

IT IS FURTHER ORDERED that, pursuant to N.D.C.C. § 30.1-21-01(1), and Estate of Cashmore, 2010 ND 159, ¶14, 787 N.W.2d 261, issues that must yet be resolved in this probate proceeding, including but not limited to those issues addressed and/or referred to in **Doc. #436** and **Doc. #490** (the Estate will proceed to a formal close; Estate farmland will need to be utilized for administrative purposes, "including dealing with mortgages that Arline Hogen gave on the land to secure debt incurred by Rodney"), **Doc. #499** (the amount of the right of retainer claim, post-remand), **Doc. #500** (payment of remaining attorney fees and PR fees, additional real estate taxes, and the amount of the right of retainer claim, post-remand), **Doc. #502** (payment of additional administrative expenses, including additional real estate taxes), **Doc. #505** (payment of PR's fee and

attorney fees "out of the estate **assets**"), **Doc. #506 (payment of PR's fee and attorney fees)**, **Doc. #521 and Doc. #522** (payment of PR's fee and attorney fees, and utilizing correct right of retainer claim, post-remand), **Doc. #546** (in the "REPORT OF PRESENT STATUS OF PROBATE," at pp. 4-5, the "prior payments" needed to be paid out of the assets in the Estate before the Estate can be closed), **Doc. #562** (proceed to a formal close, selling some farm property, deed of sale will have to be given to the buyer, deed of distribution for whatever's left will have to be given--p. 16, l. 9; substantial attorneys fees and PR fees that are going to have to be paid out of the assets of the estate--p. 17, l. 15; the personal representative has some significant work to do to bring the estate to its finality, including deeds of distribution, paying administrative expenses, and so forth, "so I will order that the personal representative complete the items that are necessary to close the estate, whatever those are determined to be" --p. 21, l. 17; "the personal representative should do whatever is necessary, take the necessary steps to close the estate, including collection of assets, payment of expenses, and distribution of any remaining property" --p. 22, l. 12), and **Doc. #568** (see pp. 2-7), **are hereby bifurcated**, and all such issues

will be ruled upon by the Court after future proceedings and orders, which will culminate in a formal closing and the entry of a final judgment at a later date as to all such issues, and/or entry of an order closing the estate at such later date, and/or entry of an order terminating the appointment of the PR at such later date.

(Index # 639, ¶ 4.)

[¶20] This probate proceeding was commenced in 2007, which was the year that Arline died, and has continued since that time. Accordingly, N.D.C.C. § 30.1-12-08, cited by Rodney in support of his argument and which statute generally limits probate proceedings being commenced more than three years after the decedent's death, does not apply. Likewise, Rodney's citation to Dennison does not support his argument; in that case "[n]o probate was filed to administer [Magdalena Retzer's] estate[.]" Dennison v. N.D. Department of Human Services, 2003 ND 10, ¶ 11, 656 N.W.2d 25. The Court rejects Rodney's repeated and incorrect arguments regarding termination of the Estate.

[¶21] In addition, this Court has previously rejected this argument from Rodney and expressly determined that Steven's appointment as personal representative has not been terminated and that the Estate was in need of further administration. (Index # 702 at ¶¶ 6-7.)

V. The Personal Representative's requested

attorney fees and expenses are approved.

[¶22] The North Dakota Supreme Court has summarized the law with regard to awarding attorney fees to a personal representative of an estate:

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 actions must be in good faith and for the benefit of the estate. 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.

In re Estate of Hogen, 2015 ND 125, ¶50,863 N.W.2d 876 (citations omitted).

[¶23] Rodney does not challenge any specific hourly rates or time entries in the fee request but rather claims that all fees are barred by N.D.R.Civ.P. 54(e). Rule 54(e) states that a motion for attorney fees must be made "within 21 days after notice of entry of judgment." Rodney argues that the Personal Representative needed to bring a motion for attorney fees within 21 days of this Court's April 3, 2017 Order on Petition for Complete Settlement and Distribution of Estate in order to be timely. But the Court's April 3,

2017 order was not a final judgment; it was an interlocutory order. There has been no final judgment in this case, so Rule 54(e) does not apply.

[¶24] The Court finds that the hourly rates charged by Ohnstad Twichell, P.C., are reasonable, and Rodney has not challenged the hourly rates. The Court further finds that the time spent by Ohnstad Twichell, P.C., in prosecuting these proceedings is reasonable, and Rodney has not challenged any of the time entries of the requested fees. Although the amount of attorney fees requested is large, the fees were reasonable and necessary in light of the protracted nature of this litigation, which was caused by Rodney's tenacious litigation strategy. The Court finds that Steven, as Personal Representative, acted in good faith and for the benefit of the estate by employing attorneys to defend against Rodney's tenacious litigation tactics. The attorney fees benefitted the estate by ensuring Rodney could not impede or obstruct the administration of the Estate and by increasing the assets of the estate.

[¶25] The Court finds that Ohnstad Twichell, P.C., has discounted a significant portion (nearly \$90,000) of the actual attorney fees spent on this contentious and protracted litigation in an effort to avoid duplication and bring some sense of proportionality to this case. The Court has taken this voluntary discount into account when considering the reasonableness of the fee request.

[¶26] The Personal Representative requests \$50,000 for attorney fees expended prior to the remand by the supreme court in the first appeal in this case.

Rodney has made no specific challenge to this amount. The Court finds that this amount is reasonable and approves the request. One-half of this amount will be withheld from each of Steven and Rodney's shares of the Estate.

[¶27] The Personal Representative requests a total of \$200,000 in attorney fees that were expended following the remand from the supreme court. This amount includes \$128,082.15 in fees for post-remand Estate administration, \$10,788.59 in fees for two separate actions to evict a tenant from the Estate property, and \$61,129.26 in fees to defend the Barnes County quiet-title action ostensibly brought by Susan and Marby Hogen.

[¶28] The Court has already ruled that the Personal Representative's attorney fees and costs post-remand are to be deducted from Rodney's share of the Estate pursuant to Matter of Estate of Kjørvestad, 375 N.W.2d 160, 171 (N.D. 1985). The Court finds \$128,082.15 in attorney fees for post-remand litigation reasonable in light of the protracted nature of the proceedings and Rodney's efforts to obstruct the administration of the Estate. This amount shall be withheld from Rodney's share of the Estate.

[¶29] The Personal Representative was sued ostensibly by Rodney's wife and daughter in the Barnes County quiet-title action. The Court takes judicial notice of the Barnes County Court's finding in the quiet-title case that Susan and Marby were nominal plaintiffs and that the action was "clearly controlled by Rodney." (Memorandum and Order Re: Motion for

Summary Judgment, ¶ 4, Marby Hogen and Susan Hogen, v. Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hogen, Deceased, Case No. 02-2017-CV-00116, Barnes County District Court, Index # 78.) The Court finds that Rodney was responsible for and controlled the Barnes County action against the Personal Representative. Rodney's involvement in the Barnes County case is evident from the fact that Susan and Marby were represented by Rodney's counsel, the fact that Susan and Marby are Rodney's immediate family members, and the fact that the same arguments made by Rodney here were made by Susan and Marby in that case. The Court finds that the Barnes County action was another tenacious tactic by Rodney to obstruct the administration of the Estate and therefore orders that the costs of that action be taken out of Rodney's share of the Estate pursuant to Estate of Kjorvestad, 375 N.W.2d at 171. The Court finds that \$61,129.26 in attorney fees for the Barnes County case was reasonable, and Rodney makes no challenge to the specific amount. The Court finds that the attorney fees expended in the Barnes County case benefitted the Estate by allowing the sale of Estate property to move forward, which increased the assets of the Estate. The \$61,129.26 shall be withheld from Rodney's share of the Estate.

[¶30] The Personal Representative was also required to evict a tenant of the homestead in connection with the sale of the property. Prior to the eviction hearing in April 2018, the tenant, LeRoy Cromwell, neither paid rent to the Personal Representative or obeyed his instructions to leave the property. Two separate eviction proceedings were

necessary as the tenant testified he had been regularly paying monthly rent to Rodney Hogen, who had not asked him to vacate the premises. This contravenes ¶4 of this Court's Order of April 3, 2017. These Cass County District Court eviction proceedings may be found as files #09-2017-CV-02802 and 09-2018-CV-01059. Rodney Hogen has not accounted to the Personal Representative for any monthly rents received from this tenant.

[¶31] The Court finds that \$10,788.59 in attorney fees was reasonable for the two eviction actions. Rodney alleges this was a "massive amount" but offers no evidence or argument as to why. The Court finds the amount is reasonable because the complex background of the case and protracted litigation made those eviction actions far more complex than a typical landlord-tenant eviction proceeding. The Court finds that Rodney's actions in allowing the tenant to remain on the property made it necessary for the Personal Representative to evict the tenant and therefore orders that the costs of the eviction actions be taken out of Rodney's share of the Estate pursuant to Estate of Kjorvestad, 375 N.W.2d at 171. The Court finds that evicting the tenant from the property was necessary and benefitted the Estate by allowing the sale of Estate property to move forward, which increased the assets of the Estate. The \$10,788.59 shall be withheld from Rodney's share of the Estate.

[¶32] The Personal Representative also requests a total of \$23,000 in attorney fees be withheld from Rodney's share until the final resolution of all appeals related to this case and the Barnes County case, which

has already been appealed. This amount includes \$3,000 for the remaining work to be done on the Barnes County appeal and \$20,000 for the expected appeal in this case. Rodney has made no challenge to the reasonableness of these amounts, and for the foregoing reasons, they are properly chargeable to Rodney pursuant to Estate of Kjorvestad, 375 N.W.2d at 171. The Court finds these amounts to be reasonable and orders an additional \$23,000 to be withheld from Rodney's share of the Estate for fees related to these appeals. These withheld funds shall be placed in the Ohnstad Twichell Trust Account and used to pay the attorney fees and costs incurred by the Personal Representative in connection with such appeals. Any unused funds shall be promptly distributed to Rodney.

VI. Steven is discharged as Personal Representative, but such order is stayed until the appeal period runs in this matter or until this matter is finally resolved following an appeal.

[¶33] The Court has the power to condition the discharge of a personal representative upon the occurrence of an event. See In re Estate of Fisk, 2010 ND 186, ¶ 1,788 N.W.2d 611 (appeal from an order discharging a personal representative upon payment on a claim against the estate). The Probate Code provides that "the court may enter an order or orders, on appropriate conditions, ... discharging the personal representative from further claim or demand of any interested person." N.D.C.C. § 30.1-21-01 (emphasis added). Nothing in the Probate Code prohibits staying the discharge of a personal representative pending appeal. The Court finds that staying the discharge of

the Personal Representative until the appeal period runs with no filing of an appeal, or until the matter is finally resolved following an appeal, and until the Barnes County case is finally resolved, is an appropriate condition in this case because Rodney's tenacious litigation strategy and history of appealing indicate that there is nearly an absolute certainty this order will be appealed. Rodney also agrees that the Personal Representative should not be discharged until all probate litigation is concluded. (Index # 745 at p. 12, ¶ J.) The Court orders that Steven is discharged as Personal Representative, but such discharge is stayed until the appeal period runs with no filing of an appeal in this matter or until this matter is finally resolved following an appeal, and such order is further stayed until the Barnes County appeal is finally resolved following the appeal in that case.

[¶34] Based on the foregoing, the Court orders as follows:

[¶35] The Court approves the distributions and disbursements as set forth in the Personal Representative's Petition for Discharge of Personal Representative.

[¶36] Attorney fees and expenses expended prior to the remand by the North Dakota Supreme Court in the first appeal in this case in the amount of \$50,000 shall be paid to Ohnstad Twichell, P. C. One-half of this amount will be withheld from each of Steven's and Rodney's shares of the Estate.

[¶37] Attorney fees and expenses following the

remand by the North Dakota Supreme Court in the amount of \$200,000 shall be paid to Ohnstad Twichell, P.C. This entire amount shall be withheld from Rodney's share of the Estate.

[¶38] An additional \$23,000 shall be withheld from Rodney's share of the Estate for attorney fees and costs related to the Barnes County case appeal and any appeal in this case. These withheld funds shall be placed in the Ohnstad Twichell Trust Account and used to pay the attorney fees and costs incurred by the Personal Representative in connection with such appeals. Any unused funds shall be promptly distributed to Rodney Hogen.

[¶39] Steven Hogen is discharged as Personal Representative, but such discharge is stayed until the appeal period runs with no filing of an appeal in this matter or until this matter is finally resolved following an appeal, and such discharge is further stayed until the Barnes County appeal is finally resolved following the appeal in that case.

BY THE COURT

Signed: 8/22/2018 3:01:42 PM

/s

John C. Irby

APPENDIX D

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.

In re Estate of Hogen, 2015 ND 125, 863 N.W.2d 876

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-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 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 personalty 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 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 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 Graber 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:

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 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, 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 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 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:

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 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 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 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 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 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).

C

[¶ 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 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 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 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 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 E

Name, Address and Telephone No. of Attorney

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Attorney for Personal Representative
Court File No. 09-07-P-100

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

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

ORDER ON PETITION FOR DELIVERY OF
POSSESSION
AND CONTROL OF ESTATE REAL PROPERTY

[¶1] The above matter is before the Court on the Personal Representative's ("PR") Petition for Entry of Order for Delivery of Possession and Control of Estate Real Property. A hearing on the Petition was held on February 2, 2016, with the PR being represented by attorney Michael D. Nelson of West

Fargo, North Dakota, and respondent and interested person Rodney Hogen ("Rodney") being represented by attorney Jonathan T. Garaas of Fargo, North Dakota.

[¶2] On the basis of the Petition and the supporting and opposing papers filed in connection with the Petition, and the argument of counsel, if any, and the Court being fully advised in the premises, the Court makes the following Findings and Order:

FINDINGS

[¶3] Adequate notice of the hearing on the Petition has been provided to interested person Rodney.

[¶4] Petitioner, the PR, has established that the Estate's real property, including but not limited to the following-described tracts or parcels, to-wit:

1. An undivided 28.5% interest in and to the Northeast Quarter (NE¼) of Section Twenty-one (21), EXCEPT the East 572 feet of the South 762 feet of the Northeast Quarter (NE¼) 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.

2. An undivided one-half interest in and to the Northeast Quarter (NE $\frac{1}{4}$) 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 (E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$) of Section 33, Township 140, Range 54, Cass County, North Dakota, subject to highways, easements and rights of way of record.
3. An undivided one-half interest in and to the Northwest Quarter (NW $\frac{1}{4}$) 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 $00^{\circ}52'48''$ 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.

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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

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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

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

4. An undivided one-half interest in and to Lot One (1), Block One (1), Hogen Subdivision, Cass County, North Dakota.
5. An undivided one-half interest in and to the Northwest Quarter (NW $\frac{1}{4}$) and the South Half of the Southwest Quarter (S $\frac{1}{2}$ SW $\frac{1}{4}$) 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, and the North Half of the Southwest Quarter ($N\frac{1}{2}SW\frac{1}{4}$) 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 $46^{\circ}01'57''$ 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 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.

(a) is asserted by Rodney, in whole or in part, to be in his (Rodney's) possession and/or control, and (b) that Petitioner has the right to possession and control of said Estate real property under N.D.C.C. § 30.1-18-09, to the exclusion of Rodney.

[¶5] Petitioner, the PR, has requested that interested person Rodney deliver possession and control of all Estate real property, including the real property described above in ¶4, to Petitioner.

[¶6] Petitioner's request for delivery by Rodney of possession and control of the Estate's real property to Petitioner is conclusive evidence, in this proceeding, that possession and control of said Estate real property by the PR is necessary for the management, protection, and preservation of the decedent's Estate, and necessary for purposes of administration, pursuant to N.D.C.C. § 30.1-18-09.

ORDER

[¶7] NOW, THEREFORE, it is hereby ordered and decreed, that:

[¶8] Rodney Hogen immediately and forthwith surrender and abandon to the PR, and immediately

and forthwith deliver over to the PR, complete possession and complete control over, all the Estate's real property, including but not limited to the following-described tracts or parcels of real property, to-wit:

1. An undivided 28.5% interest in and to the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-one (21), EXCEPT the East 572 feet of the South 762 feet of the Northeast Quarter (NE $\frac{1}{4}$) 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.
2. An undivided one-half interest in and to the Northeast Quarter (NE $\frac{1}{4}$) 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 ($E\frac{1}{2}E\frac{1}{2}NE\frac{1}{4}$) of Section 33, Township 140, Range 54, Cass County, North Dakota, subject to highways, easements and rights of way of record.

3. An undivided one-half interest in and to the Northwest Quarter ($NW\frac{1}{4}$) 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

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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 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

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

4. An undivided one-half interest in and to Lot One (1), Block One (1), Hogen Subdivision, Cass County, North Dakota.
5. An undivided one-half interest in and to the Northwest Quarter (NW $\frac{1}{4}$) and the South Half of the Southwest Quarter (S $\frac{1}{2}$ SW $\frac{1}{4}$) 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, and the North Half of the Southwest Quarter (N $\frac{1}{2}$ SW $\frac{1}{4}$) 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 $46^{\circ}01'57''$ 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 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.

[¶9] Consistent with the immediately preceding ¶ 8 of this Order and N.D.C.C. § 30.1-18-09, neither Rodney Hogen nor his agents or attorneys shall interfere in any manner with the complete possession and complete control of the Estate's real property, or with the PR's power over title to the Estate's real property which the PR has under N.D.C.C. § 30.1-18-

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11.

[¶10] IT IS SO ORDERED.

BY THE COURT:

Signed: 2/2/2016 9:51:30 AM

s/ John C. Irby

APPENDIX F

Name, Address and Telephone No. of Attorney

Michael D. Nelson

Attorney ID #03457

OHNSTAD TWICHELL, P.C.

901 - 13th Avenue East

P.O. Box 458

West Fargo, NO 58078-0458

(701) 282-3249

Court File No. 09-07-P-1 00

Attorney for Personal Representative

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

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

**ORDER DENYING PETITION FOR ORDER
RESTRAINING PERSONAL REPRESENTATIVE**

[¶] The above-entitled matter is before the Court on interested person Rodney Hogen's ("Rodney") Petition for Order Restraining Personal Representative, filed at **Doc. #560**. This Petition was brought on for hearing on February 2, 2016, with Rodney represented by attorney Jonathan T. Garaas, of Fargo, North Dakota, and the Personal Representative, Steven C. Hogen ("PR"), represented by attorney Michael D. Nelson, of West Fargo, North

Dakota.

[¶2] On the basis of the reasoning set forth in (a) the PR's "Brief in Opposition to Rodney Hogen's Petition for Order Restraining Personal Representative," **Doc. #568**, and (b) the PR's "Combined: (1) Second Response Brief in Opposition to Rodney Hogen's Petition for Order Restraining Personal Representative, and (2) Reply Brief as to Personal Representative's Motion for Entry of Cashmore Bifurcation Order," **Doc. #618**, which reasoning the Court adopts in total, and also on the basis of the argument of counsel, and the Court's files and records in this matter, and the Court being fully advised in the premises,

[¶3] IT IS ORDERED Rodney's Petition for Order Restraining Personal Representative (**Doc. #560**) is in all things DENIED.

BY THE COURT

Signed: 2/4/2016 2:58:00 PM

s/ John C. Irby

APPENDIX G

Name, Address and Telephone No. of Attorney

Michael D. Nelson

Attorney ID #03457

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Court File No. 09-07-P-1 00

Attorney for Personal Representative

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

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

ORDER BIFURCATING ISSUES

[¶1] The above-entitled matter is before the Court on the Personal Representative's ("PR") "Motion for Entry of Cashmore Bifurcation Order," filed at **Doc. #576**. This Motion was brought on for hearing on February 2, 2016, with the PR, Steven C. Hogen, represented by attorney Michael D. Nelson, of West Fargo, North Dakota, and interested person Rodney Hogen ("Rodney") represented by attorney Jonathan T. Garaas, of Fargo, North Dakota.

[¶2] On the basis of the parties' briefs filed in connection with the Motion, the argument of counsel, and the Court's files and records in this matter, and the Court being fully advised in the premises,

[¶3] IT IS ORDERED the PR's Motion for Entry of Cashmore Bifurcation Order is GRANTED.

[¶4] IT IS FURTHER ORDERED that, pursuant to N.D.C.C. § 30.1-21-01(1), and Estate of Cashmore, 2010 ND 159, ¶ 14, 787 N.W.2d 261, issues that must yet be resolved in this probate proceeding, including but not limited to those issues addressed and/or referred to in **Doc. #436** and **Doc. #490** (the Estate will proceed to a formal close; Estate farmland will need to be utilized for administrative purposes, "including dealing with mortgages that Arline Hogen gave on the land to secure debt incurred by Rodney"), **Doc. #499** (the amount of the right of retainer claim, post-remand), **Doc. #500** (payment of remaining attorney fees and PR fees, additional real estate taxes, and the amount of the right of retainer claim, post-remand), **Doc. #502** (payment of additional administrative expenses, including additional real estate taxes), **Doc. #505** (payment of PR's fee and attorney fees "out of the estate assets"), **Doc. #506** (payment of PR's fee and attorney fees), **Doc. #521** and **Doc. #522** (payment of PR's fee and attorney fees, and utilizing correct right of retainer claim, post-remand), **Doc. #546** (in the "REPORT OF PRESENT STATUS OF PROBATE," at pp. 4-5, the "prior payments" needed to be paid out of the assets in the Estate before the Estate can be closed), **Doc. #562** (proceed to a formal close, selling some farm property, deed of sale will have

to be given to the buyer, deed of distribution for whatever's left will have to be given--p. 16,1. 9; substantial attorneys fees and PR fees that are going to have to be paid out of the assets of the estate-p. 17, 1. 15; the personal representative has some significant work to do to bring the estate to its finality, including deeds of distribution, paying administrative expenses, and so forth, "so I will order that the personal representative complete the items that are necessary to close the estate, whatever those are determined to be"--p. 21, 1. 17; "the personal representative should do whatever is necessary, take the necessary steps to close the estate, including collection of assets, payment of expenses, and distribution of any remaining property"--p. 22,1. 12), and **Doc. #568** (see pp. 2-7), **are hereby bifurcated**, and all such issues will be ruled upon by the Court after future proceedings and orders, which will culminate in a formal closing and the entry of a final judgment at a later date as to all such issues, **and/or** entry of an order closing the estate at such later date, **and/or** entry of an order terminating the appointment of the PR at such later date.

BY THE COURT

Signed: 2/4/2016 3:55:46 PM

/s John C. Irby

APPENDIX H

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

In the Matter of Arline H. Hogen, Deceased

Cass File No. 09-07-P-100

**Order Denying Personal Representative's Motion for
Consolidation**

[¶1] This matter came on before the Court, pursuant to personal representative, Steven C. Hogen's motions to consolidate the present file (Estate case) with tile 09-2015-CV-01717, in the Matter of Curtiss A. Hogen Trust B as created under the Last Will and Testament of Curtiss A. Hogen (Trust Case). Among the reasoning for the request was essentially the contention that because Steven Hogen (Steven) and his brother Rodney Hogen (Rodney) are the devisees in the Arline H. Hogen Estate and are the residuary beneficiaries of the Curtiss A. Hogen Trust B and that the dispute in both matters involves Rodney's failure to meet his obligations to the Trust and the Estate. Further, the bulk of the assets in the Trust and the Estate are undivided interests in the same farmland in Cass and Barnes Counties. Further, that the ultimate resolution of each matter will require the sale of a portion of the farm properties.

[¶2] Steven cites Rule 42 of the North Dakota Rules of Civil Procedure as the authority for such consolidation.

[¶3] The Court declines to exercise its discretion in consolidating these matters for several reasons. First, both the instant case and the Curtiss Hogen Trust case have already been tried to their respective courts. At the time of the personal representative's request, the Court's file in the instant case contains over 10,000 pages of documents. This matter has been to the Supreme Court twice. It's this Court's understanding that the other matter has been tried to the Honorable Steven McCullough and a decision is pending. The time to attempt a savings of judicial resources and to efficiently resolve this matter passed years ago.

[¶4] In the event of consolidation, the undersigned judge will be no longer able to preside over the consolidated matters. At one point the undersigned was assigned to the Trust case, but a demand for change of judge was made and granted in that matter. See Odyssey Nos. 38 and 45 in the Trust case. In addition, the litigants in each of these two cases appear in different capacities. In the Estate case Steven is the personal representative and a devisee, and Rodney is a devisee. In the Trust case, both are co-trustees and residuary beneficiaries. It would appear that either Steven or Rodney would be allowed to file a demand for change of judge in the estate case within ten days of that matter being assigned the Honorable Steven McCullough.

[¶5] Further, because the litigants appear in each case in different capacities than in the other case, the procedures for resolutions of these matters differ.

[¶6] The time for consolidating these matters has long passed. In the Estate case alone, over \$350,000 in attorney and personal representative fees have been awarded and affirmed. This matter has been ordered to proceed to a formal close which will no doubt involve selling farm property. Given the undivided interest in farm property held by the Estate, it would behoove the personal representative to cooperate with the trustee of the Curtiss Hogen Trust in any sale of farm property to maximize the results if that is a concern. Theoretically, however, that is not required. The Court finds that there are no compelling reasons to consolidate the two matters. For better or worse, consolidation would result in the removal of the undersigned as the presiding judge of this case. The facts in these cases have, for the most part, been already determined.

[¶7] Accordingly, the personal representative's motion to consolidate is denied.

Dated this 12 day of December, 2016.

BY THE COURT:

s/ John C. Irby

John C. Irby

District Court Judge

East Central Judicial District

APPENDIX I

Name, Address and Telephone No. of Attorney

Sara K. Sorenson

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Court File No. 09-07-P-1 00

Attorney for Petitioner Steven C. Hogen

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

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

ORDER FOR THE RELEASE OF LIS PENDENS

[¶1] On February 2, 2016, this Court ordered Rodney Hogen to surrender and abandon to the personal representative and immediately deliver to the personal representative complete possession and control over all of the estate's real property. This Court further ordered "consistent with the immediately preceding ¶8 of this order and N.D.C.C. § 30.1-18-09, neither Rodney Hogen nor his agents or attorneys shall interfere in any manner with the complete possession

and complete control of the estate's real property, or with the personal representative's power over title to the estate's real property which the PR has under N.D.C.C. § 30.1-18-11."

[¶2] On the day following the entry of this Court's Order of February 2, 2016, which ordered Rodney Hogen to surrender the property to the personal representative, Rodney signed a lis pendens, presumably prepared by his attorney, covering all of the real property. The lis pendens was recorded with the Cass County Recorder on February 4, 2016, as Document Number 1469575, and with the Barnes County Recorder on February 5, 2016, as Document Number 282524.

[¶3] A notice of lis pendens may be filed "[i]n a civil or criminal action in a court affecting the title to real property:" N.D.C.C. § 28-05-07. "[T]he purpose of a notice of lis pendens is to 'let the world know that there is an action pending, and everybody interested can go to the clerk's office, and there learn the particulars from the complaint.'" Bragg v. Burlington Res. Oil & Gas Co. LP, 2009 ND 33, ¶ 9, 763 N.W.2d 481 (quoting Plott v. Kittelson, 58 N.D. 881, 890, 228 N.W. 217, 220 (1929)). The use of lis pendens is restricted to avoid abuse. Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶34, 788 N.W.2d 312.

[¶4] North Dakota law provides for the cancellation of lis pendens:

The court in which the action was

commenced, at any time, on application of any person aggrieved and on good cause shown and on such notice as directed or approved by the court, may order the notice authorized by section 28-05-07 to be canceled of record in whole or in part by the recorder of any county in whose office the same may have been filed for record, and such cancellation must be made by an endorsement to that effect on the margin of the record which shall refer to the order. Such cancellation, in like manner, may be made by the recorder upon a written request, directing such cancellation, signed by the party or the attorney of the party who caused such notice to be filed. Such notice is also canceled by the entry of a final judgment in the action if no appeal has been taken from such judgment within the time provided by law.

N.D.C.C. § 28-05-08.

[¶5] Rodney Hogen's recording a lis pendens in direct violation of this Court's February 2,2016 Order is unreasonable and unjustified.

[¶6] It is ordered that the lis pendens filed by Rodney Hogen in the office of the Cass County Recorder on February 4,2016, as Document Number 1469575, concerning the following described real property:

TRACT ONE. An undivided 28.5% interest in and to the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-one (21), EXCEPT the East 572 feet of the South 762 feet of the Northeast Quarter (NE $\frac{1}{4}$) 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 (NE $\frac{1}{4}$) 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 (E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$) 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 (NW $\frac{1}{4}$) 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 $00^{\circ}52'48''$ 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 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

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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

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.

is hereby released and cancelled, and the Cass County Recorder is hereby authorized and directed to discharge the same of record.

[¶7] It is further ordered that the lis pendens

filed by Rodney Hogen in the office of the Barnes County Recorder on February 5, 2016, as Document Number 282524, concerning the following described real property:

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 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

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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

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50.00 feet on each side of said centerline for a distance of 31.00 feet; thence North $89^{\circ}53'33''$ West with 50.00 feet on each side of said centerline for a distance of 525.00 feet; thence continuing North $89^{\circ}53'33''$ 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,

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North Dakota.

is hereby released and canceled of record, and the Barnes County Recorder is hereby authorized and directed to discharge the same of record.

BY THE COURT

Signed: 5/9/2017 11 18:49 AM

s/ John C. Irby

John C. Irby

District Court Judge

East Central Judicial District

APPENDIX J

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

JUDGMENT

Supreme Court No. 20180325
Cass County Case No. 07-P-00100

Appeal from the district court for Cass County.

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

Steven C. Hogen, Petitioner and Appellee

v.

Rodney Hogen, Respondent and Appellant

and

Susan Hogen and Marby Hogen, Purported Interested
Persons and Appellants

[¶1] This appeal having been heard by the Court at the
February 2019 Term before:

[¶2] Chief Justice Gerald W. VandeWalle, Justice
Daniel J. Crothers, Justice Lisa Fair McEvers, Justice
Jerod E. Tufte, and Justice Jon J. Jensen;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the orders of the district court are AFFIRMED.

[¶41 IT IS FURTHER ORDERED AND ADJUDGED that Steven C. Hogen have and recover from Rodney Hogen, Susan Hogen, and Marby Hogen costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

[¶51 This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: May 16, 2019

By the Court:
s/ Gerald VandeWalle

Chief Justice

ATTEST:
s/ Penny Miller

Clerk

APPENDIX K

N.D.C.C. § 28-05-07. Lis pendens--Effect.

In a civil or criminal action in a court affecting the title to real property, the plaintiff, at the time of filing the complaint or criminal information or indictment or at any time afterwards, or the defendant, when the defendant sets up in the defendant's answer an affirmative claim for relief affecting the title to real property and demands substantive relief, at the time of filing the defendant's answer or at any time afterwards, may file for record with the recorder of each county in which the real property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property affected. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded is deemed a subsequent purchaser or encumbrancer with notice and is bound by all proceedings taken after the filing of such notice to the same extent as if that person were a party to the action. For the purpose of this section, an action is deemed to be pending from the time of filing such notice, but the notice in a civil action is of no avail unless it is followed by the first publication of the

summons, or by the personal service thereof on a defendant, within sixty days after such filing.

N.D.C.C. § 28-26-31. Pleadings not made in good faith.

Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

N.D.C.C. § 30.1-01-06. (1-201) General definitions.

Subject to additional definitions contained in the subsequent chapters which are applicable to specific chapters, and unless the context otherwise requires, in this title:

7. "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the

estate.

26. "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. The term also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

49. "Settlement", in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

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.

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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 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.

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. § 30.1-17-02. (3-602) Acceptance of appointment--Consent to jurisdiction Currentness.

By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed by ordinary first-class mail to the personal representative's address as listed in the application or petition for appointment or as thereafter reported to the court and to the personal representative's address as then known to the petitioner.

N.D.C.C. § 30.1-17-07. (3-607) Order restraining personal representative.

1. On petition of any person who appears to have an interest in the estate, the court, by temporary order, may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of the personal representative's office, or make any other order to secure proper performance of the personal representative's duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested

person. Persons with whom the personal representative may transact business may be made parties.

2. The matter shall be set for hearing within ten days unless the parties otherwise agree. Notice, as the court directs, shall be given to the personal representative and the personal representative's attorney of record, if any, and to any other parties named defendant in the petition.

N.D.C.C. § 30.1-17-10. (3-610). Termination of appointment--Voluntary.

1. An appointment of a personal representative terminates as provided in section 30.1-21-03, one year after the filing of a closing statement.

2. An order closing an estate as provided in section 30.1-21-01 or 30.1-21-02 terminates an appointment of a personal representative.

3. A personal representative may resign the position by filing a written statement of resignation with the court after giving at least fifteen days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to the successor representative.

N.D.C.C. § 30.1-18-03. (3-703) General duties--Relation and liability to persons interested in estate--Standing to sue

1. A personal representative is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this title, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred upon the personal representative by this title, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

N.D.C.C. § 30.1-18-13. (3-713). Sale, encumbrance, or transaction involving conflict of interest--Voidable--Exceptions.

Any sale or encumbrance to the personal representative, the personal representative's spouse, agent, or attorney, or any corporation, limited liability company, or trust in which the personal representative has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:

1. The will or a contract entered into by the decedent expressly authorized the transaction; or
2. The transaction is approved by the court after notice to interested persons.

N.D.C.C. § 30.1-18-14. (3-714) Persons dealing with personal representative--Protection.

A person who in good faith either assists a personal representative or deals with the personal representative for value is protected as if the personal representative properly exercised the personal representative's power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 30.1-16-04, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not in substitution for that provided by comparable provisions

of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

N.D.C.C. § 30.1-19-03. (3-803). Limitations on presentation of claims.

1. All claims against a decedent's estate which arose before the death of the decedent, including claims of the state or any political subdivision, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, the heirs and devisees of the decedent, and nonprobate transferees unless presented as follows:

a. Within three months after the date of the first publication and mailing of notice to creditors if notice is given in compliance with section 30.1-19-01; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

b. Within three years after the decedent's death, if notice to creditors has not been published and mailed.

2. 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 months after performance by the personal representative is due.

b. Any other claim, within three months after it arises.

3. Nothing in this section affects or prevents:

a. Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate.

b. To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which the decedent or personal representative is protected by liability insurance.

N.D.C.C. § 30.1-20-11. (3-911) Partition for purpose of distribution.

When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the district court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the district

court shall partition the property in the same manner as provided by chapter 32-16. The district court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

N.D.C.C. § 30.1-21-01 (3-1001) Formal proceedings terminating administration--Testate or intestate--Order of general protection.

1. A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and, after receiving satisfactory evidence of payment of any estate tax due, directing or approving distribution of the estate and discharging the personal

representative from further claim or demand of any interested person.

2. If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

N.D.C.C. § 30.1-21-08. (3-1008) Subsequent administration - Fee.

If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, the court, upon petition of any interested person and upon notice as it directs, may appoint the same or a successor personal representative to administer the subsequently

discovered estate. Any person filing a petition under this section shall pay to the clerk of district court a filing fee as prescribed in section 27-05.2-03. If a new appointment is made, unless the court orders otherwise, the provisions of this title apply as appropriate, but no claim previously barred may be asserted in the subsequent administration.

N.D.C.C. § 32-16-04. Lis pendens required.

Immediately after filing the complaint in the district court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties, so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action.

N.D.C.C. § 32-16-23. Part of action continued.

When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court, if necessary, may require such parties to present the facts or law in the controversy by pleading as in an original action.

N.D.C.C. § 32-16-24. How sales made.

All sales of real property made by referees under this chapter must be made at public auction to the highest bidder upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice.

N.D.C.C. § 32-16-28. Compensation when consent not given.

If such consent is not given, filed, and entered as provided in section 32-16-27 at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party or deposited in court for that party, as the case may require.

N.D.C.C. § 32-16-30. Value of future estates settled by court.

In all cases of sales, when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate and must direct such proportion of the proceeds of the sale to be invested, secured, or

paid over in such manner as will protect the rights and interests of the parties.

N.D.C.C. § 32-16-35. Interested party may apply share on purchase price.

When a party entitled to a share of the property, or an encumbrancer entitled to have that encumbrancer's lien paid out of the sale, becomes a purchaser, the referees may take their receipt for so much of the proceeds of the sale as belongs to them.

APPENDIX L

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Probate No. 09-07-P-100

Attorneys for Rodney Hogen

**IN THE DISTRICT COURT FOR
CASS COUNTY, NORTH DAKOTA**

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

**PETITION FOR ORDER RESTRAINING
PERSONAL REPRESENTATIVE**

**TO THE HONORABLE JOHN C. IRBY, JUDGE OF
THE ABOVE NAMED COURT:**

[¶1] Petitioner Rodney Hogen respectfully shows the
Court as follows:

[¶2] Petitioner is a son of the above named decedent
and one of two residuary devisees under the Last Will
and Testament of Arline H. Hogen, Deceased. As one

of the two residuary devisees, an undivided one-half of decedent's interest in the following four tracts of real property, situated in Cass County, North Dakota, devolved upon your Petitioner on March 23, 2007 -- the date of Arline H. Hogen's death:

TRACT ONE. 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. 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. 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 $00^{\circ}52'48''$ 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
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°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

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

[¶3] As one of the two residuary devisees, an
undivided one-half of decedent's interest in the
following real property, situated in Barnes County,

North Dakota, devolved upon your Petitioner on March 23, 2007 -- the date of Arline H. Hogen's death:

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. and 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 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.

[¶4] This Court issued its Order on Petition for Approval of Final Account, for Determination of Testacy Status, and Settlement of Estate under N.D.C.C. § 30.1-21-01 on October 24, 2013. Docket Entry #436. This Court issued its Amended Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate on December 11, 2013 [Docket Entry # 490]. This Court issued its Order of March 6, 2014 referring to these orders and recognizing the Petition Rodney Hogen was a 50% distributee and his brother Steven Hogen a 50% distributee, Docket Entry #506 recognizing what was originally ordered on October 24, 2013, in Docket Entry #436.

[¶5] The Orders, referred to in ¶4 of this Petition were affirmed by the Supreme Court of North Dakota in Estate of Hogen, 2015 ND 125, 863 N.W.2d 876. When affirming this Court's Orders, referred to in ¶4 of this Petition, the Supreme Court of North Dakota made the following pertinent holdings:

[¶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. 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.

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

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. [part of ¶27]

Bolding supplied by Petitioner for emphasis.

[¶6] Under N.D.C.C. § 30.1-17-10 (2), “An order closing an estate as provided in section 30.1-21-01 or 30.1-21-02 terminates an appointment of a personal

representative.” When presenting his Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate of March 19, 2010, the Personal Representative Steven C. Hogen stated his petition was made under N.D.C.C. § 30.1-21-01. [page 9, ¶14 of the personal representative’s petition; Docket entry 12]. When presenting his First Amended Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate of February 15, 2013, the Personal Representative Steven C. Hogen stated his petition was made under N.D.C.C. § 30.1-21-01. [page 12, ¶14 of the personal representative’s petition; Docket entry 197]. When affirming the Orders, referred to in ¶4 of this Petition, the Supreme Court of North Dakota determined that this Court’s Order(s) were final orders issued under statutory authority found in N.D.C.C. § 30.1-21-01.

[¶7] The Supreme Court of North Dakota has determined that the personal representative’ power over Petitioner Rodney Hogen’s inherited real property continued only until the termination of his appointment. By statute [and Supreme Court of North Dakota decision], the Personal Representative’s power over Rodney Hogen’s inherited real property terminated when this Court issued its Order(s) referred to in ¶4 of this Petition; Petitioner’s real property is no longer encumbered by the personal representative’s power or estate administration.

[¶8] Under N.D.C.C. § 30.1-17-08, “Termination ends the right and power pertaining to the office of personal

representative as conferred by this title or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative.” Neither the leasing of Petitioner Rodney Hogen’s real property, nor a sale of Petitioner’s real property, would be an act “necessary to protect the estate” and therefore are beyond any power that a personal representative may have after the termination of his appointment.

[¶9] WHEREFORE, Petitioner Rodney Hogen prays that the Court fix a time and place for hearing; that notice be given to all interested persons as provided by law; and after hearing the Court enter an order restraining the Personal Representative from exercising any power over Rodney Hogen’s inherited real property including any attempt to lease or sell the real property.

Dated this 10th day of September, 2015.

s/ Rodney Hogen

Rodney Hogen

State of North Dakota
County of Cass

Rodney Hogen, being duly sworn, state as follows: He is the Petitioner in the foregoing Petition, that he has read the petition and the facts therein

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stated are true to the best of his knowledge.

s/ Rodney Hogen

Rodney Hogen

Subscribed and sworn to before me this 10th day of
September, 2015.

/s Jonathan T. Garaas

Notary Public

APPENDIX M

Name, Address and Telephone No. of Attorney
Michael D. Nelson
Attorney ID #03457 OHNSTAD TWICHELL,
P.C. 901 - 13th Avenue East
P.O. Box 458
West Fargo, ND 58078-0458 (701) 282-3249

Attorney for Personal Representative
Court File No. 09-07-P-100

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

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

**ORDER FOR ENTRY OF SECOND AMENDED (ON
REMAND) ORDER ON PETITION FOR APPROVAL
OF FINAL ACCOUNT, FOR DETERMINATION OF
TESTACY STATUS, AND FOR SETTLEMENT OF
ESTATE**

[¶1] The above matter is before the Court pursuant to the North Dakota Supreme Court's remand, as part of it's 5/27/15 opinion in Estate of Hogen 2015 ND 125"r 13, 863 N.W.2d 876.

[¶2] On the basis of the post-appeal submittals

of the parties, and the Court's files and records in this matter, and the Court being fully advised in the premises,

[¶3] IT IS ORDERED ¶11 of this Court's 12/11/13 Amended Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate (Doc. #490) (hereinafter "12/11/13 Order") is amended to read as follows:

"[¶11] Rodney continued his fanning relationship with his mother's estate in the same manner that he fanned the property with his mother for the years 2007 and 2008. The difference, however, is that the Court finds that no waiver existed for the years 2007 and 2008. Essentially, Rodney farmed a portion of the farm for 2007 and 2008 on a crop-share agreement with the Estate and the Curtis Hogen Trust on the same one-third landlord/two-thirds tenant arrangement with the landlord being responsible for one-third of the crop inputs. This was a very favorable arrangement according to the Estate's expert witness, Kyle Nelson, a farm appraiser and farm management professional. Rodney was to continue farming the Barnes County property on a cash rent basis of \$30 per acre, again, a very favorable cash rent rate. At \$30 per acre for the 226.8 Barnes acres that were not in CRP, Rodney owed \$6,804 to his

collective landlords for each year. The Estate's share for the year 2007 would be \$3,402. The same amount would be owed for the year 2008, \$3,402. The Court agrees with the calculation found at Exhibit #126C, as herein modified on remand.

[¶4] IT IS FURTHER ORDERED ¶13 of this Court's 12/11/13 Order is amended to read as follows:

[¶13] For 2007, there was 393.1 crop share acres. The average input cost per acre was \$59.99. The Estate's one-sixth share would be \$1 0.00. (Exhibit#123C). The Estate's share of expenses for the crop-shares would be \$3,930.35. Rodney testified that he off-set the Barnes County cash rent with the crop-share expenses of the landlord that he paid on the crop share acres. However, he overshot the mark by a bit. The Court's final calculations for the 2007 farm proceeds (not counting CRP proceeds) would be as follows:

Barnes cash rent not paid	\$3,402
Crop share receipt shortage	\$2,909
Less crop inputs paid by Rodney ...	<u>(\$3,930)</u>
2007 Estate shortage ...	<u>\$2,381</u>

[¶5] IT IS FURTHER ORDERED, ¶15 of this Court's 12/11/13 Order is amended, to read as follows:

[¶15] Crop input expenses per acre for 2008 is \$62.45. The Estate's per acre share would be \$10.41. The Estate's 2008 crop share expenses would be \$4,091.52. Again, it appears that Rodney attempted to off-set the cash rent that he owed to the Estate for the Barnes County property with the crop share expenses of the landlord that Rodney had paid. Again, he overshot the mark with his expense deductions. The Court would calculate Rodney's obligation for 2008 as follows:

Barnes cash rent not paid ...	\$3,402.00
Crop share receipt shortage ...	\$9,508.92
Less crop inputs paid by Rodney ...	<u>(\$4,091.52)</u>
2008 Estate shortage ...	<u>\$8,819.40</u>

[¶16] IT IS FURTHER ORDERED, ¶16 of this Court's 12/11/13 Order *is* amended to read as follows:

[¶16] Rodney farmed the Estate's Barnes County land and Cass County land for the year 2009. Steven believed that there was an agreement reached in 2009 for Rodney to cash rent the Barnes County land at \$55 per acre and the Cass County land at \$60 per acre. This agreement was made in the presence of the parties' attorneys. The Court finds that there was, in fact, an agreement made to rent the property from the Estate at this rate. Even if there was no

agreement reached, the Court concludes that \$55 per acre for Barnes County farmland rental and \$60 for Cass County farmland rental for 2009 was a rental rate well within the values for such rental as testified to by plaintiff's expert witness, Kyle Nelson. Barnes County rent for 2009 owed to the Estate would be calculated as follows:

$$\$55/\text{acre} \times 226.77 \text{ acres} \times .5 \text{ (Estate's share)} = \$6,237$$

2009 Cass County cash rent due calculated as follows:

$$\$60/\text{acre} \times 393.1 \text{ acres} \times .5 \text{ (Estate's share)} = \$11,793.00$$

[¶7] IT IS FURTHER ORDERED ¶ 22 of this Court's 12/11/13 Order is amended to read as follows:

[¶22] The total amounts owed to the Estate by Rodney for shortages as of November 1, 2013, is recapped as follows:

2007	\$2,381.00
2008	\$8,819.00
2009	\$18,030.00
2010	\$11,310.00
2011	\$11,310.00
2012	\$16,722.00
2013	<u>\$21,497.00</u>

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TOTAL **\$90,069.00** (excludes CRP
calculations and interest

[¶8] IT IS FURTHER ORDERED ¶26 of this
Court's 12/11/13 Order is amended to read as follows:

*Table showing court's recalculations omitted due
to size*

Total interest to November 2013* ...
\$14,234.00

Rent and CRP owed to Estate to 11/1/13 ...
\$102,074.00

Total Rent and CRP with interest
owed by Rodney to the Estate to 11/1/13 ...
\$116,308.00

*Farm rents are often times due on or about November
1 of each crop year.

BY THE COURT:

Signed: 10/1/2015

11:44:39 AM

s/ John C. Irby

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APPENDIX N

Name, Address and Telephone No. of Attorney

Michael D. Nelson

Attorney JD #03457

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Attorney for Personal Representative

Court File No. 09-07-P-1 00

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

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

**MOTION FOR ENTRY OF CASHMORE
BIFURCATION ORDER**

[¶1] Personal Representative Steven C. Hogen ("PR") moves the Court pursuant to N.D.C.C. § 30.1-21-01(1), and Estate of Cashmore, 2010 ND 159, ¶ 14, 787 N.W.2d 261, for entry of its Order bifurcating issues that must yet be resolved in this probate proceeding, including but not limited to those issues addressed and/or referred to in Doc. #436 and Doc. #490 (the Estate will proceed to a formal close; Estate farmland

will need to be utilized for administrative purposes, "including dealing with mortgages that Arline Hogen gave on the land to secure debt incurred by Rodney"), Doc. #499 (the amount of the right of retainer claim, post-remand), Doc. #500 (payment of remaining attorney fees and PR fees, additional real estate taxes, and the amount of the right of retainer claim, post-remand), Doc. #502 (payment of additional administrative expenses, including additional real estate taxes), Doc. #505 (payment of PR's fee and attorney fees "out of the estate assets"), Doc. #506 (payment of PR's fee and attorney fees), Doc. #521 and Doc. #522 (payment of PR's fee and attorney fees, and utilizing correct right of retainer claim, post-remand), Doc. #546 (in the "REPORT OF PRESENT STATUS OF PROBATE," at pp. 4-5, the "prior payments" needed to be paid out of the assets in the Estate before the Estate can be closed), Doc. #562 (proceed to a formal close, selling some farm property, deed of sale will have to be given to the buyer, deed of distribution for whatever's left will have to be given--p. 16, 1.9; substantial attorneys fees and PR fees that are going to have to be paid out of the assets of the estate--p. 17, 1. 15; the personal representative has some significant work to do to bring the estate to its finality, including deeds of distribution, paying administrative expenses, and so forth, "so I will order that the personal representative complete the items that are necessary to close the estate, whatever those are determined to be"--p. 21, 1. 17; "the personal representative should do whatever is necessary, take the necessary steps to close the estate, including collection of assets, payment of expenses, and distribution of any remaining property"--

p. 22, 1. 12), and Doc. #568 (see pp. 2-7), which issues are yet to be ruled upon by the Court after future proceedings and orders, which will culminate in a formal closing and the entry of a final judgment at a later date as to all such issues, and/or entry of an order closing the estate at such later date, and/or entry of an order terminating the appointment of the PR at such later date.

[¶2] This Motion is made on the grounds that there is significant work remaining to be done by the PR in this probate, in administering the estate, and all parties and this Court plus the North Dakota Supreme Court are all aware of that, but respondent Rodney Hogen ("Rodney") and his counsel refuse to acknowledge or admit that this probate is not closed, but instead remains open, and it is apparent that Rodney and his counsel may have made and filed their frivolous "Petition for Order Restraining Personal Representative" (Doc. #560) for the specific purpose of getting an adverse ruling from this Court and then immediately appealing that adverse ruling to the North Dakota Supreme Court, to further gum up and drag out this probate.

[¶3] This Motion is further made on the grounds that, should Rodney file such an appeal as referenced above (in ¶2), the PR's intention is to immediately move to remand this case back to this Court, in order for the PR to do his work in administering the instant estate to a conclusion.

[¶4] This Motion is based on N.D.C.C. § 30.1-21-

01(1), and Estate of Cashmore, 2010 ND 159, ¶ 14, 787 N.W.2d 261. and the Brief in Support of PR's Motion for Entry of Cashmore Bifurcation Order, filed contemporaneously herewith.

[¶5] The PR respectfully requests that the Court enter its Cashmore bifurcation order, a preliminary draft of which (an incomplete draft) is attached as Exhibit "C" to the PR's Brief in Support of Motion for Entry of Cashmore Bifurcation Order.

Dated: November 12, 2015.

s/ Michael D. Nelson

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APPENDIX O

Name, Address and Telephone No. of Attorney

Michael D. Nelson

Attorney JD #03457

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(701) 282-3249

Court File No. 09-07-P-1 00

Attorney for Personal Representative

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

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

PETITION FOR SUPERVISED ADMINISTRATION

[¶1] Steven C. Hogen, the Personal Representative ("PR") in the above-entitled matter, petitions the Court for supervised administration of the Estate of Arline H. Hogen, Deceased ("Estate").in accordance with N.D.C.C. § 30.1-16-02. Supervised administration is necessary under the circumstances to protect the devisees and assets of the estate and conserve judicial resources.

[¶2] In support of this Petition for Supervised Administration ("Petition"), the PR states for the Court the following grounds for the relief requested:

[¶3] Arline H. Hogen ("Arline") died testate on March 23, 2007, and the Court appointed Steven C. Hogen ("Steven") as PR on April 23, 2007. Arline's Will did not indicate a preference to administer her Estate through unsupervised or through supervised administration.

[¶4] Since Arline's death, there has been contention between the Estate's two devisees, Steven and Steven's brother, Rodney Hogen ("Rodney"), regarding real property of the Estate. This contention has spawned protracted litigation, including an appeal to the North Dakota Supreme Court that consumed some 15 months to resolve (from the filing of the notice of appeal by Rodney to the denial, by the Supreme Court, of Rodney's petition for rehearing).

[¶5] Estate farmland, located in Cass and Barnes Counties, State of North Dakota, has increased in value since Arline's death on March 23, 2007.

[¶6] Due to the above-referenced protracted litigation, Court-approved costs of administration already exceed \$333,000.00, before even considering costs of administration incurred (a) in the above-referenced appeal and (b) subsequent to the remand of this matter (by the North Dakota Supreme Court) to this Court. If the Estate remains unsupervised, the possibility for additional piecemeal appeals exists, see

In re Estate of Hass, 2002 ND 82, ¶ 7, 643 N.W.2d 713, which if pursued, will almost certainly consume additional substantial costs of administration. If, however, the Estate becomes supervised, the costs of administration for the Estate will be reduced, leaving the possibility of enhanced assets for distribution to the Estate's two devisees.

[¶17] Supervised administration of the Estate will also conserve judicial resources (and time) by avoiding future piecemeal appeals, which North Dakota courts generally disfavor. See Riemers v. Hill, 2014 ND 80, ¶ 6, 845 N.W.2d 364 (referencing "the longstanding policy to discourage piecemeal appeals"); and Pifer v. McDermott, 2013 ND 153, ¶ 27, 836 N.W.2d 432 (same).

[¶8] Supervised administration is necessary for the PR to accomplish his duty of settling and distributing the assets of the Estate "as expeditiously and efficiently as is consistent with the best interests of the estate." N.D.C.C. § 30.1-18-03(1) (defining general duties of a personal representative).

[¶9] As provided in N.D.C.C. § 30.1-16-04, upon the ordering of supervised administration, the PR will not exercise his power to make any distribution of the assets of the Estate without prior Order of the Court.

[¶10] This Petition is based on the PR's Brief in Support of Petition for Supervised Administration, filed contemporaneously herewith.

[¶11] WHEREFORE, the PR requests that the Court order supervised administration of the Estate. For the Court's convenience, a proposed Order for Supervised Administration is being filed with the Court contemporaneously herewith.

Dated: January 4, 2016.

s/ Michael D. Nelson

Michael D. Nelson

ND ID#03457

Attorney for the Personal Representative,

Steven C. Hogen

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APPENDIX P

Name, Address and Telephone No. of Attorney

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(701) 282-3249

Court File No. 09-07-P-100

Attorney for Personal Representative

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

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

**PERSONAL REPRESENTATIVE'S FORMAL
REQUEST FOR DELIVERY OF POSSESSION AND
CONTROL OF ESTATE REAL PROPERTY**

TO: Interested Person Rodney Hogen and his attorney,
Jonathan T. Garaas, of Garaas Law Firm, DeMores
Office Park, 1314 - 23rd Street South, Fargo, ND
58103-3707.

FROM: Steven C. Hogen, as Personal Representative
of the Estate of Arline H. Hogen, Deceased.

[¶1] Pursuant to N.D.C.C. § 30.1-18-09, Steven C. Hogen, as Personal Representative of the Estate of Arline H. Hogen, Deceased ("PR"), hereby requests from Interested Person Rodney Hogen ("Rodney"), delivery of possession and control of all real property of the Estate of Arline H. Hogen, Deceased ("Estate"), including but not limited to the real property described as follows, to-wit:

1. An undivided 28.5% interest in and to the Northeast Quarter (NE $\frac{1}{4}$) of Section Twenty-one (21), EXCEPT the East 572 feet of the South 762 feet of the Northeast Quarter (NE $\frac{1}{4}$) 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.
2. An undivided one-half interest in and to the Northeast Quarter (NE $\frac{1}{4}$) 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 (E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$) of Section 33, Township 140, Range 54, Cass County, North

Dakota, subject to highways, easements and rights of way of record.

3. An undivided one half interest in and to the Northwest Quarter (NW $\frac{1}{4}$) 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 described; thence North 88°54'30" East 388.17 feet; thence South 02°51'55" East 548.01 feet; thence South 88°54'23" West 407.12 feet to the West line of said Northwest Quarter; thence North 00°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

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

4. An undivided one-half interest in and to
Lot One (1), Block One (1), Hogenl
Subdivision, Cass County, North Dakota.
5. An undivided one-half interest in and to
the Northwest Quarter (NW $\frac{1}{4}$) and the
South Half of the Southwest Quarter
(S $\frac{1}{2}$ SW $\frac{1}{4}$) 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,
and the North Half of the Southwest
Quarter (N $\frac{1}{2}$ SW $\frac{1}{4}$) 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 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.

The above-described tracts or parcels of real property are all included in the PR's Second Amended Inventory and Appraisalment (Doc. #499 in the Estate) previously filed by the PR.

[¶2] Possession and control of the above-described real property is and will be necessary for purposes of administration of the Estate, in the judgment of the PR.

[¶3] This Personal Representative's Request for Delivery of Possession and Control of Estate Real Property is in addition to the demands made by the PR, since his appointment, for signed rental agreements from Rodney and for rental payments for Rodney's leasing of Estate real property, none of which demands have been honored by Rodney, at all.

Dated: January 6, 2016.

s/ Steven C. Hogen

Steven C. Hogen, as Personal
Representative of the Estate of Arline H.
Hogen, Deceased

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s/ Michael D. Nelson

Michael D. Nelson

ND ID#03457

Attorney for the Personal Representative,

Steven C. Hogen

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APPENDIX Q

Name, Address and Telephone No. of Attorney

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Court File No. 09-07-P-100

Attorney for Personal Representative

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

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

ORDER FOR SUPERVISED ADMINISTRATION

[¶1] The above-entitled matter came before the Court on the Personal Representative's request for supervised administration of the Estate of Arline H. Hogen in accordance with N.D.C.C. § 30.1-16-02.

[¶2] The Court finds that supervised administration will be necessary for the protection of persons interested in the estate, and is otherwise necessary under the circumstances.

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[¶3] On the basis of the foregoing,

[¶4] IT IS HEREBY ORDERED that the administration of the Estate of Arline H. Hogen will be supervised by the Court.

BY THE COURT:

Signed: 1/11/2016 2:04:59 PM

s/ John C. Irby

APPENDIX R

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North Dakota Bar ID #03080
Probate No. 09-07-P-100
Attorneys for Rodney Hogen

IN THE DISTRICT COURT FOR
CASS COUNTY, NORTH DAKOTA

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

**OBJECTION TO THE COURT'S ORDER
GRANTING SUPERVISORY ADMINISTRATION**

[¶1] Devisee Rodney Hogen, by and through his attorney, Jonathan T. Garaas of the Garaas Law Firm, Fargo, North Dakota, hereby objects to the Court's "Order For Supervised Administration" dated January 11, 2016 [Docket ID # 621], that ordered supervised administration of the Estate of Arline H. Hogen, Deceased. The grounds for this objection include the

following:

- [¶2] A. Steven Hogen’s power and authority as personal representative terminated over two (2) years prior to the “Order for Supervised Administration” dated January 11, 2016, when this Court issued the following orders: Order of October 24, 2013, on Petition for Approval of Final Account, for Determination of Testacy Status, and Settlement of Estate under N.D.C.C. § 30.1-21-01 [Docket Entry #436]; Amended Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate of December 11, 2013 [Docket Entry #490]; and Order of March 6, 2014, recognizing the Rodney Hogen was a 50% distributee and his brother Steven Hogen a 50% distributee [Docket Entry #506]. Because this Court issued these orders under authority provided by **N.D.C.C. § 30.1-21-01** [hereinafter **emphasized** by Rodney Hogen when applicable], at Steven Hogen’s invitation, Steven Hogen’s appointment as personal representative terminated as a matter of law. N.D.C.C. § 30.1-17-10; “2. An order closing an estate as provided in **section 30.1-21-01** or 30.1-21-02 terminates an appointment of a personal representative.” Steven Hogen, as a personal representative, had “no

right and power” to request supervised administration under N.D.C.C. § 30.1-16-02 because his “right and power pertaining to the office of personal representative” had previously ended. See, N.D.C.C. § 30.1-17-08; N.D.C.C. § 30.1-16-02.

- [¶3] B. Statutorily, supervised administration is not possible after a final order has been issued under N.D.C.C. § 30.1-21-01. See specifically, N.D.C.C. § 30.1-16-01 [“Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative, or other order terminating the proceeding. ..”]; and N.D.C.C. § 30.1-16-05 [“Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under **section 30.1-21-01...**”].
- [¶4] C. The Order For Supervised Administration dated January 11, 2016, was irregularly entered by this Court, and is void [or voidable] because Rodney Hogen was not afforded a meaningful opportunity to

respond to Steven Hogen's petition in violation of Rodney Hogen's due process rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States and the North Dakota Constitution.

[¶5] D. The Order For Supervised Administration dated January 11, 2016, was issued irregularly, and did not comply with the fourteen (14) day notice requirement "to interested persons" as required by N.D.C.C. § 30.1-03-01 and N.D.C.C. § 30.1-16-02. Steven Hogen's Notice of Petition for Supervised Administration of January 4, 2016, had identified that the petition would be heard on February 2, 2016. This Court abused its discretion when it issued its Order For Supervised Administration dated January 11, 2016, because this Court misapplied the law by not following the procedural requirements for issuing the subject order. See, State v. 1998 Jeep Grand Cherokee, 2016 ND 9, ¶ 9, ___N.W.2d ___.

[¶6] E. The District Court has already issued its order, now final after appeal, that supervised administration was denied [Docket Entry # 436], and this Court has no jurisdiction to alter that final determination which was affirmed on appeal – it became the "law of the case"

under precepts recognized by Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 101, ¶ 12, 729 N.W.2d 101. If not “law of the case”, it would be governed by res judicata and collateral estoppel, and that prior decision to deny supervised administration, now final, cannot be undone. *Id.*, ¶s 13-21.

- [¶7] F. If there is a possibility of future district court probate proceedings, the stated reason for supervised administration [“avoiding future piecemeal appeals”; ¶ 7 of the Petition for Supervised Administration] is inadequate, and would act to deprive interested persons of their statutorily authorized civil right to appeal to the North Dakota Supreme Court [N.D.C.C. § 28-27-02, among other laws] as actually recognized to exist with respect to probate matters in Steven Hogen’s cited case of In re Estate of Hass, 2002 ND 82, ¶ 7, 643 N.W.2d 713, citing Schmidt v. Schmidt, 540 N.W.2d 605, 607 (N.D. 1995). The District Court should not affirmatively participate in the denial of appellate rights.

- [¶8] This objection is respectfully submitted this 20th day of January, 2016.

GARAAS LAW FIRM

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s/ Jonathan T. Garaas

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APPENDIX S

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Probate No. 09-07-P-100

Attorneys for Rodney Hogen

IN THE DISTRICT COURT FOR
CASS COUNTY, NORTH DAKOTA

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

**AFFIDAVIT OF RODNEY HOGEN RESPONDING
TO THE PETITION FOR COMPLETE
SETTLEMENT AND DISTRIBUTION OF THE
ESTATE**

State of North Dakota
County of Cass

[¶1] Rodney Hogen, after first being duly sworn,
respectfully testifies as follows:

[¶2] On March 19, 2010, Personal Representative

Steven C. Hogen filed a Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate, containing the following pleadings pertinent to the Personal Representative present petition:

5. Petitioner has filed a Final Account hereto and the estate is in a condition to be closed.

* * *

14. This Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.

[¶3] On February 15, 2013, Personal Representative Steven C. Hogen filed a First Amended Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate, containing the following pleading pertinent to Steven Hogen's present petition:

14. This First Amended Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate

administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.

[¶4] No provision within the First Amended Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate asked this Court to delay the termination of Steven C. Hogen's appointment as personal representative so that land could be sold after the final account. There is no language within said prior petition that Steven C. Hogen sought the power to lease the farm lands [for estate purposes] after the approval of his First Amended Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate.

[¶5] This Court issued its Order on Petition for Approval of Final Account, for Determination of Testacy Status, and Settlement of Estate under N.D.C.C. § 30.1-21-01 on October 24, 2013. Docket Entry #436. This Court issued its Amended Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate on December 11, 2013. Docket Entry # 490.

[¶6] This Court issued its Order of March 6, 2014, referring to these orders and recognizing your affiant was a 50% distributee and his brother Steven Hogen a 50% distributee. Docket Entry #506 recognizing what was originally ordered on October 24, 2013, in Docket Entry #436. Under Steven Hogen's petition(s) to settle the estate under the provisions of N.D.C.C. § 30.1-21-

01, the real estate [owned by Arline Hogen at the time of death] and the “right of retainer” were listed assets to be distributed to both your affiant, Rodney Hogen, and Steven Hogen equally.

[¶7] This Court’s concluding Orders do not reserve jurisdiction to sell the farm lands that devolved upon your affiant and Steven Hogen, equally, at the time of the death of their mother through her probated Will. Neither do this Court’s concluding Orders reserve jurisdiction to lease the farm lands.

[¶8] The above referenced Orders were affirmed by the Supreme Court of North Dakota in Estate of Hogen, 2015 ND 125, 863 N.W.2d 876. In affirming this Court’s order(s), the Supreme Court recognized that your affiant’s appeal was from an “order approving a final accounting and settlement in the probate of the estate of Arline Hogen.” Estate of Hogen, ¶ 1. The Supreme Court of North Dakota also determined that the personal representative’s power and control over decedent’s property continues no later than the “termination of the personal representative’s appointment ..”. Estate of Hogen, ¶s 25 and 26.

[¶9] In ¶ 20 of Estate of Hogen, the Supreme Court of North Dakota advanced the following concept about a personal representative’s powers over real estate during the time of his administration.

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.

Bolding supplied by Rodney Hogen for emphasis.

[¶10] The power to sell your affiant and Steven Hogen's inherited lands was not exercised by the personal representative prior to the Court's concluding Order(s) – Orders which have been determined by the Supreme Court of North Dakota to be a "final account and settlement in the probate of the estate of Arline Hogen." Estate of Hogen, ¶ 1. **The Supreme Court of**

North Dakota's determination that this Court's Orders were final orders settling the estate is the law of this case. [BOLDING is made for emphasis].

[¶11] Subsequent to the Supreme Court of North Dakota's decision in Estate of Hogen, *supra.*, that affirmed this Court's orders – issued under N.D.C.C. § 30.1-21-01, and approving the personal representative's final account and order for the distribution of 50% to Steven Hogen and 50% to Rodney Hogen, the Personal Representative now files a petition that seeks to wrest possession of real property from the successors by erroneously claiming that the "Estate" owns the real estate and that your affiant had no right to alienate his inherited real estate by transferring remainder rights to his wife, Susan Hogen, and his daughter, Marby Hogen. The Personal Representative's present position, expressed within his present petition, is inconsistent with the clear holdings by the Supreme Court of North Dakota in the Estate Hogen, *supra.*, **which is the "law of this case"**. The Personal Representative's present position, expressed within his present petition, is also inconsistent with your affiant's constitutional right to alienate his property.

[¶12] Your affiant states that remaindermen Susan Hogen and Marby Hogen are indispensable parties to any attempt to effectuate a "new" distribution of the real estate that varies from this Court's prior "final" Order that had been affirmed on appeal.

[¶13] Your affiant further states that the Personal Representative's present position [if there is any

present jurisdiction to entertain such petition] is unjust and inequitable for several reasons, including the following:

A. The Personal Representative has taken income from my inherited lands, after the death of Arline Hogen, but has never paid any principal and interest payments for the mortgages on said lands. I have been forced to make all principal and interest payments on mortgage debt even though the personal representative has taken income from said lands. The Personal Representative's First Amended Inventory and Appraisement reveals the following principal amounts on mortgages against your affiant and Steven Hogen's inherited lands when inventoried: (1) \$90,000.00 on the NE $\frac{1}{4}$ of 21-140-54, Cass County North Dakota; (2) \$60,900.00 on the NE $\frac{1}{4}$ of 33-140-54, Cass County, North Dakota; (3) and \$200,000.00 for the subject lands in the W $\frac{1}{2}$ of 5-140-56, Barnes County, North Dakota. The principal of these mortgages now approximate the following: (1) \$21,414.79 on the NE $\frac{1}{4}$ of 21-140-54, Cass County North Dakota; (2) \$54,303.27 [\$22,613.01 + \$31,790.26 = \$54,303.27] on the NE $\frac{1}{4}$ of 33-140-54, Cass County, North Dakota; (3) and \$63,835.82 for the subject lands in the W $\frac{1}{2}$ of 5-140-56, Barnes County, North Dakota. Attached to my affidavit, marked Exhibit A, is a redacted loan inquiry history concerning the mortgage to First State Bank of North Dakota - Buffalo of the mortgage on the NE $\frac{1}{4}$ of 21-140-54, Cass County North Dakota. Attached to my affidavit, marked Exhibit B, are mortgagee AgCountry Farm Credit Services transaction history reports showing the principal

balances [and some of the interest payments] for the mortgage loans it has on Cass County and Barnes County lands. Part of the interest that I have paid towards the loans is reflected on said Exhibits and other amounts of interest paid by me are reflected on my income tax returns – that have been received into evidence by this Court previously.

B. The Personal Representative's present position is inequitable for he believes I would be responsible to pay rent for Cass County lands that exceed the income that the Cass County lands can produce. Attached to my affidavit, marked Exhibit C, is redacted Schedule F showing my 2014 "profit" of \$2,916.00 from farming the Cass County lands and all CRP [lands received from Arline Hogen and Curtiss Hogen] in 2014. Attached to my affidavit, marked Exhibits D, is redacted Schedule F showing my 2015 "profit" of \$25,442.00 from farming the Cass County lands and all CRP [lands received from Arline Hogen and Curtiss Hogen] in 2015. In crop year 2014, for just the lands inherited from Arline Hogen, Steven Hogen believes that this Court [without trial] can impose a contract upon me – a contract never agreed to by me – in an amount for rent that exceeds my actual income from all the land [inherited from Arline Hogen or Curtiss Hogen] by over \$17,262.16 [\$2,916.00 actual income less \$19,890.50 request rent less CRP of \$288.00 less CRP of \$1,607.00 = negative \$17,262.16]. Steven Hogen advocates the same in the Trust action [involving Curtiss A. Hogen Trust] so that the inequity to me is more than doubled. In crop year 2015, for just the lands inherited from Arline Hogen, Steven Hogen

believes that this Court [without trial] can impose a contract upon me – a contract never agreed to by me – in an amount for rent and CRP that totals \$17,791.64 which would leave me only with \$7,650.36 in profits [\$25,442.00 income less \$17,791.64 = \$7,650.36] from my labors in 2015. Since Steven Hogen advocates the same position in the Trust case [involving Curtiss A. Hogen Trust B], he advocates I have no profit in 2015 from my labors. Steven Hogan wants more from rentals [for alleged Estate property and alleged Trust property] than the land produced in farm income for that year. This would be slavery.

C. This Court has issued its order that this matter should not be consolidated with the Trust action, yet Steven Hogen's proposals contemplate consolidation.

D. There has been no meaningful trial, or hearing, in these proceedings concerning the factual issues raised by Steven Hogen's petition. This Court would act inequitably [and respectfully submitted, without any authority in law] if it would take testimony from a trial in another action, and impose a contract upon your affiant based upon that testimony.

s/ Rodney Hogen

Rodney Hogen

Subscribed and sworn to this 7th day of February, 2017.

s/ David Garaas & seal

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Notary Public

APPENDIX T

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Probate No. 09-07-P-100

Attorneys for Rodney Hogen

IN THE DISTRICT COURT FOR
CASS COUNTY, NORTH DAKOTA

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

[¶1] **OBJECTION TO PROCEEDINGS**

[¶2] Rodney Hogen hereby objects to any proceedings inconsistent with execution, delivery, and recordation of any necessary deeds of distribution consistent with the Last Will and Testament of Arline H. Hogen, Deceased.

[¶3] Steven Hogen, and his counsel, seek judicial approval for further violation of Due Process of Law, and in particular, legal principles made clear by In re Estate of Cashmore, 2010 ND 159, 787 N.W.2d 261

(*Cashmore I*), and/or In re Estate of Cashmore, 2013 ND 150, 836 N.W.2d 427 (Cashmore II).

[¶4] Following formal proceedings always invoked by Petitioner Steven Hogen [2010 Docket Entry #12: “This Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.”; also, 2013 Docket Entry #197: “This First Amended Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03”], always seeking the statute’s objective – “complete settlement of the estate”; N.D.C.C. § 30.1-21-01 entitled “Formal proceedings terminating administration – Testate or intestate – Order of general protection”. Following remand by the North Dakota Supreme Court for recalculation of the retainer, and known to have been fully accomplished by “Order for Entry of Second Amended (On Remand) Order on Petition for Approval of Final Account, For Determination of Testacy Status, and For Settlement of Estate” dated October 1, 2015 [Docket Entry #571; filed October 6, 2015; Notice of Entry of Second Amended (On Remand) Order on Petition for Approval of Final Account, For Determination of Testacy Status, and For Settlement of Estate noted as Docket Entry

#572 on October 6, 2015], *no appeal was thereafter taken by any party.*

[¶5] Pursuant to N.D.R.App.P. 4(a), any notice of appeal required by Rule 3 must have been filed with the clerk of the supreme court within 60 days from service of notice of entry of the judgment or order being appealed. In the absence of timely appeal, the probate court case was completely settled as a matter of law – it is now “final”.

[¶6] Steven Hogen’s authority as Personal Representative ended on October 24, 2013, as a matter of law, when the Court signed its “Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate”. Docket Entry #436. Should there be argument as to that date [the personal representative has the designation only authorizing him to wind up the estate by signing/delivering appropriate deeds of distributions, etc.] because of the Court’s error in computing the retainer, then October 1, 2015, becomes the last possible date – the date the Court entered its final order authorized by the remand, which was never appealed. Docket Entry #571. Summarized, the formal proceedings under section 30.1-21-01, initiated by Steven Hogen in 2010, and decided in 2013 [and, following remand, resulting in a 2015 order never appealed], resulted in the termination of his statutory/judicial authority in 2013 because N.D.C.C. § 30.1-17-10(2) provides: “An order closing an estate as provided in section 30.1-21-01 or 30.1-21-02 terminates an appointment of a personal representative.” The

Court's "Order on Second Amended Petition for Approval of Final Account and Rule 54(b) Certification" [Docket Entry #506] which clearly established "Rodney Hogen, a 50% distributee, (and) Steve Hogen, .. also a 50% distributee" was appealed by Rodney Hogen; had Steven Hogen desired to contest the distribution on a 50/50 basis or the termination of his authority in 2013 (termination as a matter of law invited by lawful petition), he certainly could have cross-appealed as to those issues, but chose not to do so. The Supreme Court's decision "approving a final accounting and settlement in the probate of the estate of Arline Hogen" [In re Estate of Hogen, 2015 ND 125, ¶ 1, 863 N.W.2d 876, is also final. The right to a 50% distribution is final, and it would be the law of the case. Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, ¶ 12, 729 N.W.2d 101. The lower court is without jurisdiction to alter that final judgment, and if there ever proves to be subsequently discovered "other property of the estate", it also must be distributed 50/50 – consistent with law and two (2) Wills – Curtiss A. Hogen's Will and Arline H. Hogen's Will if either decedent had other property later discovered.

[¶7] Under N.D.C.C. § 30.1-21-08, subsequent administration is generally never possible unless "other property of the estate is discovered after an estate has been settled", and the subsequent administration would only involve "the subsequently discovered estate"; HOWEVER, there also exists a massive prohibition precluding any further judicial oversight – "no claim previously barred may be asserted in the subsequent administration." N.D.C.C.

§ 30.1-21-08.

[¶8] Simply put, no new property has ever been identified to exist except possibly, the cash rental amount(s) now on deposit actually belonging to Steven Hogen and Rodney Hogen resulting from judicial overreaching initiated by Steven Hogen's illegal January 4, 2016, Petition for Supervised Administration [Docket Entry #596] improvidently authorized ex parte and in violation of due process of law by Order for Supervised Administration dated January 11, 2016 [Docket Entry #621], and no claims against said deposited funds are possible due to statutes of limitations. See, N.D.C.C. § 30.1-19-03(2); In re Estate of Hogen, 2015 ND 125, ¶ 29-30, 863 N.W.2d 876; N.D.C.C. § 30.1-21-06(1) [three years after decedent's death]; N.D.C.C. § 30.1-21-06(2) [one year after the time of distribution].

[¶9] Due to clearly pertinent legal discussion(s), Rodney Hogen attaches his Brief Supporting Rodney Hogen's Petition to Restrain Personal Representative and Rodney Hogen's Response to Motion for Cashmore Bifurcation Order [Docket Entry #584], marked Exhibit A, and incorporated by reference.

[¶10] Rodney Hogen's property [lease payments] remains under control of a personal representative without statutory authority, and court order without jurisdiction. Rodney Hogen requests that he be provided appropriate judicial relief, to include reasonable attorney fees, costs, and disbursements as allowed by law. The legal theories, and factual presentation of Rodney Hogen as set forth in his

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Affidavit [Affidavit of Rodney Hogen Responding to the Petition for Complete Settlement and Distribution of the Estate; Docket Entry #680] are hereby incorporated by reference.

Dated this 27th day of February, 2017.

GARAAS LAW FIRM
s/ Jonathan T. Garaas

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APPENDIX U

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Court File No. 09-07-P-1 00

Attorney for Petitioner Steven C. Hogen

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

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

**PETITION FOR DISCHARGE OF PERSONAL
REPRESENTATIVE**

[¶1] This Estate is supervised. In order for the Estate to be closed in a supervised administration, the Court is required to do the following: (1) approve the distribution of the estate; and (2) discharge the personal representative. See Matter of Estate of Starcher, 447 N. W.2d 293, 296 (N.D. 1989). This petition requests a discharge of the

Personal Representative because the Estate will or has been distributed in accordance with the previous Orders in this matter.

[¶2] The balance of the Estate remaining in the possession of the Personal Representative for distribution pursuant to the previous Orders in this matter, has been paid out and distributed (or held in Trust for distribution) in accordance with such previous Orders and as set forth in the following paragraphs.

[¶3] The Court previously approved the sale of estate property to pay mortgages and other monetary liens, court-ordered attorney's fees and costs, and payments to the devisees to make an equal distribution. (Order on Petition for Complete Settlement and Distribution of Estate, Index # 702, ¶ 14.)

[¶4] In order to sell the property to pay for debts incurred, the Court previously approved the allocation of the real property between Steven and Rodney as set forth in the following table:

		Estate	Trust	Steven	Rodney
1	Grandma's Quarter (NE $\frac{1}{4}$ Sect. 21)	\$81,624	\$204,776	\$286,400	

2	West Home Quarter (NE ¹ / ₄ Sect. 33)	\$116,350	\$116,350		\$232,700
3	East Home Quarter (NW ¹ / ₄ Sect. 34)	\$143,805	\$143,805		\$287,610
4	Farmstead	\$50,000	\$50,000		\$100,000
5	North/South Oriska Quarters (Barnes)		\$283,977	\$567,954	
6	Missile Site (Barnes)	\$283,977	\$6,400	\$6,400	
T o t a l			\$805,308	\$860,754	\$620,310

[¶5] The Estate property is equalized between the two devisees as follows:

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Estate Real Property to Steven (Estate's share of #1 and #5, above)	\$365,601.00	
Estate Real Property to Rodney (Estate's share of #2, #3, #4, above)		\$310,155.00
Estate checking account cash to Steven	\$1,939.52 FN#1	
Unpaid Rent/CRP Owing Estate as Determined by Court		109,619.82 FN#2
Unpaid Rent/CRP Owing Estate for Years 2014, 2015, and 2016		\$55,379.73 FN#3
TOTALS	\$367,540.52	\$475,154.55

Amount Owning to Steven from Rodney for Equal Distribution	\$53,807.02	(\$53,807.02)
	\$421,347.54	\$421,347.54

FN#1: This amount is detailed on Exhibit 1 to this Petition as the amount maintained in the Estate checking account. The amount detailed on Exhibit 1 is a continuation of the "Record of Receipts and Disbursements" as previously set forth in the Court record at Index # 673.

FN#2: On remand, the Court in the Estate determined that \$116,308.00 was owed by Rodney in a right of retainer claim, for unpaid rent and CRP, plus interest. (Index # 571, ¶ 8, Estate of Arline Hogen, Case No. 09-07-P-100). This amount became law of the case due to the appeal. Nonetheless, Steven Hogen agrees that this amount erroneously contains an extra \$6,688.18 for an unaccounted-for crop-share deposit, and this amount is subtracted from the Court-ordered amount of \$116,308, to yield a net amount of \$109,619.82.

FN#3: This amount is per the Court's decision (Index # 702, ¶ 9.)

[¶6] The real property allocated to Rodney and a portion of the real property allocated to Steven had to be sold to pay for amounts owing from the Estate, and the proceeds of the sales should be distributed as

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follows:

DISBURSEMENT OF ESTATE CASH		
	STEVEN	RODNEY
Gross proceeds from sale of real property FN#4 *Footnotes 4-16 at back of Petition as endnotes	\$182,253.75	\$651,363.50
Less: Rent owned to buyer minus real estate taxes FN#5	(4,52] .65)	\$(10,885.73)
Less: Commission to auctioneer (4%)FN#6	\$ (7,290.15)	\$(26,054.54)
Less: Sales expenses FN#7	\$ (570.06)	\$ (570.06)
Less: Survey expense	\$ (1,221.97)	\$ 0.00
Less: Abstract updates	\$ (815.49)	\$ (725.00)
Less: Title opinions/closing fee	\$ (119.12)	\$ (450.00)
Less: Deed preparation/document preparation	\$ 0.00	\$ (40.00)
Less: Recording mortgage satisfactions/other documents	\$ (27.49)	75.00)

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Net Proceeds from land sale	\$167,687.83	\$612,563.17
Cash amounts to Steven from Rodney FN#8	\$ 53,807.02	(53,807.02)
Estate Income to Steven and Rodney FN#9	\$ 11,190.79	\$ 11,190.79
Less: Mortgage payoffs FN#10	\$ (3,216.84)	\$ 131,923.38)
Less: Approved fees/costs FN#11	\$ 129,942.16)	\$ 129,942.16)
Less: Adjustment for interest on amounts owed by Rodney FN#12	\$ 20,214.23	\$(20,214.23)
Less: Cass Rural Water Charges owed by Rodney FN#13	\$ 39.65	\$ (39.65)
Preliminary cash allocation prior to deduction for unpaid fees/costs and future expenses	\$119,780.52	\$ 287,827.53
Less: Cash withheld for preparation of Estate tax returns	\$ (2,500.00)	\$ (2,500.00)

Less: Cash payment of attorney's fees and costs FN#14	\$(25,000.00)	\$(225,000.00)
Less: Cash withheld for fees/future expenses FN#15		\$(23,000.00)
TOTAL CASH PAYABLE FROM ESTATE:	\$ 92,280.52	\$ 37,327.53

[¶7] Steven Hogen has consulted with a CPA to prepare the final tax returns for the Estate and Trust, and the CPA has estimated the fees for the preparation of the Estate/Trust tax returns and calculation of basis in conjunction therewith, to be \$8,000-\$10,000, of which one-half (\$5,000) is allocated to the Estate (with the remaining one-half to the Trust, and the one-half allocated to the Estate is split between Steven and Rodney.

[¶8] Counsel for Steven Hogen has prepared an affidavit outlining the attorney fees and costs incurred by the Personal Representative since the last fee application in this matter, and that affidavit is filed contemporaneously herewith.

A. Distribution to Rodney Hogen

[¶9] As set forth in the previous table, the real

estate in the Estate allocated to Rodney Hogen was sold to pay for: (1) personal debts of Rodney Hogen, (2) an allocation to Steven Hogen to make the distribution between Steve Hogen and Rodney Hogen equal, (3) interest owing by Rodney Hogen to the Estate on amount previously determined owing the Estate; and (4) and administrative expenses of the Estate. The Settlement Statements showing the proceeds of the sale are set forth on Exhibits 5 and 6.

[¶10] **Personal debts of Rodney Hogen.** As set forth in the table above and footnote 10, Steven Hogen, as the Personal Representative, has distributed Estate cash on behalf of Rodney to pay off personal loans with AgCountry Farm Credit Services and First State Bank of Buffalo.

[¶11] **Allocation to Steven Hogen to make the distribution between Steven Hogen and Rodney Hogen equal.** From the proceeds of the sale, and as set forth in paragraph 5, the amount of \$53,807.02 was subtracted from the distribution to Rodney Hogen and distributed to Steven Hogen to make the allocation between them equal.

[¶12] **Interest owing by Rodney Hogen to the Estate.** Rodney Hogen owes interest on amounts previously ordered by the Court in this matter. The amount of \$109,619.82 was owing on unpaid rents as of November 1, 2013. See footnote 2, above. Interest on this amount from November 1, 2013, until July 20, 2018, was calculated at the rate of 6% as set forth on Exhibit 4. The Court previously determined that rents

owing for 2014, 2015, and 2016, without interest, totaled \$55,379.73 as calculated by the personal representative. (Order on Petition for Complete Settlement and Distribution of Estate, Index # 702, ¶ 9.) The Court determined that interest at 6% per year will be allowed on each component of that total. (Id.)

[¶13] The amount determined by the Personal Representative for the years 2014, 2015, and 2016, is as follows. (Petition for Complete Settlement and Distribution of Estate, Index #668, ¶ 6.) The amount of \$21,785.17 was owing in unpaid rents as of November 1, 2014. Interest on this amount from November 1, 2014, until July 20, 2018, was calculated at the rate of 6% as set forth on Exhibit 4. The amount of \$17,791.31 was owing on unpaid rents as of November 1, 2015. Interest on this amount from November 1, 2015, until July 20, 2018, was calculated at the rate of 6% as set forth on Exhibit 4. The amount of \$15,802.26 was owing on unpaid rents as of November 1, 2016. Interest on this amount from November 1, 2016, until July 20, 2018, was calculated at the rate of 6% as set forth on Exhibit 4. One-half of the total interest amount, \$20,214.23, is subtracted from Rodney's share and added to Steven's share to make the distributions to them equal.

[¶14] **Administrative Expenses of the Estate.** Administrative expenses were subtracted from the cash held in the IOLTA Trust account for the Estate account as detailed on Exhibit 3. In addition, one-half of the unpaid attorney's fees and costs, previously approved by the Court, are withheld from Rodney's share, as

further detailed above and in footnote 11.

[¶15] Without authority, Rodney allowed a tenant, Leroy Cromwell, to occupy the Farmstead owned by the Estate. An eviction action was required to evict Leroy Cromwell. Mr. Cromwell indicated that he paid rent to Rodney, but this amount was never paid to the Personal Representative. In addition, the tenant failed to pay certain utility bills at the Farmstead, including \$79.30 to Cass Rural Water, which became due and owing by the Estate. One-half of the Estate's share of this expense is subtracted from Rodney's share and added to Steven's share to make the distribution to Steven and Rodney equal.

[¶16] The remaining amount of cash allocated to Rodney from the Estate after the payment of the amounts detailed above equals \$287,827.53. The personal representative proposes that \$2,500 of this amount be withheld from Rodney's share for the payment of the final Estate tax return. A similar amount would be withheld from Steve's share.

[¶17] **Attorney's fees and costs.** Prior to the remand of the first appeal in this matter (which remand happened on May 27, 2015) and following the Court's last award of fees and costs in this matter, which was through October 29, 2013, the time spent by the Personal Representative's attorneys at the hourly rate applicable to those charging time on this matter, totaled \$97,037.00, as further detailed on the Affidavit in Support of Petition for Discharge of Personal Representative. During this same time period, the

amount of \$1,614.68 in costs was incurred, for total fees and costs of \$98,651.68.

[¶18] This Court has previously held that the "personal representative's attorney's fees and costs following the remand of this matter by the Supreme Court are awarded against Rodney Hogen and Rodney Hogen's distribution of the Estate rather from the Estate as a whole." (Order on Petition for Complete Settlement and Distribution of Estate, Index # 702, ¶ 9.) Following the remand of this matter on May 27, 2015, the time spent by the Personal Representative's attorneys at the hourly rate applicable to those charging time on this matter, totaled \$166,516.50, as further detailed on the Affidavit in Support of Petition for Discharge of Personal Representative. During this same time period, the amount of \$1,660.62 in costs was incurred, for total fees and costs of \$168,177.12. It is anticipated that Rodney will appeal any decision in this matter, and it is estimated that \$20,000 in fees and costs will be expended for any appeal.

[¶19] In addition, following the remand in this matter, in June 2017, the Personal Representative was served with the Summons and Complaint in a Barnes County, North Dakota, lawsuit seeking to quiet title to all real estate commonly owned by the Estate and the Curtiss Hogen Trust B. The lawsuit was brought by Marby Hogen and Susan Hogen, (respectively Rodney Hogen's daughter and wife), whose claims were purportedly based upon the Quit Claim Deeds signed by Rodney Hogen as described in the Court's Order of April 3, 2017, at paragraph 5. That lawsuit was filed as

Barnes County District Court File No. 02-2017-CV - 00116. The plaintiffs were represented by the same attorney and law firm that represented Rodney Hogen throughout these proceedings. Lis Pendens was again filed against all of the real estate owned by the Estate. See, Barnes County Document No. 285453 and Cass County Document No. 1511717.

[¶20] The Barnes County lawsuit, and the related Lis Pendens filings, clouded the title to the real estate being administered by the Personal Representative and potentially jeopardized the already announced auction sale of several parcels of real estate necessary for administration of this Estate as directed by the Court. As a result, considerable legal work and expense was necessarily incurred by the Personal Representative to release and remove the Lis Pendens, Answer and defend the lawsuit, and, ultimately, obtain Judgment dismissing the plaintiff's claims (Barnes Dkt #90).

[¶21] The Barnes County plaintiffs have appealed the dismissal of their claims. The North Dakota Supreme Court file number is 20180143. The Brief of Appellants was served on June 19,2018. The Appellee's Brief was served on July 18,2018. It is anticipated that additional legal work and expense will be required to argue the Personal Representative's position before the North Dakota Supreme Court.

[¶22] The time spent by the Personal Representative's attorneys at the hourly rate applicable to those charging time on this matter

related to the Barnes County action along with the out-of-pocket costs, totaled \$61,129.26, as further detailed on the Affidavit in Support of Petition for Discharge of Personal Representative. It is anticipated an additional \$3,000 in legal fees and expenses will be incurred on the appeal.

[¶23] The Personal Representative was also required to evict a tenant of the homestead following the sale of the property. Prior to the eviction hearing in April 2018, the tenant, LeRoy Cromwell, neither paid rent to the Personal Representative or obeyed his instructions to leave the property.

[¶24] Two separate eviction proceedings were necessary as the tenant testified he had been regularly paying monthly rent of \$400/\$450 to Rodney Hogen, who had not asked him to vacate the premises. If true, this appears to contravene ¶4 of this Court's Order of April 3, 2017. These Cass County District Court eviction proceedings may be found as files #09-2017 - CV -02802 and 09-2018-CY-01059. Rodney Hogen has not accounted to the Personal Representative for any monthly rents received from this tenant.

[¶25] The time spent by the Personal Representative's attorneys at the hourly rate applicable to those charging time in the Barnes County action along with the out-of-pocket costs for this matter, totaled **\$10,788.59** as further detailed on the Affidavit in Support of Petition for Discharge of Personal Representative.

[¶26] All of the legal fees and expenses itemized regarding the Barnes County lawsuit and the evictions are attributable to the unjustifiable conduct of Rodney Hogen and should be charged exclusively against his share of the estate proceeds.

[¶27] Of the amount of fees expended **prior to the remand**, the Personal Representative proposes that a total of **\$50,000** in fees and costs be approved and one-half be withheld each from Steven and Rodney Hogen. Of the amount of fees expended following remand, the Personal Representative proposes that **\$200,000** be withheld from Rodney's share of the Estate, to include the attorney's fees and costs for the Barnes County action and the eviction. FN#16

[¶28] Steven Hogen proposes to hold **\$23,000** in remaining cash amounts to be distributed to Rodney Hogen in trust until such time as the appeal period runs and/or any appeal in this matter and the Barnes County case are finally determined.

A. Distribution to Steven Hogen

[¶29] As set forth above, a portion of the real estate in the Estate allocated to Steven Hogen was sold to pay for: (1) a personal debt of Rodney Hogen to First State Bank of which Steven Hogen agreed to pay for one-half because the proceeds were used to invest into Red Trail Vineyards, of which Steven Hogen has a one-half interest; and (2) administrative expenses of the Estate. The Settlement Statement showing the proceeds of the sale are set forth on Exhibit 7.

[¶30] Personal debt of Rodney Hogen to First State Bank. As set forth in the table above and footnote 10, Steven Hogen, as the Personal Representative, has distributed Estate cash on behalf of Steven to pay off Rodney's personal loan with First State Bank of Buffalo, half of which Steven Hogen agreed to pay from his Trust and Estate distributions.

[¶31] Administrative Expenses of the Estate. Administrative expenses were subtracted from the cash held in the IOLTA Trust account for the Estate account as detailed on Exhibit 3. In addition, one-half of the unpaid attorney's fees and costs, previously approved by the Court, are withheld from Steven's share, as further detailed above and in footnote 11.

[¶32] The remaining real estate not sold, which was allocated to Steven Hogen, is the remaining portion of the North/South Oriska Quarters and Grandma's Quarter. Both parcels will be deeded to Steven Hogen.

[¶33] The amount of \$1,939.52, which consists of the proceeds in the Estate checking account, as detailed in Exhibit 1, has been distributed to Steven Hogen. The remaining amount of cash allocated to Steven from the Estate after the payment of the amounts detailed above equals \$119,780.52. The Personal Representative proposes that \$2,500 of this amount be withheld from Steven's share for the payment of the final Estate tax return, and \$25,000 for attorney's fees and costs prior to the remand. The Personal Representative proposes the balance,

\$92,280.52, be distributed to Steven Hogen.

[¶34] WHEREFORE, Steven Hogen prays that the Court:

[¶35] Fix a time and place for a hearing on this Petition;

[¶36] Enter an order approving the distributions and disbursements as set forth herein;

[¶37] Enter an order approving Steven Hogen's attorney's fees and expenses and allocating such fees and expenses as set forth herein;

[¶38] Enter an order formally discharging the Personal Representative, but staying such order until the appeal period runs in this matter or until this matter is finally resolved following an appeal; and

[¶39] Grant such other and further relief as may be proper.

[¶140] Under penalties for perjury, I declare or affirm that I have read this document and I know or believe its representations are true and complete.

s/ Steven C. Hogen 7/23/18
_____date

4. Based upon the allocation of real estate between the parties, the division of the respective gross

sales proceeds is noted. The sales proceeds are more than the date of death values.

To Steven - "North/South Oriska Quarters" - Sale Price - \$364,507.50 ($\frac{1}{2}$ Estate, $\frac{1}{2}$ Trust)

The total to Steven of the Estate real estate proceeds allocated to him is $\frac{1}{2}$ of the sales proceeds for the South Oriska Quarter of \$182,253.75. Only a portion of the South Oriska Quarter (111.3 acres) was sold at \$3,275/acre. The "North/South Oriska Quarters" as referenced herein are more fully described in the Second Amended Inventory and Appraisement at page 4, paragraph 5. (Index # 499.) The remaining portion of the North/South Oriska Quarters not sold will be conveyed to Steven Hogen.

To Rodney - "West Home Quarter" - Sale Price - \$564,000.00 ($\frac{1}{2}$ Estate, $\frac{1}{2}$ Trust)

To Rodney - "East Home Quarter" - Sale Price - \$678,727.00 ($\frac{1}{2}$ Estate, $\frac{1}{2}$ Trust)

To Rodney - "Farmstead" - Sale Price - \$60,000.00 ($\frac{1}{2}$ Estate, $\frac{1}{2}$ Trust)

The total to Rodney of the Estate real estate proceeds allocated to him is one-half of the sales proceeds for the West Home Quarter, East Home Quarter, and Farmstead, since the Estate only owns one-half of these items. (One-half of (\$564,000.00 + \$678,727.00 + \$60,000.00)) for a total of \$651,363.50.

The "West Home Quarter" as referenced herein is more fully described in the Second Amended Inventory and

Appraisalment at page 2, paragraph 2. (Index # 499.)
The "East Home Quarter" as referenced herein is more fully described in the Second Amended Inventory and Appraisalment at pages 2-3, paragraph 3. (Index # 499.)
The "Farmstead" as referenced herein is more fully described in the Second Amended Inventory and Appraisalment at page 4, paragraph 4. (Index # 499.)

5. The purchase agreements for the sale required the buyers to pay the 2017 taxes and to receive the 2017 rent. Because of the delay in the sale, the Estate paid the taxes and received the rent. Thus, the net amount of the taxes less the rent was returned to the buyer. For the property allocated to Steven, a total of \$9,565.94 was returned to the buyer. The Estate's portion of this amount is \$4,521.65. For the property allocated to Rodney, \$21,771.46 was returned to the buyer. The Estate's portion is \$10,885.73. The calculation of these amounts is more fully set forth on Exhibit 2.

6. This amount is 4% of the gross proceeds from the sale.

7. The total amount of sales expenses is \$2,280.25 for advertising. Half of this amount (\$1,140.13) is allocated to the Estate, and half of the amount allocated to the Estate is split evenly between Steven and Rodney.

8. This is the amount calculated in paragraph 5 above as Amount Owing to Steven from Rodney for Equal Distribution.

9. This amount is the amount remaining from the income to the Trust after the payment of expenses as detailed in Exhibit 3, and it is split evenly between Steven and Rodney.

10. Encumbrances against Estate/Trust real property allocated to Rodney:

AgCountry Farm Credit Services - \$257,413.07 was paid (\$250,288.07 was paid from the closing plus \$3,562.50 was paid from the Estate trust account and \$3,562.50 was paid from the Trust trust account due to an assignment of rents).

*One-half of the total payoff is included in the estate distribution and one-half of the payoff is included in the trust distribution as the real property was owned equally by the estate and trust.

First State Bank of ND - \$22,574.33 was paid (\$11,720.38 was paid from the proceeds of the closing plus \$5,426.97 was paid from the Trust and \$5,426.98 was paid from the Estate due to an assignment of rents)

*Between the Trust and Estate, 71.5% of this amount is allocated to the Trust because it encumbers "Grandma's Quarter" which is owned 71.5% by the Trust, and the remaining 28.5% is owned by the Estate. Thus, \$6,433.68 is allocated to the Estate. The First State Bank of ND mortgage is allocated equally to Steven and Rodney in the Estate and Trust as it was taken out in order to invest the funds into Red Trail

Vineyards. "Grandma's Quarter" as referenced herein is more fully described in the Second Amended Inventory and Appraisement at page 1, paragraph 1. (Index # 499.)

11. The Court approved a total of \$333,272.23 in fees and costs prior to the first appeal in this matter. (Index #505, ¶ 15.). At the time of this approval, \$46,105.50 had been paid in fees and \$1,334.42 had been paid in costs. Since that time, approved costs to Bradley Business Advisors in the amount of \$24,925 was paid from the Estate checking account (the remaining amount owed to Bradley Business Advisors of \$10,000 was advanced by Ohnstad Twichell, P.C.). In addition, the amount of \$1,023 in the Estate IOLTA account was applied to costs. Thus, the amount that remained to be paid to Ohnstad Twichell, P.C., and that was approved by the Court prior to the first appeal in this matter is \$259,884.31 (\$333,272.23-\$46,105.50-\$1,334.42-\$24,925.00-\$1,023.00). Half of this amount, \$129,942.15 is allocated each to Steven and Rodney.

12. Interest at the rate of 6% until July 20, 2018, is calculated on the amounts determined owing from Rodney as set forth in Exhibit 4.

13. The Estate and Trust were required to pay a bill of \$79.30 to Cass Rural Water because Rodney allowed a tenant to live on the Farmstead after the Court ordered that Rodney was not allowed to interfere with Steven Hogen's possession of the Farmstead.

14. Round numbers resulted from a discount applied by Ohnstad Twichell, P.C., against larger numbers shown on billing records. See, Affidavit in Support of Petition for Discharge of Personal Representative, ¶18.

15. See, Affidavit in Support of Petition for Discharge of Personal Representative, ¶¶8, 18, and 19.

16. See, footnote 14, supra.

APPENDIX V

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IN THE DISTRICT COURT FOR CASS COUNTY,
NORTH DAKOTA

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

**DECLARATION OF INTERESTED PERSONS
VOIDING THE ALLOCATION, PARTITION, SALE,
ENCUMBRANCE OF REAL PROPERTY ONCE
OWNED BY THE DECEDENT**

AND

**PETITION OF INTERESTED PERSONS FOR
ORDER VOIDING PERSONAL
REPRESENTATIVE'S ALLOCATION, PARTITION,**

**SALE OR ENCUMBRANCE OF REAL PROPERTY
ONCE OWNED BY THE DECEDENT [OR ORDER
CONFIRMING THE DECLARATION OF
INTERESTED PERSONS VOIDING THE
PERSONAL REPRESENTATIVE'S
TRANSACTION(S)]**

AND

**PETITION OF INTERESTED PERSONS TO
VACATE THIS COURT'S ORDER OF APRIL 3, 2017**

[¶1] Without doubt, Steven C. Hogen originally sought in 2010, and then obtained in 2014, a formal order closing the estate pursuant to N.D.C.C. § 30.1-21-01 which “terminates an appointment of a personal representative.” N.D.C.C. § 30.1-17-10(2). To set the stage for Petitioners’ positions set forth hereafter, Petitioners implore the court first examine N.D.C.C. § 30.1-17-08 which specifically provides “(t)ermination ends the right and power pertaining to the office of personal representative as conferred by this title or any will ..” The Editorial Board Comments to the latter statute notes (1) “(t)ermination” “provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate”, and (2) “that ‘termination’ is not ‘discharge’”. However an order of the court entered under section 30.1-21-01 .. both terminates the appointment of, and discharges, a personal representative.” After 2014, Steven C. Hogen cannot lawfully claim the status of personal representative, nor lawfully act as personal representative, and

Petitioners respectfully show the court as follows:

[¶2] 1. Petitioners are persons interested in the estate.

[¶3] Petitioner Rodney Hogen, is one of the residual devisees under the Last Will and Testament of Arline H. Hogen, deceased, and therefore, Rodney Hogen is a person interested in the estate, as defined by the laws of the State of North Dakota. N.D.C.C. § 30.1-01-06(25). Through two (2) quit claim deeds attached as Exhibits 1 and 2 to this petition, Rodney Hogen has conveyed to his wife, Susan Hogen, a life estate, and to his daughter, Marby Hogen, a remainderman's interest in and to all real property once owned by the Decedent Arline H. Hogen at the time of her death. As the result of the two (2) quit claim deeds, Petitioners Susan Hogen and Marby Hogen are persons interested in the estate, as defined by N.D.C.C. § 30.1-01-06(25), and have been persons interested in the estate since the quit claim deeds were delivered to them on February 20, 2014.

[¶4] Rodney Hogen's Quit Claim Deeds to Susan Hogen and Marby Hogen trailed this court's December 11, 2013, "order approving a final accounting and settlement in the probate of the estate of Arline Hogen." After the execution and delivery of the quit claim deeds, this court issued its Order on Second Amended Petition for Approval of Final Account and Rule 54(b) Certification, describing "...interested person Rodney Hogen, a 50% distributee, or Steve Hogen, the PR and also a 50% distributee ...". This

court's 2013 and 2014 orders, made under authority of N.D.C.C. § 30.1-21-01, indicated its "ruling ends the actions as to said matters." District Court Docket Entry #506.

[¶5] 2. Pertinent Background for Petitioners' declaration voiding transactions of Steven C. Hogen, and for their Petitions.

[¶6] On March 19, 2010, Personal Representative Steven C. Hogen filed a Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate [District Docket Entry # 12], containing the following pleadings:

5. Petitioner has filed a Final Account hereto and the estate is in a condition to be closed.

* * *

14. This Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.

[¶7] On February 15, 2013, Personal Representative Steven C. Hogen filed a First Amended Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate [District

Court Docket Entry #197], containing the following, almost identical, pleadings:

14. This First Amended Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.

[¶8] There was no provision within the “First Amended Petition for Approval of Final Account, for Determination of Testacy Status and Settlement of Estate” that asked this court to delay the termination of Steven C. Hogen’s appointment as personal representative so that land could be leased, sold, allocated or partitioned after the final account. There is no language within said petition(s) indicating Steven C. Hogen sought the power to lease, sell, or partition the farm lands [for estate purposes] after his appointment would be terminated by issuance of an order [or orders] under the provisions of N.D.C.C. § 30.1-21-01. Steven C. Hogen did not seek, nor suggest, [and certainly this court never ordered from 2007 through February 20, 2014] a bifurcation of issues [under procedural path suggested available by In re Cashmore, 2010 ND 159, 787 N.W.2d 261] prior to the Supreme Court’s mandate.

[¶9] This court issued its Order on Petition for

Approval of Final Account, for Determination of Testacy Status, and Settlement of Estate under N.D.C.C. § 30.1-21-01 on October 24, 2013. District Docket Entry #436. The court issued its Amended Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate on December 11, 2013. District Docket Entry #490.

[¶10] This court issued its Order of March 6, 2014, referring to these two (2) Orders [District Docket Entry #506], recognizing Petitioner Rodney Hogen was a 50% distributee and his brother, Steven Hogen, a 50% distributee. The March 6, 2014, Order affirmed what was originally ordered on October 24, 2013. District Docket Entry #506, page 2, ¶3; and District Docket Entry #506, page 2, ¶6. Under Steven Hogen's 2010 and 2013 petition(s) to formally settle the estate, *made under the provisions of N.D.C.C. § 30.1-21-01*, (a) the real estate [owned by Arline Hogen at the time of death], and (b) the "right of retainer", were listed as assets to be distributed to Rodney Hogen and Steven Hogen, and by this court order(s), to be divided equally.

[¶11] This court's concluding Orders [in 2013 or 2014] did not reserve jurisdiction to lease, sell, allocate or partition the farm lands that devolved upon Rodney Hogen and Steven Hogen, equally, at the time of the death of their mother through her probated will. Again, bifurcation under Cashmore was never sought, nor suggested, and never ordered prior to the Supreme Court's mandated remand.

[¶12] The three Orders, referred to above, were affirmed by the Supreme Court of North Dakota in Estate of Hogen, 2015 ND 125, 863 N.W.2d 876. In affirming this court's order(s), the Supreme Court recognized Rodney Hogen's appeal was from an "order approving a final accounting and settlement in the probate of the estate of Arline Hogen." Estate of Hogen, ¶1. The Supreme Court of North Dakota also determined that the personal representative's power and control over decedent's property continues no later than the "termination of the personal representative's appointment ...". Estate of Hogen, ¶s 25 & 26; *as a matter of law [N.D.C.C. § 30.1-17-10(2)], termination of appointment occurs upon the entry of order(s) made under N.D.C.C. § 30.1-21-01.*

[¶13] In ¶20 of Estate of Hogen, the Supreme Court of North Dakota advanced the following concept about a personal representative's powers over real estate during the time of his administration.

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.

Bolding supplied by Petitioners for emphasis.

[¶14] The power to sell or partition Rodney Hogen and Steven Hogen’s inherited lands was not exercised by the personal representative prior to this court’s concluding Order(s) of 2013 and 2014. These Order(s) have been determined by the Supreme Court of North Dakota to be the “final account and settlement in the probate of the estate of Arline Hogen.” Estate of Hogen, ¶1.

[¶15] During the September 3, 2015, Hearing on Remand, Rodney Hogen informed this court of his position that the administration [or powers of the personal representative] had terminated. Page 15 of Transcript of Hearing on Remand Held September 3,

2015, [District Court Docket No. 562]. Rodney's position was the Supreme Court of North Dakota's pronouncement that the District Court's Order(s), *made after Steven Hogen's voluntary petition(s) for formal closing of the Estate under N.D.C.C. § 30.1-21-01*, were a "final account and settlement", and the law of this case had terminated Steven Hogen's powers as a personal representative – as a matter of law. *Id.* It was Rodney's position that the District Court had ordered a 50-50 distribution to Rodney Hogen and Steven Hogen of the lands and the determined "retainer" by the concluding Order(s) that had been affirmed on appeal. Transcript of September 3, 2015 Hearing, pages 15, 20, and 21.

[¶16] During the September 3, 2015, Hearing on Remand, both the personal representative's attorney and this court disagreed with Rodney Hogen's position that the personal representative's powers had been statutorily terminated by this court's "order approving a final accounting and settlement in the probate of the estate of Arline Hogen", and the ordered 50-50 distribution. Transcript of September 3, 2015 Hearing, pages 17-19.

[¶17] On September 10, 2015 [because of this court's "in court" rejection of Rodney Hogen's position that the powers of the personal representative had been terminated], Rodney Hogen filed his verified Petition for Order Restraining Personal Representative. District Docket Entry #560. Within this petition, Rodney Hogen advanced his legal authority [statutes and the Supreme Court's pronouncements within

Estate of Hogen, *supra.*, that support his position] Steven C. Hogen's personal representative powers over Rodney Hogen's inherited lands had terminated. *Id.* Rodney Hogen's petition was first noticed for November 2, 2015, but due to the District Judge's health problems, was not heard until February 2, 2016.

[¶18] Steven C. Hogen resisted Rodney Hogen's position that his personal representative powers over Rodney's inherited lands had terminated. On November 12, 2015, and apparently spurred by Rodney Hogen's position as to the termination of the powers of the personal representative, Steven C. Hogen moved for the entry of a "Cashmore Bifurcation Order." District Docket Entry #576. Steven C. Hogen's spurious argument concerning Rodney Hogen's position as to the "law of the case" [or mandate rule] is best seen in ¶9 of his Brief in Support of Personal Representative's Motion for Entry of Cashmore Bifurcation Order [District Docket Entry #578]—attorney Nelson did not understand the Cashmore ruling:

[¶9] Notwithstanding the North Dakota Supreme Court's statement in its introductory sentence in Hogen I at ¶ 1, to-wit:

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.

(emphasis added), no such “order approving settlement” (final or otherwise) has ever been entered in this case. Nor has any order directing or approving distribution of the estate (final or otherwise) ever been entered in this case. Nor has any order closing or terminating the estate ever been entered in this case. Nor has any order ever been entered determining the persons entitled to distribution of the estate. Nor has any order discharging the PR ever been entered in this case. Finally, as Cashmore makes clear, the only prohibition on filing an amended final account arises after a final judgment or order has been entered approving a final accounting and distribution:

Once a final judgment or order has been entered approving a final accounting and distribution under N.D.C.C. § 30.1-21-01(1), the estate proceedings are concluded, and the parties are not authorized to file a petition to approve an

amended final accounting
under the statute.

Matter of Estate of Cashmore, 2010 ND 159, ¶
14.

Steven C. Hogen’s motion for the entry of a “Cashmore
Bifurcation Order” was originally to be heard on
December 3, 2015. District Docket Entry #577.

[¶19] On November 23, 2015, Rodney Hogen
responded to Steven C. Hogen’s Motion for Cashmore
Bifurcation Order, repeating his claim as to the
“finality” of this court’s concluding order(s), affirmed on
appeal. Rodney Hogen argued Steven C. Hogen had
ignored North Dakota’s controlling statutes, and the
clear pronouncement of the Supreme Court of North
Dakota [including its use of only the past tense when
referring to Steven C. Hogen’s probate administration]
within Estate of Hogen, *supra*. District Docket Entry
#584. Rodney Hogen’s position was that Steven C.
Hogen confused “probate administration” with his
“ministerial duties” of “winding up” the estate [such as
performing the ministerial duty to execute and deliver
an appropriate deed to document the devolvement of
real property at the time of Arline Hogen’s death].

[¶20] Rodney Hogen’s response caused Steven C.
Hogen to seek an extension of time – to January 8,
2016 – to respond by filing his reply to Rodney’s
response. District Docket Entry #590. This court
granted the extension on December 30, 2015. District
Docket Entry #595.

[¶21] On January 4, 2016, Steven C. Hogen filed a Petition for Supervised Administration with notice to Rodney his petition would be heard on February 2, 2016. District Docket Entry #596. *Without any meaningful opportunity for Rodney Hogen to respond to Steven C. Hogen's petition for supervised administration*, this court, ex parte and without notice, issued its Order for Supervised Administration on January 11, 2016 – before the noticed hearing date. District Docket Entry #621.

[¶22] On January 5, 2016, Steven C. Hogen petitioned for an “Order for Delivery and Possession and Control of Estate Real Property.” District Docket Entry #604. This was Steven Hogen’s first attempt to obtain control of Cass County lands since this court’s concluding 2013 and 2014 order(s).

[¶23] On January 8, 2016, Steven C. Hogen filed his brief replying again to Rodney Hogen’s position as to the “finality” of the District Court’s prior order(s) that were affirmed on appeal. District Docket Entry #618. In his reply, Steven C. Hogen tries to escape from the Supreme Court of North Dakota’s clear words in Estate of Hogen, ¶1, that Rodney Hogen’s prior appeal was from an “order approving a final accounting and settlement in the probate of the estate of Arline Hogen.” Trying to escape from the res judicata effect [and/or law of the case] of the appealed Order(s) [determined by this court to be final], Steven C. Hogen argued, “Rodney can point to no language in the Supreme Court’s decision where that Court ‘determined that this Court’s Order(s) were final orders

issued under statutory authority found in N.D.C.C. § 30.1-21-01,' because no such determination was made by the Supreme Court, anywhere, in its lengthy opinion." District Docket Entry #618, page 11. Within his reply, Steven C. Hogen presented no meaningful law [neither case law, nor statute] that detracted from Rodney Hogen's position [which was based upon statute and case law], including ¶1 of Estate of Hogen: "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". Curiously, Steven C. Hogen attempted to lessen the res judicata effect [and/or law of the case effect] of the appealed Order(s), and the adjudication of an equal distribution, by trying to again advance the unequal distribution he favored in his petition made under N.D.C.C. § 30.1-21-01. District Docket Entry #618, pages 8 and 9. Not able to advance any credible law or fact to support his position, Steven C. Hogen then resorted to disparagement of Rodney Hogen [and/or the members of the Garaas Law Firm] calling his argument "frivolous," containing "falsehoods," and "bizarre." District Docket Entry #619, pages 1,7-10, and 14.

[¶24] On January 19, 2016, Rodney Hogen responded to Steven C. Hogen's motion to obtain possession and control of his inherited real property for crop year 2016. District Docket Entry #624. In his response, Rodney Hogen repeated his position that the personal representative's powers terminated upon the entry of the 2013 and 2014 Order(s) issued under N.D.C.C. §

30.1-21-01 - final Order(s) that were affirmed upon appeal by the Supreme Court of North Dakota in Estate of Hogen, *supra*.

[¶25] On January 20, 2016, Rodney Hogen submitted his Objection to this court's irregularly issued Order Granting Supervisory Administration. District Docket Entry #626. Rodney based his objection upon his position the powers of the personal representative had terminated by the entry of the 2013 and 2014 Order(s) that were subject of the prior appeal, and the procedural irregularity leading up to the "order for Supervised Administration." *Id.*

[¶26] This court entertained oral arguments on the various petitions and motions on February 2, 2016. See Transcript; District Docket Entry #642. After hearing oral arguments, this court issued the following three (3) orders: (1) Order on Petition for Delivery of Possession and Control of Estate Real Property dated February 2, 2016 [District Docket Entry #633]; (2) Order Denying Petition for Restraining Personal Representative of February 4, 2016 [District Docket Entry #638]; and (3) Order Bifurcating Issues of February 6, 2016 [District Docket Entry #639]. When entering these three (3) orders, the lower court rejected all of Rodney Hogen's positions, claims, or legal arguments concerning the termination of the personal representative's powers and the finality of the prior Order(s) that were affirmed by the Supreme Court of North Dakota in Estate of Hogen, *supra*.

[¶27] To protect Rodney Hogen's interest in and to

real estate Rodney Hogen inherited from his mother, the Garaas Law Firm filed a Lis Pendens for both Cass County and Barnes County lands in early February, 2016.

[¶28] On November 9, 2016, Steven Hogen moved to consolidate the Estate of Arline Hogen probate proceedings with trust proceedings involved in “In the Matter of Curtiss A. Hogen Trust B as created under the Last Will and Testament of Curtiss A. Hogen”, Cass County District No. 09-2015-CV-01717. District Docket Entry #651.

[¶29] On November 18, 2016, Rodney Hogen timely resisted the consolidation of the probate and the trust matter. When resisting consolidation, Rodney Hogen made the following claims: (1) when issuing its pertinent Order(s) of October 24, 2013 through March 6, 2014, the Probate Court did not reserve jurisdiction to sell or partition farm lands; (2) the power to sell Rodney and Steven Hogen’s inherited farm lands was not exercised by the personal representative prior to the Probate Court’s concluding orders; (3) the determined “right of retainer” was distributed to Rodney and Steven Hogen equally with the determined amount [after remand] of \$102,074.00 in principal and with interest to November 1, 2013, for a total of \$116,308; (4) the personal representative had “retained” the principal amount of \$97,220.66 [as of November 18, 2016, and without interest thereon] from post-death income from just the inherited lands from Arline; (5) the probate or trust proceedings did not presently involve a partition; (6) necessary parties to

the partition of the lands would include Rodney Hogen's grantees Marby Hogen and Susan Hogen; (7) the personal representative's power(s) to sell, lease or initiate partition proceedings terminated when the probate court issued its 2013 and 2014 concluding order(s) that had been affirmed on appeal; and (8) neither the amounts claimed as a right of retainer, nor unpaid probate or Trust administration expenses could be paid in a partition action for they are neither liens, nor encumbrances upon the land. District Docket Entry #657.

[¶30] On December 12, 2016, this court denied Steven Hogen's motion for consolidation with the trust matter. District Docket Entry #665.

[¶31] On January 27, 2017, Steven C. Hogen filed a Petition for Complete Settlement and Distribution of the Estate. Steven C. Hogen sought this court to determine and order, without benefit of a proper pleading or trial in the probate proceedings, that (1) Rodney Hogen owes an additional \$55,379.63 together with interest thereon for crop years 2014, 2015, and 2016; (2) an order directing Rodney Hogen to release the two Lis Pendens filed in Cass County and Barnes County; (3) an order authorizing the sale of real property and distribution of the Estate; (4) an order determining capital gain taxes to be paid on land sold by the personal representative based upon the personal representative's allocation of the real estate; (5) such other necessary orders to accomplish a settlement of the estate; and (6) after the completion of the sale and distribution, an order discharging the personal

representative. District Docket Entry #668.

[¶32] In ¶9 of his January 27, 2017, petition, Steven C. Hogen fraudulently asserted a proposed allocation of real property based upon an alleged agreement between Rodney Hogen and Steven C. Hogen, as revealed in testimony in In the Matter of the Curtiss A. Hogen Trust, Cass County District Court No. 09-2015-CV-01717. The following portions of the transcript in that case establishes the falsity of Steven C. Hogen's factual assertions in his petition to this probate court:

A. Transcript of Proceeding of September 22, 2016, pages 189-190:

Q In 2009, was there an effort on the part of Steven Hogen to become a 100 percent owner of certain lands and you to become a 100 percent owner of certain lands?

A Yeah, we had emails going back and forth pertaining to how we were going to split the land and what would work out best.

Q And had you reached an agreement with only the paperwork to be accomplished by the Ohnstad Twichell Law Firm?

A Right. Yeah.

Q Did it ever get accomplished?

A It never happened.

B. Transcript of Proceeding of September 22, 2016,
pages 196-197:

THE COURT: So before the time those two ships passed, again you have never agreed on an undivided one-half interest split with Steven, right?

THE WITNESS: Right. We -- like it said, we said, let's -- you take yours and I'll take mine. Steve, Barnes County, I'll take Cass County. I still farmed. It would be handy. And also in Cass County there would be more land, so one of the quarters in Cass County Steve and I were going to split to make it fair.

THE COURT: And you came close, but that didn't happen.

THE WITNESS: It didn't happen.

THE COURT: And then since then there's been no agreement I assume.

THE WITNESS: No.

The above testimony establishes that Steven C. Hogen's proposed allocation of the lands was not

“pursuant to the agreement”, as his petition falsely claimed, because there was never an effective agreement between them. What verbal agreement that may have been reached in 2009, between Steven C. Hogen and Rodney Hogen, substantially varied from the allocation submitted by Steven C. Hogen in his 2017 petition. Exhibit C to the Post-Hearing Brief of Devisee Rodney Hogen, dated August 4, 2013, [District Court Docket #432] reflects Rodney Hogen’s understanding of the parties’ “verbal” agreement.

[¶33] On February 7, 2017, Rodney Hogen submitted his Affidavit of Rodney Hogen Responding to the Petition for Complete Settlement and Distribution of the Estate. See, District Docket Entries #681-684. Within this affidavit, Rodney Hogen testified in reference to the following claims made by him: (1) that the probate court’s concluding Order(s) [that were previously affirmed on appeal] terminated Steven C. Hogen’s powers as the personal representative; (2) the Order of March 6, 2014, had recognized that Rodney Hogen and Steven C. Hogen were entitled to an equal distribution which included the real estate and the determined right to retainer; (3) when issuing its concluding Order(s) [that were affirmed on appeal], the probate court did not reserve jurisdiction to sell or lease the farm land; (4) the personal representative did not exercise power to sell the real property before the probate court issued its concluding Order(s); (5) the personal representative’s position is inconsistent with law of the case expressed in Estate of Hogen, *supra*.

[¶34] Repeating his post-appeal position concerning

the effect of the probate court's Order(s), all affirmed on appeal in Estate of Hogen, *supra*, Rodney Hogen filed his Objection to Proceedings on February 27, 2017. District Docket Entry #698.

[¶35] Oral arguments on Steven Hogen's Petition for Complete Settlement and Distribution of the Estate were held on March 2, 2017. On March 10, 2017, three days after the trust hearing, Steven C. Hogen's attorneys sent this court a letter informing him of the Post-Trial Opinion and Order in Cass County District Court No. 09-2015-CV-01717 [involving the Curtiss A. Hogen Trust]. District Docket Entry #701.

[¶36] On April 3, 2017, this court issued its Order on Petition for Complete Settlement and Distribution of Estate. District Docket Entry #703. This order concludes the "supervised administration" that began in 2016 – after the finality of Estate of Hogen [to include the remand] – contains the following orders: (1) an allocation of the estate of real property as set forth in Exhibit A to the personal representative's petition or in such other manner as may be commercially reasonable; (2) the release of Rodney's Lis Pendens; (3) the sale of real property to pay (a) all mortgages and monetary liens as determined by the personal representative; (b) estate attorney fees and costs as previously ordered by the court; and (c) payments to devisees to make an equal distribution. See ¶14 of said Order. After the proceeds of such sale were used to pay the mortgages, monetary liens, and the previously ordered attorney fees, this court ordered the "allocated" real property was to be distributed to Rodney Hogen

and Steven C. Hogen. Order, ¶15 and ¶16.

[¶37] Without a “determination” of the amount – and without recitation as to the authority for its order – the April 3, 2017 Order shifted all post-appeal attorney fees incurred by Steven C. Hogen to Rodney Hogen, apparently due to Rodney’s continued position that the personal representative’s powers had previously terminated and the filing of the *Lis Pendens*.

[¶38] Although Rodney Hogen asserts, and continues to maintain, this court did not have jurisdiction to issue its April 3, 2017 Order [due to the law of the case doctrine, statutes, and Cashmore decision], if this court had continuing jurisdiction, such Order would be a “final” judgment as envisioned by N.D.R.Civ.P. 52 [although not final for appeal purposes until a discharge of the personal representative].

[¶39] Under N.D.R.Civ.P. 54(e)(3), Steven C. Hogen [or his attorneys] were required to file a motion with 21 days after the notice of entry of the judgment as to their claim for attorney fees [Steven C. Hogen and his attorneys had notice its judgment was entered no later than April 10, 2017 for Rodney Hogen attempted to appeal from such order]. Steven C. Hogen and his attorneys have failed to bring the requisite motion to obtain the “determination” of the amount of attorney fees, and there is not any order of judgment requiring Rodney Hogen to pay attorney fees, in a determined amount, in existence at the time of this petition.

[¶40] On or about July 26, 2018, Steven C. Hogen

gave notice to Petitioner Rodney Hogen of two (2) Settlement Statements relating to a purported sale of real property once owned by Arline Hogen. The documentation provided to Rodney Hogen, through his attorneys, establishes Steven C. Hogen has exceeded what this court ordered [Rodney maintains without jurisdiction] on April 3, 2017. On April 3, 2017, this court only ordered a sale of lands sufficient to pay (1) “(m)ortgages and monetary liens as listed in personal representatives ‘Exhibit A’”; (2) “(e)state attorney fees and costs as ordered by the court”; and (3) “(a)ny payments to the devisees to make an equal distribution.” District Court Docket #702, ¶14. Under ¶15 of this Court’s April 3, 2017, order, Rodney Hogen was to be distributed all remaining real property, and proceeds from the sale of Rodney Hogen’s allocated real property. As of the date of the June 15, 2017, personal representative’s auction, the only “determined” and “ordered” attorney fees were those stemming from this court’s 2013 and 2014 final order. As of the date of the June 15, 2017, auction, the only “ordered” attorney fees totaled \$259,884.12 [Petition for Discharge of Personal Representative, footnote 11] of which the personal representative maintains Rodney is responsible for \$129,942.15. To pay the mortgages upon the “trust/estate” lands required only \$250,888.07 [Petition for Discharge of Personal Representative, footnote 10]. Since one-half ($\frac{1}{2}$) of the mortgage amounts was to be paid out of “trust” lands, only \$125,444.04 of Rodney Hogen’s lands had to be sold due to the mortgages. This court’s order only contemplated selling no more

than \$255,086.19¹ [\$129,942.15 + \$125,444.04 = \$255,086.19] of lands allocated Rodney Hogen, yet Steven Hogen – exceeding what was authorized by this court’s orders, has sold \$651,363.50 [total sales of trust/estate land allocated to Rodney is \$1,302,727.00 divided by two (2) equals \$651,363.50]. This court never authorized Steven C. Hogen the right to sell all of the lands allocated to Rodney Hogen.

[¶41] Steven C. Hogen’s auction of the farmlands, and farm yard, was not done in a commercially reasonable manner as ordered by this court. Steven C. Hogen failed to provide prior notice to either Susan Hogen or Marby Hogen that their interest in the subject real property was in jeopardy by his actions as the purported personal representative, and failed to obtain their permission to sell real estate interest that was transferred to them through the aforementioned quit claim deeds. The Due Process Clause of the Fourteenth Amendment ensures Petitioners Marby Hogen and Susan Hogen that no probate court order can deprive them of their interest in the subject lands without a meaningful opportunity to be heard.

1

Under Steven C. Hogen’s allocation, Steven C. Hogen was to receive Barnes County lands which were encumbered, as revealed by Steven C. Hogen’s Exhibit “A” referring to Trust trial Exhibit 3, by a mortgage(s) with a balance owing on four(4) notes of \$207,605.96 as of August 25, 2016. One hundred and twenty acres of Cass County farm lands, allocated to Rodney Hogen was burdened by a mortgage with a balance of \$32,383.19 [as of August 25, 2016, and would not have had to be totally paid to reach a fair allocation of lands between Steven C. Hogen and Rodney Hogen or to pay “ordered” attorney fees.

[¶42] Although the sale was advertised as a public sale, Steven C. Hogen failed to allow Petitioners Rodney Hogen, Susan Hogen, and Marby Hogen to protect their interests in the lands being sold when it refused the Petitioners' attorney access to the sale. Without access by their attorneys, the Petitioners were denied the right to participate in the bidding process, or the right to protect their respective interests in lands by submitting a bid. There is nothing in any court order of this court that would have prevented the Petitioners from participating in the sale, and Steven C. Hogen's denial of opportunity for the Petitioners to participate is an act in excess of the parameters set by this court in its order of April 3, 2017. The Affidavit of Jonathan T. Garaas relating to the auction sale is incorporated by reference.

[¶43] Steven C. Hogen did not act in a commercially reasonable manner when he failed to reject the 2016 bid of only \$60,000.00 for the homestead which, according to Steven C. Hogen's tardy² Inventory, had a value of \$100,000.00 in 2007. There was absolutely no need for the estate to sell this tract of land to accomplish what was "ordered" to be paid in April 3, 2017, and there was absolutely no reason for the personal representative to evict a tenant to accomplish a sale that should not have been made.

² Petitioners also note Rodney Hogen has items of personal property located on the farmstead. Because of this court's orders, Rodney Hogen is subject to contempt if he tries to go on his own lands to retrieve his own property. This court should allow Rodney Hogen reasonable access to the farmstead forthwith.

[¶44] Although Steven C. Hogen has been aware of Rodney Hogen's quit claim deeds to Petitioners Susan Hogen and Marby Hogen, Steven C. Hogen has never provided either Susan Hogen or Marby Hogen any form of notice that their real estate interests would be in jeopardy by his actions. This court has never provided either Susan Hogen or Marby Hogen notice or opportunity to be heard concerning a sale, or encumbrance of real property interests received from Rodney Hogen. Although persons interested in this estate since February 20, 2014, this Petition is the first time that Petitioners Susan Hogen and Marby Hogen have entered an appearance in the *in rem* probate proceedings herein. The Petitioners Susan Hogen and Marby Hogen enter their appearance at a time their appeal from an adverse Barnes County, North Dakota, quiet title action judgment is awaiting oral arguments in Supreme Court of North Dakota (appeal no. 20180143).

[¶45] 3. **Declaration of interested persons voiding the allocation, partition, sale, encumbrance of real property once owned by the decedent.**

[¶46] By statutory right granted to all persons interested in the estate as set forth in N.D.C.C. § 30.1-18-13, Petitioners Rodney Hogen, Susan Hogen, and Marby Hogen hereby void, revoke and render ineffectual the following transactions made without notice and opportunity to be heard by Petitioner Susan Hogen and Petitioner Marby Hogen, and made without "fair disclosure" of the extent of the intended acts of the

purported personal representative afforded to
Petitioner Rodney Hogen:

1. The allocation of the claimed “estate real property” as reflected in Exhibit A to the personal representative’s Petition for Complete Settlement and Distribution dated January 27, 2017 [Petitioners also void any other manner of allocation, partition, or sale by the personal representative, whether commercially reasonable or not].
2. All contracts, including all earnest money contracts, relating to an auction of Barnes County and Cass County lands [personal representative’s claimed “estate” lands] occurring on or about June 15, 2017, made by Steven C. Hogen as a personal representative of the above named estate with John H. Triebold or Alan N. Triebold.
3. All deeds, and contracts leading to the deeds such as Settlement Statements, given by Steven C. Hogen, as a personal representative of the Estate of Arline H. Hogen, Deceased, to John H. Triebold and Alan N. Triebold, or to either of them.
4. All contracts, including all earnest money contracts, relating to an auction of Barnes County and Cass County lands [personal

representative's claimed "estate" lands] occurring on or about June 15, 2017, made by Steven C. Hogen as a personal representative of the above named estate with Tulip Acres, LLLP.

5. All deeds, and contracts leading to the deeds such as Settlement Statements, given by Steven C. Hogen, as a personal representative of the Estate of Arline H. Hogen, Deceased, to Tulip Acres, LLLP.
6. The encumbrances made upon the Petitioners' interest in real estate [or in the proceeds of the sale or leasing of real estate] in favor of personal representative's attorney by placing such proceeds [sale and rentals] in an IOTA account of the Ohnstad Twichell law firm solely under their control.
7. The exoneration of Steven C. Hogen from the encumbrances of mortgages on lands he has allocated to himself, in violation of N.D.C.C. § 30.1-19-14.

[¶47] In reference to all of the matters [or categories of matters] that the Petitioners hereby void, by statutory right, personal representative Steven C. Hogen has a conflict of interest with the Petitioners herein. As a personal representative, Steven C. Hogen is a fiduciary with a duty to settle and distribute the estate of decedent Arline Hogen in accordance with the

terms of her probated will, working expeditiously, and consistently with the best interests of the estate. When exercising his fiduciary powers, Steven C. Hogen must act in the best interests of the successors of the estate. See, N.D.C.C. § 30.1-18-03. The above matters the Petitioners now void, revoke, and render ineffectual, stem from Steven C. Hogen's violations of his fiduciary duties to the Petitioners. In said matters, and acting with a clear and substantial conflict of interest, Steven C. Hogen has attempted to gain more than a 50% share of his mother's estate [or distributable estate] at the expense of his brother, Rodney Hogen, and Rodney's family transferees. Steven C. Hogen has delayed the equal distribution mandated by this court's 2013 and 2014 order(s) which were affirmed on appeal solely to use his perceived role as personal representative to gain economic advantage over his brother. Acting with a clear conflict of interest, after the death of their mother from 2007 through 2017, Steven C. Hogen has taken income from Rodney Hogen's inherited real property, but never paid principal and interest payments for the loan. When Rodney Hogen made the mortgage payments, through his own labors by farming his inherited lands, Steven C. Hogen, acting with a clear conflict of interest, claimed rental from Rodney Hogen in amounts that income from the land would not support. Schedule F of Rodney Hogen's 2014 Income Tax Return [District Court Docket #683] shows that Rodney Hogen's net profit from his own labors was only \$2,916.00 and the farm lands itself only produced \$55,723.00 [\$58,581.00 - \$2,868.00 fuel tax credit = \$55,723] in crops or proceeds from farm program. Yet on January 27, 2017,

two years after Rodney Hogen farmed his inherited lands in 2014, Steven C. Hogen imposed a rental agreement upon Rodney Hogen of \$19,980.50 [meaning with the personal representative's imposed rental, Rodney Hogen's farm income in 2014 is negative \$17,262.15 [without taking into account a similar rent was imposed by the Trust Court]. Schedule F of Rodney Hogen's 2015 Income Tax Return [District Court Docket #684] shows that Rodney Hogen's net profit from his own labors was only \$25,442.00 and the farm lands itself only produced \$60,346.00 [\$108,366.00 - \$43,415.00 insurance proceeds -\$1,065.00 custom hire income- \$5,240 fuel tax credit = \$60,346.00] in crops or proceeds from farm programs. Yet on January 27, 2017, one year after Rodney Hogen farmed his inherited lands in 2015, Steven C. Hogen imposed a rental agreement upon Rodney Hogen of \$17,791.64 [meaning with the personal representative's imposed rental, Rodney Hogen's farm income in 2015 is \$7,650.36 [and when taking into account a similar rent was imposed by the Trust Court, Rodney Hogen has been imposed by the personal representative a negative income in 2015 and has been denied the fruit of his labors]. In 2016, Rodney Hogen's rental payments were intercepted by mortgagees exercising their assignment of rents which were superior to Steven C. Hogen's claimed possession of the 2016 farm lands. Yet Steven C. Hogen imposed \$15,802.59 in 2016 rentals upon Rodney Hogen, even though Steven C. Hogen personally, or as a personal representative, did not pay any mortgage or interest expense in 2016. Steven C. Hogen also seeks to transfer his own attorney fees unto Rodney Hogen, claiming to be acting

on behalf of the Estate as Personal Representative.

[¶48] Neither Steven C. Hogen, nor his attorneys ever brought the requisite motion, under N.D.R.Civ.P. 54(e)(3), for attorney fees 21 days after the notice of entry of this court's April 3, 2017, Order on Petition for Complete Settlement and Distribution of Estate. Yet Steven C. Hogen, acting with a clear conflict of interest, has placed all proceeds from his purported sale of Rodney Hogen's interest in Cass County and Barnes Count lands in the hands of his attorneys through its IOLTA Trust to dispense as they determine. This is an encumbrance in favor of the personal representative's attorney, and such encumbrance is voidable at the will of any of the Petitioners under the authority of N.D.C.C. § 30.1-18-13.

[¶49] All transactions, sought to be avoided, are also affected by Steven C. Hogen's conflict of interest concerning subjecting Petitioners' real property interest to the payment of barred debts, including attorney fees barred by N.D.C.C. § 30.1-19-03(2), N.D.C.C. 30.1-21-06, N.D.C.C. 30.1-21-08, or N.D.C.C. § 28-01-06.

[¶50] 4. **Petition of interested persons for order confirming personal representative's allocation, partition, sale or encumbrance of real property once owned by the decedent has been voided.**

[¶51] The Petitioners Rodney Hogen, Susan Hogen

and Marby Hogen hereby restate and incorporate by reference all matters set forth in ¶1 through ¶49, inclusive, above. The Petitioners' pray that this court determine, as to all of the transactions that Petitioners, or any of them, have declared void, such transactions were made without notice and a meaningful opportunity to be heard afforded to Petitioners Susan Hogen and Marby Hogen, and made without "fair disclosure" of the extent of the intended acts of the purported personal representative afforded to Petitioner Rodney Hogen.

[¶52] The Petitioners pray that this Court determine, as to all of the transactions that Petitioners have declared void, that the personal representative Steven C. Hogen has a substantial beneficial interest in all the transactions. Each transaction was made, designed, or undertaken by Steven C. Hogen to increase his right from an equal inheritance from his mother's to a greater share of the estate, at the expense of brother Rodney Hogen, and family transferees.

[¶53] The Petitioners pray that this Court determine, as to all of the transactions that Petitioners have declared void, that the personal representative Steven C. Hogen has a substantial conflict of interest in all the transactions. Each transaction was made, designed, or undertaken by Steven C. Hogen to increase his right from an equal inheritance from his mother to a greater share of the estate, at the expense of brother Rodney Hogen. Each transaction was made, designed, or undertaken by Steven C. Hogen to require Rodney Hogen to pay for a disproportionate share of the fight,

needlessly brought by Steven C. Hogen, concerning the ownership rights of inherited real property.

[¶54] The Petitioners pray this Court determine there has been no notice to Petitioners Susan Hogen and Marby Hogen, and inadequate notice to Petitioner Rodney Hogen, and that this court issue its order affirming the Petitioners, by statutory right, have voided each of the aforesaid transactions due to personal representative Steven C. Hogen's substantial beneficial interest and/or substantial conflict of interest in each transaction.

[¶55] **5. Petition of interested persons to vacate this court's order of April 3, 2017.**

[¶56] The Petitioners Rodney Hogen, Susan Hogen and Marby Hogen hereby re-state and incorporate by reference all matters set forth in ¶1 through ¶49, inclusive, above.

[¶57] The Petitioners Rodney Hogen, Susan Hogen and Marby Hogen hereby restate and incorporate by reference all matters set forth in ¶50 through ¶54, inclusive, above. The Petitioners reassert their position they have voided by statutory right, all of the aforementioned transactions in which personal representative has a substantial conflict of interest, and have asked this court for an order affirming their declaration voiding such transactions.

[¶58] Petitioners now assert this court acted in excess

of its jurisdiction, or without jurisdiction, when entering its Order on Petition for Complete Settlement and Distribution of Estate of April 3, 2017, for the following reasons:

- A. Following formal proceedings always invoked by Personal Representative Steven C. Hogen {[2010 Docket Entry #12]: “This Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03.”; also, 2013 Docket Entry #197: “This First Amended Petition for Approval of Final Account, for Determination of Testacy Status and for Settlement of Estate is made and filed by petitioner under N.D.C.C. § 30.1-21-01, in formal proceedings to terminate administration of the estate, in lieu of the filing of a sworn statement closing the estate under N.D.C.C. § 30.1-21-03}], Personal Representative Steven C. Hogen was always seeking the statute’s objective – “complete settlement of the estate”. N.D.C.C. § 30.1-21-01 entitled “Formal proceedings terminating administration – Testate or intestate – Order of general protection”. Following remand by the

North Dakota Supreme Court for recalculation of the retainer, and known to have been fully accomplished by “Order for Entry of Second Amended (On Remand) Order on Petition for Approval of Final Account, For Determination of Testacy Status, and For Settlement of Estate” dated October 1, 2015 [Docket Entry #571; filed October 6, 2015; Notice of Entry of Second Amended (On Remand) Order on Petition for Approval of Final Account, For Determination of Testacy Status, and For Settlement of Estate noted as Docket Entry #572 on October 6, 2015], *no appeal was thereafter taken by any party*. The decision is final.

- B. Steven C. Hogen’s authority as Personal Representative ended on October 24, 2013, as a matter of law, when the Court signed its “Order on Petition for Approval of Final Account, for Determination of Testacy Status, and for Settlement of Estate”. Docket Entry #436. Should there be argument as to that date [the personal representative has the designation only authorizing him to wind up the estate by signing/delivering appropriate deeds of distributions, etc.] because of the court’s error in computing the retainer, then October 1, 2015, becomes the last possible date – the date

the court entered its final order authorized by the remand, which was never appealed. Docket Entry #571. Summarized, the formal proceedings under section 30.1-21-01, initiated by Steven Hogen in 2010, and decided in 2013 [and, following remand, resulting in a 2015 order never appealed], resulted in the **termination of his statutory/judicial authority in 2013** because N.D.C.C. § 30.1-17-10(2) provides: “An order closing an estate as provided in section 30.1-21-01 or 30.1-21-02 terminates an appointment of a personal representative.” The court’s “Order on Second Amended Petition for Approval of Final Account and Rule 54(b) Certification” [Docket Entry #506] which clearly established “Rodney Hogen, a 50% distributee, (and) Steve Hogen, .. also a 50% distributee” was appealed by Rodney Hogen; had Steven Hogen desired to contest the distribution on a 50/50 basis or the termination of his authority in 2013 (termination as a matter of law invited by lawful petition for formal closing), he certainly could have cross-appealed as to those issues, but chose not to do so. The Supreme Court’s decision “approving a final accounting and settlement in the probate of the estate of Arline Hogen” [In re Estate of Hogen, 2015 ND 125, ¶ 1, 863 N.W.2d 876], is

also final. The right to a 50% distribution is final, and it would be the law of the case. Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, ¶ 12, 729 N.W.2d 101. The lower court is without jurisdiction to alter that final judgment, and if there ever proves to be subsequently discovered “other property of the estate”, it also must be distributed 50/50 – consistent with law and two (2) Wills – Curtiss A. Hogen’s Will and Arline H. Hogen’s Will if either decedent had other property later discovered.

- C. Under N.D.C.C. § 30.1-21-08, subsequent administration is generally never possible unless “other property of the estate is discovered after an estate has been settled”, and the subsequent administration would only involve “the subsequently discovered estate”; HOWEVER, there also exists a massive prohibition precluding any further judicial oversight – “no claim previously barred may be asserted in the subsequent administration.” N.D.C.C. § 30.1-21-08. Simply put, no new property has ever been identified to exist except possibly, the cash rental amount(s) now on deposit actually belonging to Steven Hogen and Rodney Hogen resulting from judicial over-reaching initiated by Steven Hogen’s illegal January 4, 2016, Petition for

Supervised Administration [Docket Entry #596] improvidently authorized, ex parte and in violation of due process of law, by Order for Supervised Administration dated January 11, 2016 [Docket Entry #621], and no claims against said deposited funds are possible due to statutes of limitations. See, N.D.C.C. § 30.1-19-03(2); In re Estate of Hogen, 2015 ND 125, ¶ 29-30, 863 N.W.2d 876; N.D.C.C. § 30.1-21-06(1) [three years after decedent's death]; N.D.C.C. § 30.1-21-06(2) [one year after the time of distribution].

- D. This exceeded its statutory authority when it ordered the personal representative to “allocate the estate real property as set forth in Exhibit A to the personal representative’s petition or in such manner as may be commercially reasonable.” Since the real property devolved upon Arline Hogen’s death to Rodney Hogen and Steven Hogen, as equal tenants in common, there is no statutory authority to “allocate” real property by the personal representative. The allocation, authorized by this court’s order, was in the nature of a partition of land, and this court’s order failed to honor the mandated procedure, dictated N.D.C.C. § 30.1-20-11, of “partition of the property in the same manner as provided

by Chapter 32-16" of the North Dakota Century Code. This court exceeds its jurisdiction when it authorizes a personal representative to partition lands without compliance with the statutory procedure.

- F. This court exceeded its jurisdiction when it issued its order authorizing a sale, allocation, partition, or encumbrance on the real property, once owned by Arline Hogen, without prior notice or a meaningful opportunity to be heard afforded to Petitioner Susan Hogen and Petitioner Marby Hogen. Without notice to Susan Hogen and Marby Hogen 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 them, or their interest in the lands. Alward v. Borah, 381 Ill. 13, 44 N.E.2d 865 (1942). This court should recognize, as courts in all civilized countries recognize, it has 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).
- G. This court exceeded its statutory authority when it ordered “any capital gains taxes associated with the sale of

real property herein shall be assessed against and paid by the devisee to whom such property has been allocated herein.” If a personal representative sells real property, the estate itself should be responsible for the tax. There is no statutory authority to sell a devisee’s real property, incur capital gain taxes at the tax rate of an estate, and impose that tax rate upon an individual devisee. This court’s order exceeds its statutory authority for it negates the date of distribution rule for the valuation of property mandated by N.D.C.C. § 30.1-20-06. Further, if real estate is sold by the personal representative, the lands not sold should be distributed to the devisees equally as Arline Hogen’s Will directs, subject to Rodney Hogen’s prior transfers to his wife and daughter.

[¶59] Petitioners further assert this court did not regularly pursue any authority it might have when this court, in its Order on Petition for Complete Settlement and Distribution of Estate of April 3, 2017, shifted attorney fees to Rodney Hogen, for the following reasons:

- A. The lower court should have applied the “American Rule for attorney fees in the case. In Strand v. Cass County, 2008 ND 149, ¶ 9, 753 N.W.2d 872, it is stated:

[¶9] Generally, under North Dakota law, each party to a lawsuit bears its own attorney's fees absent statutory or contractual authority. *Danzl v. Heidinger*, 2004 ND 74, ¶ 6, 677 N.W.2d 924.

In this ¶16 of the April 3, 2017, order, this court states it shifted attorney fees to Rodney Hogen merely because his attorneys filed a lis pendens, his attorneys continuation of their objections to this post-remand order in order to preserve Rodney Hogen's potential appellate issues, and Rodney Hogen's transfer of a real property interest in his inherited farm lands to his wife and daughter. This court's order, reasoning, and procedural path taken is inconsistent with N.D.R.Civ.P. 11 and N.D.C.C. § 28-26-01(2), as follows:

- i. Neither Rodney Hogen, nor his attorneys, have been afforded the procedural protections of N.D.R.Civ.P. 11. Under such rule, a party moving for sanctions must give the other party an opportunity of 21 days to withdraw or correct the challenged "paper, claim, defense, contention, or denial". N.D.R.Civ.P. 11(c)(2). Steven C.

Hogen did not bring a motion under N.D.R.Civ.P. 11 and Rodney Hogen and his attorneys were not afforded the 21 day *safe harbor* to withdraw or correct his alleged offending court document.

- ii. Taking into account the provisions of N.D.R.Civ.P. 11(c), it is inappropriate to order monetary sanctions against Rodney Hogen by the lower court's own initiative. Before imposing sanctions in the nature of shifted attorney fees, the court must "first" issue an order to Rodney Hogen "to show cause why conduct specifically described in the order has not violated Rule 11(b)" as required by N.D.R.Civ.P. 11(c)(3). As stated in Clark v. United Parcel Serv., Inc., 460 F.3d 1004 (8th Cir. 2006), on page 1008: Rule 11 provides a specific procedure to be followed when sanctions are considered. A district court may impose Rule 11 sanctions on its own initiative, but it must first enter an order describing the specific conduct that appears to violate Rule 11(b), and direct the

attorney to show cause why he has not violated the rule. Fed.R.Civ.P. 11(c)(1)(B); see also Fuqua Homes, Inc. v. Beattie, 388 F.3d 618, 623 (8th Cir.2004). Then, when imposing sanctions, the court is required to describe the conduct determined to constitute a violation of Rule 11, and explain the basis for the sanction chosen. Fed.R.Civ.P. 11(c)(3).

Not only did this court fail to “first” issue an order to show cause to Rodney Hogen describing the specific offending conduct, this court failed to explain how its sanction was “limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated” as required by N.D.R.Civ.P. 11(c)(4).

- [¶60] iii. Neither the personal representative, nor this court, have ever plead in reply or made a factual determination that any “claim for relief” made by Rodney Hogen was frivolous within the meaning of N.D.C.C. § 28-26-01(2),

nor could any litigant or court make such necessary finding to shift attorney fees to Rodney Hogen. To date, Rodney Hogen believes this Petition is his fifth (5th) request from this court for affirmative relief and his four (4) prior requests for affirmative relief were based upon probate code statutes. Prior to this court's 2013 and 2014 orders made under authority of N.D.C.C. § 30.1-21-01, Rodney Hogen only sought affirmative relief in the nature of supervised administration and summary judgment, neither pleading determined frivolous by this court. After the remand of the appeal In the Matter of the Estate of Arline Hogen, *supra.*, Rodney Hogen requested this court to restrain Steven Hogen, believing his administrative powers terminated as a matter law under the provisions of N.D.C.C. § 30.1-17-10. Rodney Hogen further asked this court of law to vacate its order for special administration, entered without an meaningful opportunity for Rodney Hogen to be heard. None of his prior "claims for relief" were to be determined to be frivolous, or could be

determined to be frivolous, and none of his prior motions would justify the massive amounts the Ohnstad Twichell is billing so that Steven C. Hogen can have a greater inheritance than his brother [and family transferees], in contravention to Arline Hogen's Will.

- [¶61] iv. This court's "inherent" powers would not justify the shifting of attorney fees to Rodney Hogen. Rodney Hogen's constitutional right to alienate his inherited real property, vested at the moment of Arline Hogen's death, is protected by the Fourteenth Amendment to the Constitution of the United of America, and the act of transferring an interest in real property would not justify this court to shift attorney fees to Rodney Hogen. A Lis Pendens is a privileged communication serving to provide constructive notice to subsequent purchasers of the pendency of an action related to real property so that they can be bound upon the final judgment. Boehm v. Long, 172 N.W. 862 (N.D. 1919). It is a *communication* made in a "proceeding authorized

by law” and therefore is a privileged communication under N.D.C.C. § 14-02-05(2). It appears that the majority of states hold that the filing of a lis pendens is absolutely privileged, while a minority of states hold that a filing of a lis pendens is conditionally privileged. See Havilah Real Property Services, LLC v. VLK, LLC, 108 A3d 334, 345-346 (D.C. 2015) . Neither the Lis Pendens, nor the transfer of an interest in Rodney Hogen’s inherited lands, would justify this court’s shifting of attorney fees to Rodney Hogen under any claimed inherent authority when exercising this court’s *in rem* probate jurisdiction.

- B. The Ohnstad Twichell law firm has a substantial conflict of interest precluding it being attorney fees from the estate or Rodney Hogen. Steven C. Hogen’s probate strategy, through Ohnstad Twichell, was designed to solely promote Steven C. Hogen’s selfish motives of obtaining a greater share of the real property while distributing to Rodney Hogen a specious “Right to Retainer”. Under such circumstances, neither Steven C. Hogen, nor his attorneys’ fees for his attorneys’ services should be shifted to Rodney

Hogen, or to the Arline Hogen Estate, for such attorney fees were rendered solely on behalf of Steven personally, and for his own self motive. See, Raszler v. Raszler, 81 N.W.2d 120, 123 (N.D. 1957); Sturdevant v. Sturdevant, 340 N.W.2d 888, 892-893 (N.D. 1983); and Coulter v. Coulter, 328 N.W.2d 232, 238 (N.D.1982). As stated in Matter of Estate of Rohrich, 496 N.W.2d 566, 571 (N.D. 1993); “Because an attorney employed by a beneficiary usually seeks to benefit only his or her client and not the entire estate, regardless of their professed motives or resulting outcome, attorney fees are disallowed.”

Steven C. Hogen refused to execute any deed distributing the inherited real property so that Steven C. Hogen could personally gain at Rodney’s expense. Steven C. Hogen’s disloyalty to his mother’s Will’s directions for an equal inheritance between two (2) brothers should have precluded any award of attorney fees. See, In re Estate of Wallace, 829 S.W.2d 696 (Tenn. Ct. App. 1992); Ray v. National Health Investors, Inc., 280 Ga. App. 44, 633 S.E.2d 388 (2006); and In re Estate of Stowell, 595 A.2d 1022 (Me. 1991).

Ohnstad Twichell, representing

Steven C. Hogen as a personal representative of his mother's estate, and representing Steven C. Hogen, individually, as a devisee trying to snag a greater share of the estate than entitled to under his mother's Will, has a conflict of interest precluding attorney fees. As a fiduciary under the Will of his mother, Steven C. Hogen has a fiduciary duty to distribute all property to the two (2) persons entitled to all property – Steven and Rodney [and to his transferees], equally. The lawyers, as fiduciaries representing the Estate of Arline H. Hogen, have undertaken a duty of loyalty to the Arline Hogen's Will, and a duty of impartiality to all devisees. By agreeing to undertake a duty to represent the Estate, Ohnstad Twichell assumed a duty to all interested persons to make sure that the distribution of all property to the two (2) persons entitled to all property – Steven and Rodney [and/or his transferees], equally – take place as soon, and as inexpensively, as possible. In re Estate of Fogelman, 197 Ariz. 1172, ¶ 17, 3 P.3d 1172 (2000); and In re Estate of Wallace, 829 S.W.2d 696 (Tenn. Ct. App. 1992). When Ohnstad Twichell, P.C., choose to simultaneously represent Steven C. Hogen's individual interests, altering Arline Hogen's Will's demand for equal and timely distribution, Ohnstad

Twichell, P.C., breaches its ethical duties without notice to, and without consent of, Rodney Hogen. By participating in litigation when there are clear conflicts of interest that are obvious – Ohnstad Twichell, P.C., is not entitled to receive any legal fees from the Trust assets, Estate assets, and Steven or Rodney, as individuals. In re Estate of McCool, 131 N.H. 340, 351, 553 A.2d 761 (1988); In re Estate of Watson, 5 Neb.App. 184, 557 N.W.2d 38 (1996).

- C. Although this court's April 3, 2017, order authorized a shifting of attorney fees to Rodney Hogen, it did not make a determination of the amount of attorney fees. Steven C. Hogen, and/or his attorneys, Ohnstad Twichell P.C., have failed to bring a motion for the amount of the attorney fees with 21 days of the April 3, 2017, order, as required by N.D.R.Civ. P. 54(e)(3). The failure of Steven C. Hogen, or his attorneys, to abide by the procedural rules to recover attorney fees, should preclude an award of attorney fees. Further, due to the "American Rule," the amount of attorney fees that could be shifted to Rodney Hogen would be a court determined "reasonable" amount and only incurred when responding to Rodney Hogen's 2015 Petition to Restrain the Personal

Representative – not the massive amount Ohnstad Twichell, P. C., bills [i.e. over \$10,000 for an eviction action] nor matters Steven C. Hogen presented, himself, to this court.

[¶62] WHEREFORE, Petitioners pray that the Court fix a time and place of hearing; that notice be given to all interested persons as provided by the laws of the State of North Dakota; that, after notice, and proper hearing, the court enter a judicial order formally determining the Petitioners have voided the transactions stated above; that the court enter a judicial order determining this court acted in excess of its jurisdiction, or without jurisdiction, when entering its Order on Petition for Complete Settlement and Distribution of Estate of April 3, 2017, and vacate all orders that are inconsistent with an equal [50-50] distribution of property and the statutory protections of the statutes concerning the partition of lands; that the court enter a judicial order determining this court did not regularly pursue any authority it might have when this court, issued its Order on Petition for Complete Settlement and Distribution of Estate of April 3, 2017, shifting attorney fees to Rodney Hogen; that the court enter a judicial order determining neither Steven C. Hogen, nor Ohnstad Twichell, P. C., are entitled to attorney fees from the estate or Rodney Hogen due to the above stated conflicts of interest; and for such other and further relief as is just and proper.

Dated this 2nd day of August, 2018.

App. 266

GARAAS LAW FIRM
s/ Jonathan T. Garaas

Jonathan T. Garaas
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Telephone: (701) 293-7211
ND Bar ID # 03080
s/ Rodney Hogen

Rodney Hogen, Petitioner

s/ Susan Hogen

Susan Hogen, Petitioner

State of North Dakota
County of Cass

Rodney Hogen and Susan Hogen, being duly
sworn, state as follows:

That they are two (2) of the Petitioners in the
foregoing petition; that they have read the petition, and
the facts therein stated are true to the best of their
knowledge.

s/ Rodney Hogen

Rodney Hogen

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s/ Susan Hogen

Susan Hogen

Subscribed and sworn to before me this 2nd day of August, 2018.

s/ Jonathan T. Garaas & seal

Notary Public

Signature Page of Petitioner Marby Hogen

s/ Marby Hogen

Marby Hogen

State of North Dakota
County of Burleigh

Marby Hogen being duly sworn, states as follows:

That she is one of the Petitioners in the foregoing petition; that she has read the petition, and the facts therein stated are true to the best of her knowledge.

s/ Marby Hogen

Marby Hogen

Subscribed and sworn to before me this 2nd day of

App. 268

August, 2018.

s/ Gretchen N. Vetter & seal

Notary Public

APPENDIX W

Jonathan T. Garaas
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
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North Dakota Bar ID #03080 Probate No. 09-07-P-100
Attorneys for Rodney Hogen

IN THE DISTRICT COURT FOR
CASS COUNTY, NORTH DAKOTA

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

**OBJECTION TO DISCHARGE OF THE PERSONAL
REPRESENTATIVE IN SUPERVISED
PROCEEDINGS**

[¶1] *IF THERE ARE VALID PROBATE PROCEEDINGS NOW EXISTING*, NOTICE IS HEREBY GIVEN that devisee and interested person Rodney Hogen, and interested persons Susan Hogen and Marby Hogen, hereby object to the “discharge” of Steven C. Hogen, as the Personal Representative in the supervised administration of the above named estate, which supervised administration was initiated by an *ex*

parte order of this court issued on January 11, 2016, in violation of Due Process of Law,¹ and statute forbidding new informal or formal estate proceedings more than three (3) years after Arline Hogen's death in 2007 – the “ultimate time limit for probate, testacy, and appointment proceedings as referenced in Dennison v. North Dakota Dept. Of Human Services, 2003 ND 10, ¶11, 656 N.W.2d 25,² followed by entering into a “winding-up” stage after this court had already issued its “concluding” Order on Petition for Complete Settlement and Distribution of Estate dated April 3, 2017. District Docket Entries #621 and #703. All orders are contrary to the prior order of the Court made pursuant to statute, and mandate of the North Dakota Supreme Court in Estate of Hogen, 2015 ND

¹ Steven C. Hogen falsely claimed status as personal representative when seeking supervised administration after the “final” judgment in the estate proceedings (never appealed). N.D.C.C. § 30.1-17-08 specifically provides the termination of under the statute, also “terminates the personal representative’s authority to represent the estate in any pending or future proceeding.” In the same statute, the termination of the estate also “ends the right and power pertaining to the office of personal representative as conferred by this title or any will ..”

² N.D.C.C. § 30.1-12-08 forbids commencement of any probate proceedings “more than three years after the decedent’s death”, and none of the five (5) exceptions existed in 2017, or ever. Moreover, even if Steven C. Hogen could fit into any of them, it would have to be subsection 4 which provides “the personal representative has no right to possess estate assets as provided in section 30.1-18-09 beyond that necessary to confirm title to the assets in the successors to estate and claims other than expenses of administration may not be presented against the estate.”

125, 863 N.W.2d 876, following “an order approving a final accounting and settlement in the probate of the estate of Arline Hogen.” *Id.*, ¶1.

[¶2] Although they have no objection to the resignation of Steven C. Hogen as a personal representative of the irregularly-established supervised administration of the above named estate [an estate already terminated by operation of law; the authority of the personal representative having been terminated, and already discharged according to the UPC Editorial Board Comments³ at N.D.C.C. § 30.1-17-08 (UPC 3-1001 is N.D.C.C. § 30.1-21-01 the statute authorizing “an order of complete settlement of the estate” utilized in the Estate of Hogen)], Rodney Hogen, Susan Hogen and Marby Hogen object to the discharge of Steven C. Hogen as the personal representative in the supervised proceedings. Steven C. Hogen has failed in his statutory duty [N.D.C.C. § 30.1-18-12] to exercise his power(s) concerning the estate [if they exist] in a proper manner, as a fiduciary with the same duties as a trustee of an express trust. In all transactions related to the devolvment [or his purported allocation, partition, or sale] of real property, Steven C. Hogen has been disloyal to the Last Will and Testament of Arline H. Hogen, deceased, that called for an equal distribution to residuary devisees Steven C. Hogen and Rodney Hogen. In all transactions related to the devolvment [or his purported allocation, partition, or

³ Estate of Hogen, at ¶12: “In construing the U.P.C., we may also look to the Editorial Board Comment for guidance. (citation omitted).”

sale] of real property, and in conflict with his mother's Will, Steven C. Hogen has improperly used his power(s) to promote positions, transactions, and litigation that advance his own personal interests to achieve a greater share of the probate estate [or distribution] to him as compared to his brother Rodney Hogen [and Rodney's transferees]. In attempt to gain personally, at the expense of his brother Rodney Hogen [and Rodney's transferees], Steven C. Hogen has exceeded his statutorily granted powers, and has exceeded any authority granted by this court's April 3, 2017, concluding order. Because of Steven C. Hogen's clear disregard of his fiduciary duties to them, Rodney Hogen, Susan Hogen, and Marby Hogen object to his discharge as a personal representative in the irregularly-created supervised administration. At the time of making their objection to the personal representative's discharge, Rodney Hogen, Susan Hogen, and Marby Hogen note that the personal representative has not distributed one (1) claimed estate asset, but rather, has placed all claimed probate assets in the hands of Ohnstad Twichell, PC – a law firm that has a conflict of interest with the devisees relating to fees barred by applicable law – and then he proposes, without statutory authority or court authorization, to leave all decision-making to the law firm as to what is paid [distributed?], and to whom.

[¶3] Rodney Hogen, Susan Hogen, and Marby Hogen's objection to the discharge includes, but is not necessarily limited to the following reasons (in addition to the primary objection relating to the authority to act following termination and discharge pursuant to prior

“final” judgment/order):

- A. On August 2, 2018, devisee and interested person Rodney Hogen, and interested persons Susan Hogen and Marby Hogen, filed herein a verified Declaration of Interested Persons Voiding The Allocation, Partition, Sale, Encumbrance of Real Property Once Owned by the Decedent And Petition of Interested Persons for Order Voiding Personal Representative’s Allocation, Partition, Sale or Encumbrance of Real Property Once Owned by the Decedent [Or Order Confirming the Declaration of Interested Persons Voiding the Personal Representative’s Transaction(s)] and Petition of Interested Persons to Vacate This Court’s Order of April 3, 2017. District Court Docket #729. Rodney Hogen, Susan Hogen and Marby Hogen hereby re-state, and incorporate by reference, all matters set forth in said declaration and petition(s), and state such re-stated and incorporated reasons preclude the discharge of Steven C. Hogen as the personal representative in the supervised administration.
- [¶4] B. Steven C. Hogen, breaching his fiduciary duty of loyalty, is failing to distribute the estate equally – at date of distribution values – to the two (2) residuary devisees

[or their transferees, as the transferee's interest appears] as required by the terms of Arline H. Hogen's Will. Steven C. Hogen has pursued an unequal distribution that conflicts with statutory provisions within N.D.C.C. Title 30.1. Under the terms of the controlling Will and statutes, if Steven C. Hogen has accomplished a commercially reasonable sale of any part of the property of the estate, Steven C. Hogen would be required to distribute all real property not sold by him as a personal representative, to Steven C. Hogen and Rodney Hogen, equally [as tenants in common, with tenant in common owner Rodney Hogen's interest subject to his 2014 conveyances to Susan Hogen and Marby Hogen].

- C. Not only is Steven C. Hogen acting inconsistently with the decedent's controlling Will, and controlling statutes relating to distribution, he is acting inconsistently with this court's 2013 and 2014 concluding "final" order(s) that require a 50%-50% distribution to Steven C. Hogen and Rodney Hogen [now subject to Rodney's transfer of part of his inherited real property to Susan Hogen and Marby Hogen]. This court's 2013 and 2014 concluding order(s), now "final", were made upon Steven C. Hogen's own

petition under N.D.C.C. § 30.1-21-01, were affirmed on appeal in Estate of Hogen, 2015 ND 125, 863 N.W.2d 876, and are the law of the case and/or subject to the mandate rule. Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, ¶12, 729 N.W.2d 101; Viscito v. Christianson, 2016 ND 139, ¶7, 881 N.W.2d 633.⁴

D. Steven C. Hogen has wrongfully obtained

⁴ Viscito v. Christianson, 2016 ND 139, ¶ 7, 881 N.W.2d 633:

“Generally, the law of the case is defined as the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. In other words, [t]he law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings, and [a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal. The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the [appellate court's] mandate into effect according to its terms.... and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms.

Carlson v. Workforce Safety & Ins., 2012 ND 203, ¶ 16, 821 N.W.2d 760 (citations and quotation marks omitted); see also *Inv'rs Title Ins. Co. v. Herzig*, 2013 ND 13, ¶ 10, 826 N.W.2d 310.

an April 3, 2017, order from this court based upon his fraudulent misrepresentation to this court as to Rodney Hogen's testimony in court proceedings involving the Curtiss A. Hogen Trust B. Due to Steven C. Hogen's fraudulent misrepresentation that Rodney Hogen had agreed to an allocation of real property, this court allowed an unequal allocation of real property, and a sale of part of the property allocated to Rodney Hogen. Steven C. Hogen failed to make adequate disclosure(s) of his intentions relating to his proposed sale of real estate once owned by decedent. Steven C. Hogen never informed Rodney Hogen [or this court] he intended to sell *all land* allocated to Rodney Hogen. This court did not previously authorize the sale of all of Rodney Hogen's interest in and to the real property, as Steven C. Hogen now purports to have done. Because of Steven C. Hogen's clear conflict of interest concerning the allocation and sale, Rodney Hogen has voided all transactions made by Steven C. Hogen involving Rodney Hogen's inherited real estate. Steven C. Hogen is not entitled to be discharged until (1) Rodney Hogen's statutory right [N.D.C.C. § 30.1-18-13] to revoke the transactions are honored by the personal representative [and/or the court], and (2)

Rodney Hogen [and his transferees] are distributed 50% of all real property of the estate.

- E. Steven C. Hogen failed to provide interested persons Susan Hogen and Marby Hogen either notice, or a meaningful opportunity to be heard, that their respective interests in and to real property was contemplated to be sold, allocated, partitioned, or encumbered by him. Until August 2, 2018, neither Susan Hogen nor Marby Hogen had entered an appearance in the probate proceedings that trailed the February 20, 2014, quit claim deeds that transferred, into them, an interest in the subject real property. Without notice to Susan Hogen and Marby Hogen – 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 them, or their interest in the lands [for they have not voluntarily appeared in the probate proceedings until August 2, 2018, when they sought to guard themselves – and others – from the wrongful acts of Steven C. Hogen (and his attorneys) purporting to act as a personal representative]. As stated in Alward v. Borah, 381 Ill. 134, 136-138, 44 N.E.2d 865, 867-868 (1942).

It is a matter of common knowledge that some estates are not settled for many years, and third parties may acquire interests in the real estate passing to the heir. It is also well known that where an estate is devised by will, rights of third parties may be acquired by judgment or otherwise, even though it be subject to the demands of creditors of decedent. When, however, the administrator or executor undertakes to exercise his power of sale in the manner provided by statute, the latter requires that all persons having an interest therein shall be made parties. If the appellees in this case had been made parties they would have had an opportunity to protect their rights by becoming bidders at the sale, but having no notice they necessarily are not bound.

The mineral deeds of appellees were on record,

and appellant, as purchaser of the premises, was bound to examine the title and ascertain what he was getting through the deed of the executor. Leininger v. Reichle, 317 Ill. 625, 148 N.E. 384; Shup v. Calvert, 174 Ill. 500, 51 N.E. 828. Appellees, as owners of record of an interest in the real estate involved, were entitled to notice of the proceeding. In the early case of Botsford v. O'Conner, 57 Ill. 72, we said: 'It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard, before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable

opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right.' So far as we know, we have never departed from this rule, but have reaffirmed it many times. Leininger v. Reichle, *supra*; Heppe v. Szczepanski, 209 Ill. 88, 70 N.E. 737, 101 Am.St.Rep. 221.

Appellant cites a number of cases to the effect that an heir or devisee cannot sell or mortgage his interest in land to the prejudice of the ancestor's creditors, and that the executor has the authority to sell the entire interest of the deceased under the statute. There can be no doubt about either legal proposition advanced, but this does not dispose of the requirement that the interested parties must be brought before the court in such a proceeding. No one, we presume, would claim that an heir would be

foreclosed of his right in his ancestor's property by such a proceeding unless he be made a party (Burr v. Bloemer, *supra*), and since the statute expressly provides that not only heirs, but also all persons holding liens or having or claiming any interest, in possession or otherwise, must be made parties to such a proceeding, it necessarily follows that before grantees of an heir or devisee may be deprived of their rights in a proceeding under the statute to pay debts, they must have had their day in court.

In every case cited by appellant, while general language was used, an examination of the case shows that service of process was had upon the interested parties, and no single case cited holds that a person acquiring an interest from an heir or devisee may be deprived of his rights in a proceeding by the administrator or

executor to sell property to pay debts without being made a party and served with process, as required by the statute or law then in effect. It follows that the proceeding of the executor in the present case against the appellees was without any force of effect whatever. Burr v. Bloemer, *supra*; Leininger v. Reichle, *supra*. Appellees raise some question as to the validity of the sale and the jurisdiction of the court to enter a decree of sale. Since appellees were not parties to the proceeding it is not necessary to consider this point, as it is immaterial to appellees whether the proceeding was regular or irregular. They were not parties thereto, and are not bound thereby.

Because Susan Hogen and Marby Hogen have not been provided Due Process of Law by Steven C. Hogen [see, *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 796 (1996)] concerning the allocation, partition or sale of their real property

interests, the two (2) of them are not bound by the prior orders of this court [any order trailing the February 20, 2014 deeds, and preceding their August 2, 2018, appearance]. Due to Steven C. Hogen's inequitable allocation, and inappropriate sale of the subject real property, Susan Hogen and Marby Hogen exercised their statutory right [N.D.C.C. § 30.1-18-13] to void all of Steven C. Hogen's transactions relating to their real property interests. Steven C. Hogen is not entitled to be discharged until interested persons Susan Hogen and Marby Hogen's statutory right to revoke the transaction(s) are honored by the personal representative and/or the court, and 50% of the real estate be distributed to Rodney Hogen and Susan Hogen, for their lives, and the remainder to Marby Hogen.

- F. The purported personal representative's auction sale was not made in a commercially reasonable manner. Neither Susan Hogen nor Marby Hogen were ever afforded prior notice [or a meaningful hearing] their interests in lands were in jeopardy of being sold; and neither consented to the auction sale. Neither Rodney Hogen, Susan Hogen, nor Marby Hogen – through their attorneys – were allowed to bid at the sale in order

to protect their real estate interests. Alward v. Borah, *supra*. Purportedly, a farm site was sold in 2017 [without a 2017 appraisal] at a price less than its 2007 appraised value. Steven C. Hogen has a fiduciary duty to conduct any sale of probate property in a commercially reasonable manner. Steven C. Hogen breached such duty when he precluded Rodney Hogen, Susan Hogen, or Marby Hogen [or their attorneys] from participating in the advertised public auction. When Steven C. Hogen accepted the 2017 low bid for the farm site, at a price less than what Rodney Hogen was forced to accept for such farmstead through Steven C. Hogen's 2017 allocation, Steven C. Hogen breached his fiduciary duties to Rodney Hogen, Susan Hogen, and Marby Hogen. See, the unpublished opinion of In re Estate of Anderson, Not Reported in N.W.2d, 2016 WL 3582414 (Mn. Ct. of App. 2016), for an apt discussion concerning a breach of a fiduciary duty by the acceptance of an inadequate sale price. Said Minnesota Court of Appeals opinion also has an apt definition for the necessary "conflict of interest" to void a transaction made by a personal representative under Minnesota's statutory equivalent to N.D.C.C. § 30.1-18-13: "A personal representative has a conflict of interest if

his personal interests directly conflicts with the decedent's interests."

- G. Steven C. Hogen's seeks discharge despite his failure to carry out the mandate of the Supreme Court of North Dakota [see, Estate of Hogen, *supra*.] that affirmed this court's "final" order(s) of 2013 and 2014, and are the law of the case, and subject to the mandate rule. Steven C. Hogen's acts, proposal, and circumstances upon which he seeks changes are contrary to the law expressed in In re Cashmore, 2010 ND 159, 787 N.W.2d 261, for he is attempting to alter a final decree. Until Steven C. Hogen distributes all real property owned at death of Arline Hogen equally between himself and Rodney Hogen [and his transferees], Steven C. Hogen is not entitled to a discharge. He has failed to honor both Will and law.
- I. Other than what was distributed through this court's concluding order(s) of 2013 and 2014 [and long-ago "final"], Steven C. Hogen has not distributed any property to anyone, but rather, he has transferred what property he did hold to Ohnstad Twichell, PC. The Ohnstad Twichell law firm has a substantial conflict of interest with the Estate of Arline Hogen, Deceased, and the devisees named in her Will. The law firm has pursued a probate

strategy designed to solely promote Steven C. Hogen's selfish motives of obtaining a greater share of the real property while distributing to Rodney Hogen a specious "Right to Retainer". Under such circumstances, neither Steven C. Hogen, nor his attorneys' fees for his attorneys' services should be shifted to Rodney Hogen, or to the Arline Hogen Estate, for such attorney fees were rendered solely on behalf of Steven C. Hogen personally, and for his own self motive. See, Raszler v. Raszler, 81 N.W.2d 120, 123 (N.D. 1957); Sturdevant v. Sturdevant, 340 N.W.2d 888, 892-893 (N.D. 1983); and Coulter v. Coulter, 328 N.W.2d 232, 238 (N.D.1982). As stated in Matter of Estate of Rohrich, 496 N.W.2d 566, 571 (N.D. 1993): "Because an attorney employed by a beneficiary usually seeks to benefit only his or her client and not the entire estate, regardless of their professed motives or resulting outcome, attorney fees are disallowed." The Ohnstad Twichell law firm has a conflict of interest for it seeks fees from the estate despite such conflict. It also seeks fees from the estate that are barred by various statutes, including but not necessarily limited to, N.D.C.C. § 30.1-19-03(2), N.D.C.C. 30.1-21-06, N.D.C.C. 30.1-21-08, and/or N.D.C.C. § 28-01-06.

Because of Steven C. Hogen's transfer of "estate" property to Ohnstad Twichell, PC, [an entity with a clear conflict of interest], Rodney Hogen, Susan Hogen, and Marby Hogen have voided the transaction. Steven C. Hogen is not entitled to a discharge until all monies and/or property transferred to Ohnstad Twichell, PC, are distributed equally to Steven C. Hogen and Rodney Hogen [and his transferees] – without payment of any attorney fees barred because of the conflict of interest, or barred by statute.

- J. Litigation involving the supervised administration of Arline Hogen and Susan Hogen and Marby Hogen is still pending in a case entitled "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" and docketed in the Supreme Court of North Dakota as case #20180143. Steven C. Hogen should not be discharged until all probate litigation is concluded.

- K. Steven C. Hogen has failed to account for any of his actions since his appointment – Rodney Hogen has not received any notice of any transactions or activities of the Personal Representative since issuance of the 2017 order for supervised administration, and never has there been any accounting for any cash rent, income, or expenditures.
- L. There can be no payment of any claims or attorney fees – only confirming title in Steven C. Hogen and Rodney Hogen [and his transferees] is possible. “In a tardy proceeding, the personal representative can only “confirm title” to estate assets, and “[c]laims other than expenses of administration shall not be presented against the estate.” Ader v. Estate of Felger, 375 P.3d 97, 106 (Ariz. Ct. App. 2016), citing Arizona’s statute modeled upon U.P.C. 3-108 [N.D.C.C. § 30.1-12-08; see Footnote #2]. The North Dakota Supreme Court impliedly recognized this statutory limitation upon judicial action in the case known as In re Estate of Huston, 2014 ND 29, ¶s14 & 15, 843 N.W.2d 3, stating the District Court “did not misapply the law and provided a reasoned explanation for its determination not to remove (the personal representative)”, in part: “It has been over three years since the date of

death of Mr. Virgil N. Huston, so the personal representative only has power to confirm title to property that transferred at the moment of his passing.” The decision fully recognizes the transfer of title at the “moment of passing”, “immediately upon death”, “instantaneously upon death”, or a hundred other ways of recognizing the transfer of title by Will or by operation of law (not necessarily by deeds).

[¶5] As to the consolidation of hearing done by ex parte motion/order, and contrary to law because our rules require “Notice must be served and filed with a motion” under N.D.R.Ct. 3.2(a)(1) and/or N.D.R.Civ.P. 6(d), the undersigned legal counsel does not believe that the prospective purchasers’ due process rights are being protected, nor are the rights of anyone else being protected. A motion for consolidation, without any accompanying notice of motion, along with meaningful opportunity to respond, is worthless. Our rules provide for appropriate response periods, and the Court failed to take into account the need for fourteen (14) days notice to the prospective purchasers under N.D.C.C. § 30.1-03-01. Indeed, no notice was afforded anyone before the court acted in violation of Due Process of Law.

[¶6] WHEREFORE for the above state reasons. Rodney Hogen, Susan Hogen, and Marby Hogen request this court enter an appropriate order denying the discharge of Steven C. Hogen.

App. 290

[¶7] Dated this 8th day of August, 2018.

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APPENDIX X

In District Court, County of Cass, State of North
Dakota

IN THE MATTER OF THE ESTATE OF ARLINE E.
HOGEN, DECEASED

CIVIL FILE NO. 09-07-P-00100

Transcript of Proceedings

RECORDED ON JULY 22, 2010
(Page 63, lines 6-21)

THE COURT: Okay. You know, we've had this hearing now for, what, oh, hour and a half or so and we've talked about a lot of procedure, wrangling, who has provided what information, who wants information in what format, how we're going to proceed in trying it when we have a couple of farm boys that want to try the meat and potatoes of a case as to whether or not there's a contract; and if there is a contract, has it been breached; and if it's breached are there damages.

And I want to get to that point. And I don't like seeing this kind of wrangling and positioning because it's all going to come down to the fact that some way, in some shape or form, I'm going to hear the evidence and

make the determination.

And once that's done the Estate will be distributed accordingly and this case will be over. And hopefully all these things will just disappear.