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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Jacquelynn D. Blikre, Deceased --- Jean Nordahl, as Personal Representative of the Estate of Jacquelynn D. Blikre, Deceased, Petitioner and Appellee, v. Sharron Jensen, Respondent and Appellant, and Jennifer Jensen, Interested Party and Appellant, and Tamra Engle, Interested Party and Appellee, _____	Supreme Court No. 20180162 District Court No. 2016-PR-00140

Appeal from the Order for Formal Probate of Jacquelynn D. Blikre Will Dated April 20, 2005, and Appointment of Jean Nordahl as Personal Representative entered on February 26, 2018 and the Order on Remand entered on February 19, 2019, in District Court Case Number 2016-PR-00140

County of Mountrail, North Central Judicial District
Honorable Richard L. Hagar, Presiding

APPELLANTS' REPLY BRIEF

Andrew D. Cook, ND ID #06278
Sara K. Sorenson, ND ID #05826

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078-0458
PHONE: 701-282-3249
E-MAIL: acook@ohnstadlaw.com
ssorenson@ohnstadlaw.com
Attorneys for Appellants

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INTRODUCTION

[¶1] The issues before the Court are whether a will executed outside the presence of the witnesses is valid, whether a missing will is revoked by law when it was not seen in more than 11 years since execution, and whether the testator's handwritten instructions concerning her estate should be given effect. Rather than addressing these substantive issues, the Personal Representative's brief consists largely of irrelevant personal attacks and innuendo against the Jensens. Because the 2005 Will was invalid, revoked, or replaced, the Court should reverse the district court's decision probating the 2005 Will.

ARGUMENT

I. The 2005 Will was Invalid Because the Witnesses Were not Present

[¶2] The Appellee's Brief avoids the central problem of the invalidity of the 2005 Will by focusing on procedural complaints and after-the-fact affidavits that seek to undermine the Personal Representative's unambiguous testimony. Neither of these arguments should be accepted by this Court.

A. The Personal Representative has an affirmative fiduciary duty to disclose the invalidity of the 2005 Will

[¶3] First, the Personal Representative faults the Jensens for not discovering the 2005 Will was invalid during the October 2017 hearing. The Personal Representative essentially argues he knew the Will was invalid, but the Court should overlook that fundamental problem because Sharron Jensen did not ask the correct questions to elicit the information he possessed.

[¶4] First, the Personal Representative now alleges his testimony was mistaken. Thus, it makes little sense to argue Sharron should have elicited the testimony in October 2017, while simultaneously disavowing that testimony.

[¶5] More importantly, the Personal Representative ignores the fact he serves as a fiduciary. "The fiduciary duty is 'the highest standard of duty implied by law.'" Enders v. Parker, 66 P.3d 11, 16–17 (Alaska 2003) (quoting Black's Law Dictionary (6th ed.1990)). The Personal Representative is held to the standards of a trustee, including the duty of good faith and loyalty. N.D.C.C. § 30.1-18-03(1). "A trustee must act with the highest good faith toward the beneficiary and not obtain any advantage over the beneficiary by the slightest concealment[.]" Estate of Vizenor ex rel. Vizenor v. Brown, 2014 ND 143, ¶ 12, 851 N.W.2d 119 (internal quotation marks and citation omitted). "Th[e] duty to make full disclosure and otherwise to exhibit extreme good faith runs through the whole law of fiduciary and confidential relations [and] applies to . . . administrator and next of kin." Estate of Whitlock, 615 A.2d 1173, 1177–78 (Me. 1992) (quoting George G. Bogert, Trusts and Trustees § 544, at 407–08 (2d ed. 1978)). "A personal representative as a fiduciary has a duty of full disclosure to all interested persons and the court[.]" The Florida Bar, 537 So. 2d 500, 539 (Fla. 1988).

[¶6] Under this well-established law, the Personal Representative cannot blame the Jensens because he maintains an affirmative duty to advise the Court and the heirs if the Will is invalid. "The personal representative has a duty to make a full disclosure to the court of all facts necessary for a proper distribution of the estate, even if no interested parties file objections." 31 Am. Jur. 2d Executors and

Administrators § 932; see also Diaz v. Duncan, 406 N.E.2d 991, 1002 (Ind. Ct. App. 1980). The Personal Representative cannot sit silently when he knew or should have known the 2005 Will was invalid.

B. The district court erred in relying on self-serving affidavits

[¶7] Second, the Personal Representative asserts his sworn testimony should not be taken as "unassailable truth" because it is "far from precise" and the district court was not "compelled to accept that testimony as credible in the face of a Will." Appellee's Brief at 20. This argument contradicts his later assertions his "testimony was credible and trustworthy." Id. at 25.

[¶8] Setting aside the curious position of the Personal Representative declaring his own testimony not credible, the district court did not make such a determination. The court cited the affidavits of the Personal Representative and Enget, and concluded it had received credible evidence the witnesses were present. APP. 68. Thus, the issue is whether the court erred in relying on the affidavits to overcome the testimony.

[¶9] The court erred in relying on the Personal Representative's affidavit because self-serving affidavits offered to contradict testimony are to be disregarded. Guilford v. Nw Pub. Serv., 1998 SD 71, ¶ 12, 581 N.W.2d 178. While the Personal Representative frames his testimony as reflecting a lack of recollection, the transcript evinces no such lack of recollection because he repeatedly explained the precise sequence of events, the individuals present, and the conversations that took place.

[¶10] Next, the Personal Representative argues if Enget had been questioned at the October 2017 hearing, his testimony would resemble his affidavit. However,

Enget *was* questioned and repeatedly disclaimed having any recollection. See Trial Tr. 22:18-19 (Oct. 30, 2017); id. at 14:5-9; id. at 17:25-18:2; id. at 13:17-20; id. at 24:1-4. Enget's affidavit is consistent in this respect, as he states he did not remember the 2005 Will. APP. 56.

[¶11] Given Enget's lack of recollection, the court erred in relying on an affidavit in which Enget opined "he *would not have* notarized the signatures . . . unless the witnesses were physically present[.]" APP. 64 (emphasis added). As recognized in Beckler v. Bismarck Public School District, 2006 ND 58, ¶ 12, 711 N.W.2d 172, "speculations and conclusions" something must have happened because it often happens is insufficient to overcome direct evidence to the contrary. The Personal Representative's testimony is the only direct evidence explaining the execution of the 2005 Will, and that testimony cannot be overcome by an affidavit describing what ordinarily would have happened. The Personal Representative does not mention Beckler, let alone explain how it does not apply.

[¶12] Finally, the Personal Representative contends this Court should remand regarding the execution circumstances. The Personal Representative is not entitled to another hearing because the court already held an evidentiary hearing on January 25, 2019. The Personal Representative does not get a do-over from his testimony that was admitted into evidence. Nor are there remaining factual disputes because the testimony is the sole account describing the execution of the 2005 Will.[1]

[1]The Personal Representative asserts the Jensens are attempting to impeach trial testimony. However, the Personal Representative's testimony was entered into evidence, and it is he who improperly seeks to impeach his own trial testimony through contrary, self-serving affidavits.

As a result, this Court should recognize the affidavits are insufficient as a matter of law to overcome the direct evidence, in accordance with Beckler.

C. The district court erred regardless of the procedural posture

[¶13] Finally, the Personal Representative contends the district court properly considered the issue as a Rule 60(b) motion based on newly discovered evidence. Rule 60(b) has no application because it only applies to relief from a "final judgment, order, or proceeding." N.D.R.Civ.P. 60(b). At the time the court issued its Order on Remand, there was no "final judgment, order, or proceeding." Indeed, this Court remanded after an initial appeal because the case was not final, and the Court has even questioned whether it is final for purposes of the present appeal.

[¶14] Moreover, the Rules of Civil Procedure do not apply to special statutory proceedings, including probate matters. See N.D.R.Civ.P. 81(a). The Uniform Probate Code is inconsistent with Rule 60(b) because it allows an order to be vacated by the proponents of a later-offered will or when good cause exists. N.D.C.C. § 30.1-15-12; N.D.C.C. § 30.1-15-13. Regardless of whether the issue is considered as a post-trial matter following the January 25, 2019 hearing, a motion under N.D.C.C. § 30.1-15-13, a motion for relief under Rule 60(b), or a motion for reconsideration, the district court erred in not granting relief because the 2005 Will is invalid.

II. The 2005 Will was Revoked by Operation of Law

[¶15] Next, the Personal Representative concedes it is presumed the missing 2005 Will was revoked and he bears the burden of overcoming that presumption. He contends In re Estate of Conley, 2008 ND 148, 753 N.W.2d 384, allows the

presumption to be overcome through alternative means. This may be true,[2] but he fails to explain how he overcame the presumption through any alternative means.

[¶16] The focus in each of the alternative findings is the original will and the testator's actions. The Personal Representative's case rests almost entirely on casting Sharron in a negative light. He attacks Sharron's actions in obtaining items for Blikre, her memory, and her management skills. None of these allegations answer the question of whether Blikre intended to revoke the 2005 Will. For instance, even accepting as true the trivial accusations that Sharron did not keep proper gas receipts while serving as attorney-in-fact, how does that prove Blikre did not intend to revoke the 2005 Will? How does Sharron's possession of two rifles in 2019 prove the 2005 Will was still in effect at Blikre's death?

[¶17] The Personal Representative also faults Sharron for not asking follow-up questions after Blikre denied having a will. It is unclear what follow-up questions should have been asked or what "written explanation" Sharron should have demanded from her ailing sister. This argument exemplifies the Personal Representative's broader approach: taking a straightforward fact — Blikre denying she has a will — and turning it into a personal attack against Sharron for not demanding Blikre provide a "written explanation," when no such writing is needed or contradicts the fact Blikre denied having a will.

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[2]The Personal Representative makes other arguments explicitly rejected in Estate of Conley. For example, he suggests there was no request by Blikre to Enget to revoke the 2005 Will. "The fact that a conformed copy of the missing will is in the office of the attorney who drafted it does not alter the rationale for the presumption." Estate of Conley, 2008 ND 148, ¶ 21. Thus, Blikre was not required to track down and destroy each copy that ever existed.

[¶18] Although the Personal Representative clouds the record with more serious implications Sharron destroyed the 2005 Will, he ultimately concedes he did not prove that occurred. In any event, the Personal Representative may not overcome the presumption by implying some nefarious motive on Sharron's part. See, e.g., In re Estate of Pallister, 611 S.E.2d 250, 257 (S.C. 2005); Daul v. Goff, 754 So.2d 847, 848 (Fla. D.C. App. 2000). The Personal Representative provides no authority disputing this principle, yet he returns to the same misguided attacks on Sharron's purported motivation.

[¶19] The only other event relied upon by the Personal Representative is a conversation where Blikre directed him to divide her minerals between Sandra and Sharron, and her remark that he "knew what to do" a few months thereafter.[3] However, Blikre's direction contradicted the 2005 Will, which is more indicative the Will was revoked. The Personal Representative cannot overcome the presumption by relying on evidence where Blikre directed him to do the *opposite* of what the Will provides. Under these circumstances, the Court should reverse the district court's decision to probate the missing 2005 Will.

[3]The Personal Representative contends Blikre reaffirmed her testamentary intent through this conversation. Yet, he discards the notion Blikre could have expressed her intent through her handwritten writings executed after this date.

Similarly, the Personal Representative faults Sharron for not demanding a "written explanation" when she denied having a will, but he did not do the same when Blikre ambiguously stated he "knew what to do." In each of these instances, the Personal Representative cannot have it both ways.

CONCLUSION

[¶20] The 2005 Will is invalid because it was not executed in the presence of the witnesses. Even if it were valid, there was not competent evidence to overcome the presumption the missing 2005 Will was revoked. Finally, Blikre's handwritten instructions replaced the 2005 Will, even assuming it were not revoked, and these instructions should be given effect. Under any scenario, the Court should reverse the district court's decision to probate the 2005 Will.

Dated: July 3, 2019.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID #06278
Sara K. Sorenson, ND ID #05826

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
Fargo, ND 58078-0458
TEL (701) 282-3249
FAX (701) 282-0825
acook@ohnstadlaw.com
ssorenson@ohnstadlaw.com
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellant in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 1,979 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 2,000 words.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID #06278
Sara K. Sorenson, ND ID #05826

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
Fargo, ND 58078-0458
TEL (701) 282-3249
FAX (701) 282-0825
acook@ohnstadlaw.com
ssorenson@ohnstadlaw.com
Attorneys for Appellants

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	)	Supreme Court No. 20180162
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Jean Nordahl, as Personal Representative of the Estate of Jacquelynn D. Blikre, Deceased,	)	District Court No. 2016-PR-00140
Petitioner and Appellee,	)	
v.	)	
Sharron Jensen,	)	
Respondent and Appellant,	)	
and	)	
Jennifer Jensen,	)	
Interested Party and Appellant,	)	
and	)	
Tamara Engle,	)	
Interested Party and Appellee,	)	
_____	)	

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I hereby certify that on July 3, 2019, I caused to be electronically filed the **Appellant's Reply Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

By North Dakota Supreme Court E-Filing Portal:

Charles L. Chapman . . . . . chapmanlaw@chaplawnd.com

By U.S. Mail:

Tamra Engle
P.O. Box 12
Eureka, MT 59917

Dated: July 3, 2019.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID #06278