
In the Supreme Court State of North Dakota

**Supreme Court Case No. 20100165
Barnes Co. Case No. 02-06-P-41-1**

In the Matter of the Estate of Bryan Keith Haugen, Deceased.

APPELLANT STACY L. HAUGEN'S REPLY BRIEF

**Appeal from Order Determining Testacy, Settlement of Account, and Closing
of Estate entered April 5, 2010, Probate No. 06-P-41
District Court of Barnes County
The Honorable Mikal Simonson, Presiding**

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I. LAW AND ARGUMENT

A. STACY HAUGEN WAS NOT DISINHERITED IN BRYAN HAUGEN'S WILL AND IS THEREFORE ENTITLED TO THE ENTIRE ESTATE

[1] Joyce Haugen ("Joyce") argues that Bryan Haugen's Will ("the Will") effectively disinherited Stacy Haugen ("Stacy"). Joyce asserts that because Stacy was disinherited in the Will, Stacy is only entitled to her elective share, if anything. However, the Will does not effectively disinherit Stacy, and as a result, she is the surviving spouse of Bryan Haugen and the sole heir of Bryan's estate.

1. Effect of Marital Separation

[2] Joyce does not dispute that Bryan and Stacy were still married at the time of Bryan's death. Joyce expressly concedes that "Stacy's right to inherit from Bryan's estate is not affected by the fact they were separated at the time of Bryan's death." Appellee's Brief, ¶ 18. Therefore, the marital separation of Bryan and Stacy does not affect Stacy's right to inherit Bryan's entire estate as the surviving spouse.

2. Stacy is Expressly Mentioned in the Will, Not Expressly Excluded

[3] Joyce argues that because Bryan's Will leaves Stacy nothing, Bryan excluded Stacy from taking under the Will. Appellee's Brief, ¶ 21. Joyce relies upon two portions of Bryan's Will in making this argument. The Will provides:

FIRST: I declare that I am married to Stacy L. Haugen; however, I am filing for divorce and that I have no children, natural or adopted, at the time of executing this, my Last Will and Testament.

...

NINTH: All of my heirs not mentioned in this will have been intentionally omitted.

(Supp. App. at 1).

[4] In the District Court, Joyce failed to argue that Stacy is expressly excluded from Bryan's Will, and thus is precluded from raising this issue or argument on appeal. (App. 71-72.) "The purpose of an appeal is to review the actions of the trial court, not to grant . . . an opportunity to develop and expound upon new strategies or theories." Gonzalez v. Tounjian, 2003 ND 121, ¶ 31, 665 N.W.2d 705 (citation omitted). This Court should not consider Joyce's argument that Bryan expressly excluded Stacy from inheriting under his Will because "[i]t is axiomatic that an issue or contention not raised or considered in the lower court cannot be raised for the first time on appeal from judgment." Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶ 13, 765 N.W.2d 705 (citations omitted).

[5] Even if this Court does consider Joyce's argument, this argument fails because it is based upon an implied interpretation, not any express language of Bryan's Will. N.D.C.C. § 30.1-04-01(2) does provide that a decedent may *expressly* exclude the right of an individual or class to succeed to property passing by intestate succession. (emphasis added). This Court has held, in interpreting § 30.1-04-01, that "[t]he plain language of the statute makes clear that disinheritance of either an individual or a class *must be expressed and cannot be implied*." In re Estate of Samuelson, 2008 ND 190, ¶ 17, 757 N.W.2d 44, 49 (emphasis added). "The sole purpose of the court in construing a will is to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will, when read in the light of the surrounding circumstances." In re Glavkee's Estate, 34 N.W.2d 300, 305 (N.D. 1948) (citation omitted). "The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will." Id.

[6] In his Will, Bryan declared that he is married to Stacy. (Supp. App. at 1). Within the same provision in which Bryan declared his marriage to Stacy, he did not expressly disinherit or exclude Stacy from taking under the Will. It therefore cannot be determined that Bryan “expressly exclude[d]” Stacy from inheriting under his Will. N.D.C.C. § 30.1-04-01(2); see Samuelson, at ¶ 3 (decedent expressly excluded his sister by stating in his will: “I have intentionally failed to provide for my half sister, Eleanor West.”). The First paragraph of Bryan’s Will is merely a provision of general declarations.

[7] Bryan did, however, include a paragraph in which he made an express declaration that “[a]ll of [his] heirs *not mentioned in this will* have been intentionally omitted.” (Supp. App. at 1) (emphasis added). The word “mention” means “a brief, often incidental, reference (to) or statement (about)” or “to refer to . . . briefly or incidentally; to specify, as by name.” Webster’s New Twentieth Century Dictionary, 1125 (2d. ed. unabridged 1983). Clearly, Bryan did indeed mention Stacy in the First paragraph of his Will. In doing so Stacy is excluded from the “all of my heirs not mentioned in this will” language used by Bryan in the Ninth paragraph of his Will. Therefore, Stacy is not excluded from taking under the Will.

[8] In her Brief, Joyce admits that “[Bryan] mentions [Stacy] in his will” Appellee’s Brief, ¶ 19. Joyce then, contrary to the plain language of the Will, impliedly concludes that because Bryan left everything to a family friend, “Bryan disinherited Stacy in his will.” Id. at ¶ 25. Joyce uses the qualifier “in other words” before stating her implication, thus acknowledging that the plain language of Bryan’s Will does not

expressly disinherit Stacy. Under this Court's holding in Samuelson, Stacy cannot be impliedly disinherited from Bryan's estate, as argued by Joyce.

[9] If this Court is to give meaning to the plain language of Bryan's Will, it must recognize that Bryan did not expressly exclude Stacy from inheriting his estate. Bryan indeed mentions Stacy in the Will, this effectively excludes her from the "[a]ll of my heirs not mentioned in this will" class, and she is rightfully the surviving spouse entitled to Bryan's entire estate. Joyce's position that Stacy is expressly excluded from taking under Bryan's Will and that Joyce is entitled to an intestate share of Bryan's estate must fail under a plain reading of Bryan's Will and N.D.C.C. § 30.1-04-02.

[10] Considering the plain language of Bryan's Will in light of the circumstances that existed at the time of its execution, it is actually Joyce who is excluded from receiving anything. Clearly, Joyce was a potential "heir" of Bryan's at the time he executed his Will, since both of Bryan's parents had predeceased him. Further, it cannot be disputed that Joyce was not "mentioned" in Bryan's Will. Thus, the plain language of Bryan's Will and the surrounding circumstances show his intent to disinherit Joyce and any other family members.

[11] Based on the foregoing, it cannot be determined, under a plain reading of Bryan's Will, that the Will expressly excludes Stacy from inheriting Bryan's estate. Stacy is expressly mentioned in the Will, not disinherited, and is not included in the class of "[a]ll my heirs not mentioned in this will[.]" Bryan's devise to Scott Hartvikson failed because Scott predeceased Bryan. Bryan's estate then must be distributed under North Dakota's intestacy statutes. Under the laws of intestate succession in North Dakota, Stacy, as the surviving spouse of Bryan—who was not excluded from taking under the

Will—is entitled to the entire estate. N.D.C.C. § 30.1-04-02. Therefore, Stacy is entitled to the entire share of Bryan’s estate as the surviving spouse of Bryan. Furthermore, it must be noted that Joyce’s position, that Bryan somehow expressly excluded Stacy from inheriting under the Will, was not argued or advanced at the District Court level and cannot be raised for the first time on appeal.

B. AS THE SURVIVING SPOUSE STACY WAS NOT REQUIRED TO WITHDRAW HER PETITION FOR AN ELECTIVE SHARE UNDER NORTH DAKOTA LAW

[12] Joyce next argues that Stacy was required to withdraw her petition for an elective share filed on October 19, 2006, prior to the entry of a final determination by the District Court. Joyce asserts that because the demand was not withdrawn, Stacy must accept the elective share of Bryan’s estate. This argument does not comport with the language of N.D.C.C. § 30.1-05-05 or the North Dakota Rules of Civil Procedure.

[13] Section 30.1-05-05 governs the proceeding and time limit for seeking an elective share under North Dakota law. The section provides: “The surviving spouse *may* withdraw a demand for an elective share at any time before entry of a final determination by the court.” N.D.C.C. § 30.1-05-05(3) (emphasis added). The legislature’s use of “may” rather than “must” makes withdrawing the petition for an elective share permissible, but not required. The statute does not indicate that a petition for an elective share must be withdrawn prior to a final determination, or that a surviving spouse must accept the elective share if a demand for the elective share is not withdrawn.

[14] Stacy petitioned for an elective share as an alternative claim to Bryan’s Estate in response to the PR’s initial position that Stacy was not entitled to receive anything from Bryan’s estate. Tr. at 58-59. Although Stacy believed she should be the

sole heir of Bryan's estate, she is entitled to assert alternate claims for relief under Rule 8(e)(2), N.D.R.Civ.P., which is applicable to formal probate proceedings pursuant to N.D.C.C. § 30.1-02-04. Stacy filed a response to the Petition filed by the PR and clearly requested that she be awarded Bryan's entire estate under § 30.1-04-02 and that the elective share be considered an alternate claim. Joyce's argument, that because the demand for an elective share was not withdrawn Stacy must accept the elective share, is without merit and Stacy is entitled to be awarded Bryan's entire estate pursuant to section 30.1-04-02.

C. STACY'S SHARE IS NOT LIMITED BY N.D.C.C. §§ 30.1-04-02(2) AND 30.1-04-03(4)

[15] Joyce argues that she is entitled to a share of Bryan's estate by reading N.D.C.C. §§ 30.1-04-02(2) and 30.1-04-03(4) together, and asserts that the District Court correctly decided so. Joyce, however, overlooks § 30.1-04-02(1)(a) and the introductory clause to § 30.1-04-03. In reading those statutes together, Stacy is clearly entitled to Bryan's entire estate.

[16] N.D.C.C. § 30.1-04-02 provides:

The intestate share of a decedent's surviving spouse is:

1. The entire intestate estate if:
 - a. No descendant or parent of the decedent survives the decedent[.]

Section 30.1-04-03 provides that any part of the intestate share not passing to the surviving spouse under section 30.1-04-02 goes accordingly to the grandparents if the decedent is not survived by a descendant, parent, or descendant of a parent, but by at least one or more grandparents. N.D.C.C. § 30.1-04-03(4). Again, Joyce ignores the introductory clause of § 30.1-04-03 which indicates that it only applies if the intestate

estate does not pass to the surviving spouse, which it does in this matter. Therefore, Joyce's argument must fail and the District Court erred in determining that Joyce was entitled to one-half of Bryan's estate.

D. IF THE DISTRICT COURT'S ORDER DETERMINING TESTACY IS REVERSED, BRYAN'S ESTATE WILL NOT ESCHEAT TO THE STATE

[17] Joyce next argues that if the District Court's Order Determining Testacy is not affirmed, Bryan's Estate will escheat to the State. In support of her argument Joyce cites N.D.C.C. § 30.1-04-05, which provides:

If there is no taker under the provisions of this title, the intestate estate passes to the state for the support of the common schools and an action for the recovery of such property and to reduce it into the possession of the state or for its sale and conveyance may be brought by the attorney general or by the state's attorney in the district court of the county in which the property is situated.

Again, Joyce's argument is without merit and a reversal of the District Court's Order will not cause Bryan's estate to escheat.

[18] Joyce essentially argues that the Ninth paragraph of Bryan's Will excludes all heirs from taking. Joyce then argues that Stacy cannot be an heir pursuant to the First and Ninth paragraphs of Bryan's Will, but somehow Joyce can be an heir under the Ninth paragraph, which states: "All of my heirs not mentioned in this will have been intentionally omitted." (Supp. App. at 1). This argument is illogical and fatally flawed. Joyce's argument then becomes "it is better to pass the estate to an heir [Joyce], rather than to have it escheat to the state." Appellee's Brief, ¶ 37. Section 30.1-04-05 provides that the estate escheats only "[i]f there is no taker" under the provisions of Title 30.1 of the North Dakota Century Code. As argued above and in Stacy's Appellant Brief, Stacy is the rightful taker of Bryan's entire estate and therefore no part of the estate will escheat

to the State. Stacy is the only taker under the Will and is entitled to the entire estate pursuant to § 30.1-04-02. Here, Stacy rightfully takes Bryan's entire estate under § 30.1-04-02 and the estate will not escheat if this Court reverses the District Court's Order Determining Testacy.

E. THE PR HAS FAILED TO FILE ANY RESPONSE BRIEF AND SHOULD BE FOUND TO HAVE CONCEDED THE CLAIMS REGARDING ADMINISTRATION OF THE ESTATE

[19] Stacy notes that the PR has failed to file any brief in response to the claims that the PR has breached her duty to properly administer the estate. This Court has repeatedly condemned appellees who fail to file a brief. State v. Huffman, 542 N.W.2d 718, 719 n. 1 (N.D. 1996). Stacy urges this Court to find that the PR's failure to file a brief constitutes an admission that the District Court's decision approving the PR's fees and administration of the estate should be reversed.

II. CONCLUSION

[20] Appellant Stacy Haugen respectfully requests that this Court reverse the District Court's Order Determining Testacy, Settlement of Account and Closing of Estate and hold that Stacy Haugen, as the surviving spouse of Bryan Haugen, is the sole heir of this estate. Appellant also requests that this Court hold that the PR has breached her duties to the estate and remand this matter to the District Court with instructions to appoint a successor personal representative and deny any award of fees to the current Personal Representative.

Respectfully submitted,

Dated: September 24, 2010

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 2,344.

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AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS

**Estate of Bryan Keith Haugen, Deceased
Barnes Co. District Court Case No.: 02-06-P-41-1
Supreme Court Case No. 20100165**

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

Theresa A. Luehring, being duly sworn, deposes and says that she is a resident of the City of Fargo, State of North Dakota, is of legal age; and that she served the within:

APPELLANT STACY L. HAUGEN'S REPLY BRIEF

on September 24, 2010, by sending a true and correct copy thereof by electronic means to the following e-mail addresses, to-wit:

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Dated this 24th day of September, 2010.

/s/ Theresa A. Luehring

Theresa A. Luehring

Subscribed and sworn to before me this 24th day of September, 2010.

/s/ Jessica Holland

(SEAL)

Notary Public