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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Lee S. Paulson, deceased, Carmen Paulson, Michael Paulson, Kim Paulson, Charlene (Paulson) Johnson, and Lynn Paulson, Appellants, vs. Robyn Risovi, Appellee.	Supreme Court File No. 20110154 Benson County District Court File No. 03-09-P-00016

Appeal from Memorandum Opinion and Order Interpreting Will, Order on Motion for Reconsideration, Rule 43(b) (sic) Certification and Motion for Stay Pending Appeal, and Order Approving Final Accounts, Determining Testacy Status, Approving Distribution, and Discharging Personal Representative

BRIEF OF APPELLEE ROBYN RISOVI

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Statement of the Case

[¶ 1] On June 26, 2009, Lee S. Paulson ("Lee") executed a Last Will and Testament ("Will") that devised certain property and the residue of his estate to Robyn Risovi ("Robyn"). (App. 60.) In his Will, Lee also devised certain property to his mother, Carmen Paulson, and to his siblings: Michael Paulson, Charlene Johnson, Kim Paulson, and Lynn Paulson (collectively "Paulson Family"). (App. 42-43.) This appeal stems from a failed attempt by the Paulson Family to have the Will construed in a manner that would result in even more assets from the Estate being distributed to them.

[¶ 2] Robyn and Lee were to be married on July 18, 2009, but Lee died three days prior to their wedding, on July 15, 2009. (App. 60-61.) Lynn Paulson petitioned to be appointed the Personal Representative of Lee's Estate. (Doc. # 2.) Lynn, in his capacity as the Personal Representative of the Estate, took the position that the devise to Robyn was conditioned upon her marriage to Lee. (App. 12.) Accordingly, on December 2, 2009, Robyn brought a petition to construe the Will. (App. 12-14.) At the same time, she brought a petition to remove Lynn Paulson as the Personal Representative due to his conflict of interest and because after Robyn filed a demand for notice in the probate proceedings, Lynn prohibited her and her minor daughter from having any contact with him or his family. (Doc. ## 12, 13, 14.)

[¶ 3] One day after Robyn's petition was filed, on December 3, 2009, Lynn filed a petition, in his capacity as the Personal Representative of Lee's Estate, to construe the Will in such a way that any devise to Robyn or her daughter be invalidated, or alternatively, that the entire Will should be invalid. (Doc. # 21.) He also demanded that Robyn turn over all property belonging to the Estate, including possessions in the house where she and her

daughter lived with Lee and that were devised to her under the Will. (Doc. # 21, Doc. # 22 at pp. 6-7.)

[¶ 4] After these petitions were filed, Lynn filed yet another petition to construe the Will, this time in his individual capacity, and he was joined by his mother and siblings. (App. 14.) In his individual capacity, Lynn requested the same relief that he did in his capacity as the Personal Representative, namely that the Will be construed in such a way that Robyn Risovi be excluded from receiving any bequests under Lee's Will, meaning that Lynn and his family would receive even more assets from the Estate. (Id.)

[¶ 5] Prior to the hearing on the petitions, the parties agreed that it would be inappropriate to call witnesses with regard to the construction of the Will. (Doc. # 52 n.1, Exh. "A.") Nonetheless, prior to the hearing, the Paulson family submitted extrinsic evidence and self-serving affidavits to support their position with regard to the construction of the Will. (Id.) Robyn objected and moved to strike this affidavit evidence, indicating that she disagreed with a large portion of the extrinsic evidence and self-serving allegations, but contending that such evidence is inadmissible and irrelevant unless a trial court first determines the Will to be ambiguous. (Doc. ## 51, 52 n.1.)

[¶ 6] The trial court agreed, and it found the Will unambiguously provided for an unconditional devise to Robyn Risovi. (App. 60-68.) The trial court also ordered Lynn Paulson to contact and inform the trial court as to whether he would be able to carry out his duties consistent with the trial court's order. (App. 68.) Lynn Paulson did not do so. (See generally Docket.) Instead, he resigned. (Doc. # 79.) The Paulson Family appealed the trial court's order. (Doc. # 71.) Robyn moved to dismiss the appeal because the trial court orally ordered supervised administration and the estate was not yet closed. This Court dismissed

the appeal, after receiving written clarification that the estate was supervised. The Paulson Family then moved for Rule 54(b) certification, or alternatively, for the trial court's reconsideration of its earlier order; the motion was denied in its entirety. (App. 69.) After entry of a final order distributing the estate pursuant to the trial court's earlier order, the Paulson Family brings this appeal. (App. 76.)

Statement of the Facts

[¶ 7] This Court determines whether an ambiguity exists by examining the four corners of the Will. With regard to the devise to Robyn, Lee's Will provides in Article Two: "I give all of my tangible personal property to my spouse, Robyn, if my spouse survives me[.]" (App. 42, ¶ 2.1.) It further provides, "I give my wife, Robyn, [certain described farmland.]." (App. 42, ¶ 2.4.) Finally, the Will provides: "I give the residue of my estate . . . [t]o my spouse, if my spouse survives me[.]" (App. 43, ¶¶ 3, 3.1.) To clarify any references to "my spouse," the Will defines the term "spouse:" "My spouse's name is Robyn Risovi and all references to 'my spouse' in this Will are to her only." (App. 44, ¶ 6.1.1). In the footnote, the Will explains why Robyn is being referred to as "my spouse": "This Will has been prepared in anticipation of the upcoming marriage of the Lee Paulson and Robyn Risovi set for July 18, 2009." (Id. n.1.)

Law and Argument

I. The trial court correctly determined that Lee's Will was unambiguous and provided an unconditional devise to Robyn Risovi.

A. Summary of the Argument

[¶ 8] The terms of Lee's Will unambiguously establish that the devise to Robyn was unconditional.[1] In order to construe a Will, a court begins by looking at the document itself; the court does not go beyond the four corners of the document, unless the document is unclear or ambiguous. Lee's Will is unambiguous. Lee's Will provides that certain of his estate goes to "my wife," "my spouse, Robyn," or simply, "my spouse." To clarify any references to "my spouse," the Will defines the term "spouse:" "My spouse's name is Robyn Risovi and all references to "my spouse" in this Will are to her only." The Will explains why Robyn is being referred to as "my spouse" in the footnote: "This Will has been prepared in anticipation of the upcoming marriage of Lee Paulson and Robyn Risovi set for July 18, 2009." As set forth below, well-established law provides that this footnote ensures that the Will and its provisions are effective before **and** after marriage.

[¶ 9] While, generally, a court can look beyond the four corners of a document if the Will is ambiguous, the standard is even higher when a party seeks to construe a Will to say that the Will (or certain portions of the Will) are only enforceable upon the happening of a condition. A condition is imposed **only** if the document clearly imposes a condition. A court cannot look beyond the four corners of a document to create a condition if a condition is not clearly created by the Will. If the Will can be construed in

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[1] However, the devise to Robyn of the tangible personal property and the residue was conditional upon her surviving Lee, which Robyn did.

a way to establish that the language sought to be a condition is merely an explanation as to why the decedent entered into a Will, the court cannot construe the Will as creating a condition. Lee's Will establishes clearly that certain assets in his Estate were to go to Robyn, and he referred to her as "my spouse" simply because he entered into the Will "in anticipation of" his upcoming marriage.

B. The language of Lee's Will is unambiguous.

[¶ 10] "Where the language of a will is clear and unambiguous, the intent of the decedent must be determined from the language of the will itself." Martin v. Martin, 1997 ND 157, ¶ 7, 568 N.W.2d 280, 282 (N.D. 1997). The language of Lee's Will expresses a clear and unambiguous intent that his devise was to Robyn Risovi, the person he referred to as his "spouse" in "anticipation of his upcoming marriage."

[¶ 11] Courts have universally held that words of description such as "wife" or "spouse" do not require the parties to be, in fact, married and do not make the Will ambiguous. For example, in the case of In Re: Nolan's Estate, 108 P.2d 385 (Ariz. 1940), the decedent made a bequest to his future wife; the parties were never validly married. Nonetheless, the Court enforced the bequest stating:

> The bequest is made in absolute and unconditional terms, so far as expressed in the language of the Will, and cannot be evaded or overcome by mere argumentative inferences drawn from words of the Will not used for such purpose. **Had the testator died before the marriage contemplated, the right of the plaintiff to the bequest cannot be doubted, for the marriage was not made a condition precedent to the legacy.**

Id. at 387 (emphasis added). Also, in the case of In Re: Breder, 432 N.Y.S. 2d 441 (1980), the Court held that the divorce of the beneficiaries would have no effect on the bequest notwithstanding the indication that the bequest was to the wife of the decedent. In particular, this case states as follows:

> In issue is whether or not the divorce had any effect on the bequest. The answer is no! There is no effect. Where a bequest is to a specifically named "wife" of a designated individual, the bequest is a personal one to the named beneficiary and **the term "wife" is deemed to be merely descriptive. The description may not be distorted into a condition limiting the bequest.**

Id. at 446 (citing cases) (emphasis added). Also, in the case of In Re: Sussman's Will, 60 N.Y.S. 2d 609 (1945), the Court found that even though the decedent entered into an invalid marriage, the mere fact that he was not in fact married did not invalidate a bequest to his wife:

> There is no question as to the identity of the respondent as the intended beneficiary. The gift having been made to an individual specifically designated by name, subsequent words or phrases which further identify the intended beneficiary are regarded as merely descriptive, and do not impose a condition upon her right to receive such bequest.

Id. at 611 (citing cases). Still another case is illustrative of the well-established principle that the "description" of a specifically-named individual does not impose a condition upon the bequest:

> The mere fact that a gift is made to a named legatee in a certain character, as, for instance, to my wife A., does not avoid the legacy, if the legatee does not happen to fill the character.' * * *

Murphy v. Markis, 98 N.J. Eq. 153, 157, 130 A. 840, 841 (N.J. Ch. 1925) (citing cases).

[¶ 12] North Dakota follows this well-established legal principle. Thus, in the case of Estate of Neshem, 1998 ND 57, 574 N.W.2d 883 (N.D. 1998), this Court reversed a trial court's decision to exclude bequests to the issue of a person described as the decedent's "son," when the person described as the "son" was not, in fact, the son of the decedent. The "son" in that case was actually the stepson of the decedent, but he was described as a "son" in the decedent's Will. Id. at ¶ 3. The stepson was deceased at the

time of the decedent's death, and his children sought to take his share as the "issue" of the decedent under the Will's residuary clause.

[¶ 13] The trial court held that the use of the term "son" was "incorrect" and "ambiguous," and therefore the residuary clause leaving the residue of the estate to the decedent's "issue" excluded the children of the stepson. In reversing the trial court, the North Dakota Supreme Court sided with the position of the stepson's children: "[B]ecause Evelyn's will defined Clifford as her "son," her will, when read as a whole, unambiguously expresses her intent to treat Clifford and the petitioners as her "issue." Id. ¶ 6. Specifically, the Court stated:

> Simply because Evelyn's will could have been worded differently does not justify ignoring her specific description of Clifford as "our son." We decline to construe Evelyn's will to disregard that designation.

Id. ¶ 9. Accordingly, even though the stepson was incorrectly described as a "son," his children were nonetheless proper beneficiaries under the Will. Id. ¶ 11 ("We construe Evelyn's will to define Clifford as Evelyn's son and to treat him as her issue for the purposes of disposing of her estate."). The North Dakota Supreme Court, like all other courts that have considered words of description, has held that such description does not limit or void a bequest even if the devisee does not, if fact, live up to that description. Id.

[¶ 14] The clear language of Lee's Will establishes that he referred to Robyn as his spouse, not as a condition, but simply to explain that it was in anticipation of his upcoming marriage. Including language in a Will that a Will is made in contemplation of marriage ensures that the Will is effective before **and** after marriage. This is made clear by examining cases from other states that, like North Dakota, have also adopted the Uniform Probate Code. Estate of Zimmerman, 2001 ND 155, ¶ 14, 633 N.W.2d 594

("We interpret uniform laws in a uniform manner, and we may seek guidance from decisions in other states which have interpreted similar provisions in a uniform law.").

[¶ 15] In this case, Lee's Will provided: "This Will has been prepared **in anticipation** of the upcoming marriage of the Lee Paulson and Robyn Risovi set for July 18, 2009." Florida has adopted the Uniform Probate Code. In Florida, courts have construed similar language, and determined that the following similar language was not a condition:

> FIRST: This will is made **in contemplation of** the marriage of LILLIAN M. NICHOLS to BERTRAN E. PETERS and this Will shall be valid after such marriage. I give, bequeath and devise all of my property, both real and personal, to BERTRAN E. PETERS.

In re Nichols' Estate, 428 So. 2d 372, 373 (Fla. Ct. App. 1983) (emphasis added). In reversing the trial courts's summary judgment holding the will contingent and void, the court noted the following:

> The word contemplation as used here does not denote a contingency implying that the will or the bequest would not be valid or effective until the marriage occurred but only refers to the fact that the will **was intended to be valid even after, or notwithstanding, the occurrence of the intended, or expected future event.**

Id. (emphasis added) The appeals court also noted that "rather than invalidating the will, this clause, explicitly indicating that marriage by the testatrix to the devisee was contemplated at the time the will was made, carefully avoids the problem that results when that point is not clear from the will." Id. (citing Estate of Ganier v. Estate of Ganier, 418 So. 2d 256 (Fla.1982)). The problem that results when the point is not clear from the Will is that a Will's provisions may not be effective **after** marriage in order to allow the surviving spouse additional rights following marriage, to the detriment of the other beneficiaries.

[¶ 16] To rectify this problem, the Uniform Probate Code does not allow a surviving spouse these additional rights (i.e. intestate rights) following marriage and makes the Will also effective after marriage if, among other exceptions, the Will was made "in contemplation of marriage." Id. at 259; N.D.C.C. § 30.1-06-01 (providing that the testator's surviving spouse is entitled to the intestate share of the testator's estate "[i]f the testator's surviving spouse married the testator after the testator executed a will," unless [i]t appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse."). In other words, if Lee had simply made a Will prior to marriage giving a portion of his estate to Robyn and a portion of his Estate to his siblings without indicating the Will was being made in contemplation of marriage, then after the marriage Robyn could have argued that she was entitled to the entire estate (her intestate share) notwithstanding the previous Will. However, because the Will, including the footnote, indicates the Will was made in contemplation of marriage, even after marriage Robyn was not entitled to the intestate share pursuant to N.D.C.C. § 30.1-06-01.

[¶ 17] Georgia has also adopted the Uniform Probate Code. In reversing the trial court's determination that the Will was invalid because it was conditioned upon a marriage to the decedent's fiancee, who died before the marriage, the Georgia Supreme Court noted the following:

> Whether or not a will is conditional or contingent depends on whether the condition or contingency is stated merely as the reason for making the will or the particular disposition of property at that time or whether it is intended to specify an occurrence which will render the will operative. **If the testator intends to bind the validity of his will to the happening of a specified event, then he must do so by language clearly showing the intent that the will be conditional or contingent.**

Brown v. Cronic, 470 S.E.2d 682, 683 (Ga. 1996) (emphasis added); 95 C.J.S. Wills § 197 (stating that the Court must construe the language of a Will to be regarded as a mere inducement to the testator making a Will and not a condition precedent, if that construction is fairly permissible). The Georgia Supreme Court, relying upon Georgia's Uniform Probate Code provision identical to N.D.C.C. § 30.1-06-01, held:

> The language in question, rather than expressing the intent that the disposition be contingent, evidenced that Wheeler's will **was made in contemplation of his marriage to Phillips, which was critical to the will's surviving the impending marriage**. See OCGA § 53-2-76. Irrespective of the fact that such a construction would largely disinherit Wheeler's heirs at law, it was clearly Wheeler's intent to do so, and consequently, it was the duty of the superior court to so construe it. See Davant v. Shaw, 206 Ga. 843, 846, 59 S.E.2d 500 (1950). The superior court's determination that Wheeler's 1990 will failed because it was conditional on marriage to Phillips cannot stand.

Id. at 684 (emphasis added). Thus, the clear language of Lee's Will establishes that he referred to Robyn as his spouse, not as a condition, but simply to explain that it was in anticipation of his upcoming marriage, which made the Will effective before and after marriage. The trial court's judgment should be affirmed.

C. The devise to Robyn is unconditional.

[¶ 18] Not only does the Will unambiguously establish that the devise to Robyn is unconditional, even if the Will was ambiguous as to whether a condition is created, the court is required to construe the Will **against** the finding of a condition:

> [T]he language of a will should be regarded as a mere inducement to the testator's making a will and not a condition precedent to operation of the will, if that construction is fairly permissible. **Unless the terms of a will clearly show that it was intended to be contingent**, it will be regarded as absolute and unconditional.

95 C.J.S. Wills § 197 (emphasis added).

[¶ 19] The terms of Lee's Will do not clearly create a condition of marriage. The creation of a condition requires conditional language, such as "if," "on condition that," or "in the event of." Brown v. Cronic, 470 S.E.2d 682, 683-84 (Ga. 1996) ("The provisions of the will in question are devoid of any language such as "if," "on condition that," or "in the event of" which might suggest that the testamentary disposition was contingent.") (citing 95 C.J.S. Wills § 975). North Dakota case law provides an example of clear language of a marriage condition:

> I am presently married and separated, contemplating divorce. I hereby leave my wife the legal minimum required by law. When we are legally divorced, I understand that the legal minimum is zero and it is my intention that **if we are not husband and wife at the time of my demise** my present wife, Sarah Lily Zimmerman, shall receive nothing from my estate.

Estate of Zimmerman, 2001 ND 155, ¶ 5, 633 N.W.2d 594, 596 (N.D. 2001) (emphasis added). The case cited by the Paulson Family also uses conditional language to clearly create a condition, particularly the allowance of a purchase "**upon** the agreement of the remaining children." Estate of Zimbleman, 539 N.W.2d 67, 70 (N.D. 1995) (emphasis added). Lee's Will does not provide anywhere that his Will is effective **if** he got married or **upon** his marriage. Lee's Will does provide other conditions. For example, he provided that: "**[i]f my mother survives me**, I give my mother cash in the amount of $75,000.00." (App. 42, ¶ 2.2). Notably, the Will does not provide any such condition for marriage. Because Lee's Will does not contain the clear language necessary to create a condition, the trial court's judgment should be affirmed for this reason as well. 95 C.J.S. Wills § 197.

D. The Antenuptial Agreement was not incorporated into the Will.

[¶ 20] To advance the argument that the Will contains a condition requiring marriage, the Paulsons' attempt to incorporate the provisions of an Antenuptial Agreement into the terms of the Will because the Antenuptial Agreement does what the Will does not do: the Antenuptial Agreement clearly contains a condition. (App. 29, Article 5.1 "This Agreement shall become effective only upon the solemnization of the parties' marriage."). This provision is simply a recitation of North Dakota law. N.D.C.C. § 14-03.1-04 ("A premarital agreement becomes effective upon marriage.").

[¶ 21] North Dakota law does not support the contention that the Will incorporated the terms of the Antenuptial Agreement See N.D.C.C. § 30.1-08-10. In order to do so, the language of the Will would be required to "describe[] the writing sufficiently to permit its identification." Id. The Antenuptial Agreement is not mentioned anywhere in the Will, and the trial court properly determined that the Antenuptial Agreement was not incorporated into the Will pursuant to N.D.C.C. § 30.1-08-10. (App. 42-46.)

[¶ 22] Notably, the Paulson Family fails to address this statute in its Brief, even though it was specifically cited by the trial court in its decision. (App. 67.) Instead, the Paulson Family cites to inapposite case law not dependent on the Uniform Probate Code. In particular, they cite to a contract case from North Dakota (Nantt v. Puckett Energy Co., 382 N.W.2d 655 (N.D. 1986)) along with two out-of-state cases decided prior to the adoption of the Uniform Probate Code in 1969. See, e.g., In re Garden's Estate, 148 P.2d 745 (Kan. 1944); Lake Shore Nat. Bank v. Coyle, 296 F. Supp. 412 (N.D. Ill. 1968). The attempt to incorporate the Antenuptial Agreement into the Will must fail pursuant to

N.D.C.C. § 30.1-08-10. See N.D.C.C. § 1-01-06 ("In this state there is no common law in any case in which the law is declared by code.").

E. Extrinsic evidence is not allowed to vary the terms of an unambiguous Will.

[¶ 23] The Paulson Family has not cited any case law to establish that Lee's Will was ambiguous. Instead, relying on self-serving and extrinsic evidence, the Paulson Family seeks to vary the terms of Lee's Will in a manner that would result in additional assets being distributed to them (assets in addition to the assets already devised to them under Lee's Will). It is well established and uniformly accepted that extrinsic evidence cannot be used to create an ambiguity where there is none. Martin, 1997 ND 157, ¶ 7. ("Where the language of a will is clear and unambiguous, the intent of the decedent must be determined from the language of the will itself."). As explained further by this Court:

> Unless a duly executed will is ambiguous, the testamentary intent is derived from the will itself, not from extrinsic evidence. . . . A contrary holding would leave every will open to attack as to the testator's alleged "real" intent, and would deprive decedents of any certainty about the eventual disposition of their estates.

Estate of Brown, 1997 ND 11, ¶ 16, 559 N.W.2d 818 (citations omitted) (emphasis in the original).

[¶ 24] Thus, in Harrell v. Rutherford, 241 P.2d 1171, 1171 (Wash. 1952), the brothers and sisters of the decedent sought a construction of the Will that would make the decedent's marriage to the decedent a condition, so that they could inherit under the Will. Like the brothers and sisters in this matter, they sought to introduce extrinsic evidence:

> The complaint alleges in detail and at length that the respondent is a bad person with improper motives, who overreached the deceased; that the divorce procured from her former spouse was illegally obtained and invalid; and that her marriage to the deceased was a nullity. They seek a construction

> of the will that makes a valid marriage a condition precedent to an effective devise.

In denying the request to consider the extrinsic evidence, the court held: "When a will is unambiguous there is no room for construction, and this is particularly so where a construction is sought to be drawn from extrinsic facts." Id.

[¶ 25] The trial court correctly concluded that the statements of family members and the scrivener of the Will are not relevant because there is no ambiguity. (App. 65.) In doing so, the trial court cited Estate of Samuelson, 2008 ND 190, ¶ 15, 757 N.W.2d 44, in which this Court stated:

> Even assuming an inference could be made from extrinsic evidence that Ernest Samuelson did not know Amanda West and Robin West, such an inference would be irrelevant. **Extrinsic evidence can only be admitted "to show what the testator meant by what he said**, not to show what he intended to say."

(emphasis added). Even though the trial court found Lee's Will unambiguous, the Paulsons argue that the trial court should have allowed the extrinsic evidence, which they argue would show "what the testator meant by what he said." (Appellant's Brief ¶ 63)

[¶ 26] The fallacy of the Paulson Family's argument is that it ignores an essential prerequisite to the admission of extrinsic evidence in the first place: there must be an ambiguity. Then, **only if there is an ambiguity**, "[e]xtrinsic evidence can only be admitted to show what the testator meant by what he said, not to show what he intended to say." Estate of Samuelson, 2008 ND 190, ¶ 15. Extrinsic evidence is not needed to show what the testator "meant by what he said" in an unambigous Will because the Will establishes what the testator meant by what he said. Estate of Brown, 1997 ND 11, ¶ 16. ("Once it is shown that the will was properly executed, "the executed will is the decedent's testamentary intent.")

[¶ 27] This principle is made clear by reviewing Jordan v. Anderson, 421 N.W.2d 816, 819 (N.D.1988), which is the case cited by Estate of Samuelson:

> **If the language of a will is ambiguous**, extrinsic evidence is permissible to remove the ambiguity. However, extrinsic evidence is admissible only to show what the testator meant by what he said, not to show what he intended to say.

Jordan, 421 N.W.2d at 819 (emphasis added) (citations and quotations omitted). Thus, in Estate of Samuelson, the trial court determined the Will was ambiguous and therefore allowed the presentation of extrinsic evidence to resolve the ambiguity. This Court determined that the Will was unambiguous, and, separately, determined that the extrinsic evidence presented to the trial court was irrelevant. Estate of Samuelson, 2008 ND 190, ¶ 15.

[¶ 28] The bottom line is that the Paulson Family cannot use extrinsic evidence to create an ambiguity where there is none. This proposition is supported by Estate of Hitz, 319 N.W.2d 137 (N.D. 1982), in which there was an ambiguous Will provision. The trial court allowed the testimony of the attorney who drafted the Will in question regarding his opinion of the interpretation of the Will. Id. at 139. Even though the Will was ambiguous, this Court found the consideration of the testimony irrelevant: "we are unaware of any case authority permitting the scrivener of a will to testify for the purpose of giving his own opinion as to the proper legal interpretation of a provision in the will." Id. The Court made the finding even though the Court noted:

> A number of jurisdictions, **in cases involving a dispute over an *ambiguous* will provision**, have permitted the scrivener of the will to give testimony reflecting upon the probable intent of the testator including such matters as communications between the testator and the scrivener, instructions given by the testator to the scrivener prior to or during preparation of the will, and circumstances surrounding execution of the will.

Id. (emphasis and double-emphasis added). Thus, while the drafter of the Will may present testimony in some cases involving an **ambiguous** Will provision, even then such testimony is limited. Id.

[¶ 29] When it comes to **unambiguous** Will provisions, however, no testimony is allowed, not even from the attorney who drafted the Will:

> Testimony by the attorney or the scrivener who prepared the will, or by a witness to its execution as to declarations by the testator with respect to his or her intentions in disposing of his or her property, or his or her instructions, are inadmissible to establish an intention not apparent in the will itself.

96 C.J.S. Wills § 895; accord Estate of Frietze, 966 P.2d 183, 186 (N.M. Ct. App. 1998) ("[I]t was error to allow the introduction of extrinsic evidence from the attorney who drafted the will to show an intent of Testator not expressed therein."); Reynolds v. Harrison, 604 S.E.2d 184, 187 (Ga. 2004) ("Where the terms of a will are plain and unambiguous, they must control. Parol evidence cannot be used to contradict or give new meaning to that which is expressed clearly in the will. . . . [T]he affidavit of the attorney who prepared the will cannot be used to shed light upon the intent of the testator."); In re Succession of Delcambre, 893 So. 2d 167, 171 (La. Ct. App. 2005) ("In their next assignment of error, the defendants contend that the trial court erred in failing to accept the testimony of the decedent's attorney as to the decedent's intent at the time the Will was drafted. The defendants contend that the decedent's attorney's testimony should have been accepted for consideration as to the issue of ambiguity. . . .We find no merit in this assertion. Again, the terms of the testament are clear.").

[¶ 30] The Paulson Family has failed to establish that Lee's Will was ambiguous; accordingly, extrinsic evidence is not allowed to vary the terms of an unambiguous Will. Martin, 1997 ND 157, ¶ 7. ("Where the language of a will is clear and unambiguous, the

intent of the decedent must be determined from the language of the will itself."); In re Glavkee's Estate , 34 N.W.2d 300, 306 (N.D.1948) ("[N]o extrinsic evidence is ever competent to contradict, vary, or add to the terms of a will, and under this fundamental rule, evidence even of the circumstances surrounding the testator cannot be received for the purpose of showing an intention different from that contained in the will, or to import into the will an intention not therein expressed.").

F. Even if the Will was ambiguous, which it is not, extrinsic evidence is not allowed to create a condition.

[¶ 31] Moreover, the Paulson family seeks to use extrinsic evidence to show a condition, which is not allowed, *even if the will was ambiguous*, which it is not:

> **[P]arol evidence is not admissible to show that an instrument which in form is a general or absolute will was intended to take effect only on a contingency. Parol evidence is admissible, however, to show that the testator's intention was to make an absolute and not a contingent will.**
>
> [T]he language of a will should be regarded as a mere inducement to the testator's making a will and not a condition precedent to operation of the will, if that construction is fairly permissible. Unless the terms of a will clearly show that it was intended to be contingent, it will be regarded as absolute and unconditional.

95 C.J.S. Wills § 197 (emphasis added).

[¶ 32] As explained above and as supported by the case law, the devise to Robyn was unconditional; the indication that Lee was marrying Robyn was a mere inducement to the making a Will and was not a condition precedent to its operation. The Paulson Family has failed to demonstrate that the Will clearly provided that it was intended to be contingent on Lee's marriage to Robyn. Accordingly, the Will provided an unconditional devise to Robyn. The decision of the district court should be affirmed.

Conclusion

[¶ 33] The clear language of Lee's Will establishes that he referred to Robyn as his spouse, not as a condition, but simply to explain that it was in anticipation of his upcoming marriage. Accordingly, his Will was made effective before and after marriage. The decision of the trial court should be affirmed.

Dated: September 2, 2011.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Lee S. Paulson, deceased, Carmen Paulson, Michael Paulson, Kim Paulson, Charlene (Paulson) Johnson, and Lynn Paulson Appellants, vs. Robyn Risovi, Appellee.	Supreme Court File No. 20110154 Benson County District Court File No. 03-09-P-00016 **CERTIFICATE OF SERVICE**

I hereby certify that on September 2, 2011, I caused the **Brief of Appellee Robyn Risovi** to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy to supclerkofcourt@ndcourts.com and to be served upon the attorney for appellants, David S. Maring, and upon the attorney for the Personal Representative of the Estate of Lee S. Paulson, J. Thomas Traynor, by e-mailing a true and correct copy to each as follows:

David S. Maring ..... dmaring@maringlaw.com

J. Thomas Traynor ..... tomtraynor@traynorlaw.com

The originals of the foregoing are being held in my office.

Dated this 2nd day of September, 2011.

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