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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20050001

Dennis S. Martin, Deborah J. Martin,
and Sheila R. Wells,

Plaintiffs/Appellants,

vs.

Tracy (Martin) Berg, Rick Berg, and
Margaret Martin, individually, and
as personal representative of the
Estate of Stephen Martin,

Defendants/Appellees.

Appeal from Order on Motions for Summary Judgment and Judgment
Oliver County District Court, The Honorable Robert O. Wefald
District Judge Presiding

REPLY BRIEF FOR THE APPELLANTS DENNIS S. MARTIN, DEBORAH J. MARTIN, AND SHEILA R. WELLS

Daniel J. Dunn (Atty. ID No. 04869)
MARING WILLIAMS LAW OFFICE, P.C.
1220 Main Avenue, Suite 105
P.O. Box 2103
Fargo, ND 58107-2103
(701) 241-4141

Thomas P. Martin (Atty. ID No. 05269)
P.O. Box 1745
Fargo, ND 58107-1745
(218) 291-0896

ATTORNEYS FOR APPELLANTS

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INTRODUCTION

Dennis S. Martin (Dennis), Deborah J. Martin (Deborah), and Sheila R. Wells (Sheila) submit this reply brief in further support of their appeal and in response to arguments raised in the brief filed on behalf of Margaret Martin (Margaret), Tracy (Martin) Berg (Tracy), and Rick Berg (Rick).

ARGUMENT

I. THE DEFENDANTS ERRONEOUSLY RELY ON NORTH DAKOTA CENTURY CODE § 30.1-09-13 IN THIS APPEAL.

The defendants claim that the Amended Complaint should be dismissed based upon N.D.C.C. § 30.1-09-13. The defendants made this same argument regarding the application of N.D.C.C. § 30.1-09-13 in the district court. The district court wisely recognized that N.D.C.C. § 30.1-09-13 is not relevant to this case as it did not rely or otherwise reference the statute in its Order on Motions for Summary Judgment. (A-170-174). This Court should likewise reject the application of N.D.C.C. § 30.1-09-13 as it clearly does not apply under the facts of this case.

N.D.C.C. § 30.1-09-13 states as follows:

> **Contracts concerning succession.** A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after July 1, 1975, can be established only by:
>
> 1. Provisions of a will stating material provisions of the contract;
>
> 2. An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

3. A writing signed by the decedent evidencing the contract.

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. (Emphasis added).

Black's Law Dictionary, 5th Ed., defines "executed" as "[c]ompleted; carried into effect; already done or performed; signed, taking effect immediately; now in existence or in possession; conveying an immediate right or possession. Act or course of conduct carried to completion. Term imports idea that nothing remains to be done. The opposite of *executory*. *See also* **Execution**."

The defendants have not read the statute carefully as by its very terms, N.D.C.C. § 30.1-09-13 refers to a "contract to make a will or devise, or not to revoke a will or devise, …." The statute is not dependent on the date when a will is executed. Instead, the test is when the contract underlying the will was completed. The facts in this case show that the agreement to treat the children equally was "completed" or "existed" by the time the 1973 wills were signed. At the time of executing those wills in 1973, it was unnecessary for the agreement to appear in writing. *See Estate of Stanton*, 472 N.W.2d 741, 744 (N.D. 1991) (the law in effect at the time of execution is controlling in regard to the validity of a will).

The defendants rely heavily on opinions from other states interpreting the Uniform Probate Code (UPC), as well as the Editorial Board Comments, in support of their argument. This reliance is misplaced as N.D.C.C. § 30.1-09-13 is irrelevant to the agreement between Stephen and Margaret to treat the

children equally. The agreement was reached prior to signing the wills on October 23, 1973, so the UPC, effective after July 1, 1975, is irrelevant.

II. THE DEFENDANTS FAILED TO ADDRESS CONTROLLING NORTH DAKOTA CASE LAW AND INSTEAD RELIED ON IRRELEVANT CASES FROM OTHER JURISDICTIONS IN SUPPORT OF THEIR POSITION.

In their brief, the defendants failed to address, or even mention, the North Dakota decisions which control this case. *See O'Connor v. Immele,* 43 N.W.2d 649 (N.D. 1950), *Kuhn v. Kuhn*, 281 N.W.2d 230 (N.D. 1979) *reh'g denied* (July 11, 1979), and *Quandee v. Skene*, 321 N.W.2d 91 (N.D. 1982). The defendants also failed to address, or even mention, the widely accepted law governing mutual, reciprocal wills. *See* 79 *Am.Jur.2d Wills*, §§ 693, 714, and 715 (2002). Likewise, the defendants failed to address, or even mention, North Dakota contract law which supports the existence of an agreement to treat the children equally. *See* N.D.C.C. §§ 9-03-25, 9-06-01, 9-06-02, and 9-09-05. The defendants' failure to discuss this law is intentional as the law supports the plaintiffs' arguments and defeats the defendants' motion for summary judgment.

Instead of discussing applicable North Dakota law, the defendants cite cases from other jurisdictions holding that contracts to make a will must be proven by clear and convincing evidence. (Appellees' Brief, p. 7). These cases are irrelevant as North Dakota has never adopted this standard of proof.

It also appears that the defendants completely misrepresented the statutory language underlying the case entitled *Floerchinger v. Williams*, 148 N.W.2d 410 (Iowa 1967). (Appellees' Brief, p. 7). The defendants claim that the

Floerchinger case is based on a statute which is "identical" to N.D.C.C. § 30.1-09-13. (*Id.*) The only substantive provision referenced in the opinion, Iowa Probate Code § 633.270, states: "Contractual or mutual wills. No will shall be construed to be contractual or mutual, unless in such will the testator shall expressly state his intent that such will shall be so construed." Even a cursory reading of *Floerchinger* shows that the Iowa statute is completely different from contracts concerning succession set forth in N.D.C.C. § 30.1-09-13. Relying upon IPC § 633.270, the *Floerchinger* court ultimately concluded that the wills in question were not "reciprocal or mutual in their provisions" so it held that the wills did not qualify as "contractual" or "mutual" instruments. *Id.* at 413. In the present case, the defendants concede that the 1973 and 1985 wills are "reciprocal" or "mutual" wills. (Appellees' Brief, pps. 1-2). Moreover, the *Floerchinger* court did not involve an agreement regarding the disposition of the husband and wife's assets upon the death of the surviving spouse.

The only North Dakota case discussed at length by the defendants is entitled *Hagen v. Schluchter*, 126 N.W.2d 899 (N.D. 1964). Contrary to the defendants' position, the *Hagen* opinion actually undermines their argument for summary judgment. The *Hagen* case involved a dispute over certain Contracts for Deed which were allegedly executed in violation of mutual, reciprocal wills. *Id*. at 900. It was undisputed that the surviving spouse, who executed the Contracts for Deed, did not change her will at any time. *Id.* It was further undisputed that the surviving spouse did not offer her husband's will for probate. *Id.* The plaintiff in *Hagen* claimed that the property transferred by the Contracts

for Deed violated an agreement to dispose of property held in joint tenancy, except as provided by the mutual, reciprocal wills. *Id.* The *Hagen* court was presented with three issues regarding the existence of the agreement to preserve the joint property. *Id.* at 902. One, the evidence was insufficient to establish an agreement. Two, if the agreement was established, it was void for lack of consideration. Three, an oral agreement to dispose of real property by a will is prohibited by the statute of frauds. *Id.*

The *Hagen* court could not reach a consensus on the first two issues. *Id.* at 902. However, the court determined that the statute of frauds presented an insurmountable barrier to the enforcement of the oral agreement under the facts of that case. *Id.* Specifically, the plaintiff was unable to produce a writing evidencing the agreement and could not establish sufficient part performance to remove the agreement from the statute of frauds. *Id.* at 903-04. The court explained "[s]ince the agreement which plaintiffs seek to enforce in the case is within the ban of the statute of frauds," the judgment dismissing the lawsuit was affirmed. *Id.* at 904.

In the present case, the defendants are precluded from raising the statute of frauds defense as they failed to affirmatively allege this defense in their answer to the Amended Complaint as required by Rule 8(c) of the North Dakota Rules of Civil Procedure. Accordingly, the sole basis for dismissing the lawsuit in *Hagen* – the statute of frauds defense – does not apply to this case. In addition, the underlying agreement to treat the children equally upon the surviving spouse's death has been in place since 1973, years before the joint tenancy

status arose. Unlike *Hagen*, Margaret probated Stephen's will so the property transferred to her through the probate process. The legal ownership status of the property prior to the probate transfer is irrelevant as the agreement to treat the children equally predated the purchase of any land ultimately transferred to Tracy. (A-10-17). Moreover, Margaret accepted the benefits of the agreement with Stephen so she cannot repudiate the agreement at this late date. *See O'Connor*, 43 N.W.2d at 653-54; *Kuhn*, 281 N.W.2d at 233.

III. THE 1973 WILLS SERVE AS THE FIRST PIECE OF EVIDENCE OF THE AGREEMENT TO TREAT THE CHILDREN EQUALLY.

At one point in their brief, the defendants admit that "[r]elevant to a disposition of the legal issues in this case are the Wills of Stephen and Margaret." (Appellees' Brief, p. 3). The defendants then discuss the terms of Stephen and Margaret's wills dated October 23, 1973. (*Id.*) Later, the defendants contradict their position by arguing that "the 1973 wills are not relevant in the decision of this case …." (*Id.* at 7). This argument is without merit. The 1973 wills serve as the first piece of evidence of the agreement between Stephen and Margaret to treat the children equally upon the surviving spouse's death.

The defendants further claim that "[a]ll the plaintiffs have pointed to throughout this litigation is the 1973 and 1985 wills." (Appellees' Brief, p. 11). This is patently untrue. The plaintiffs listed numerous facts in support of the agreement to treat the children equally which were unrelated to the 1973 and 1985 wills. (Appellants' Brief, pps. 6-9, 11, 14-15, and 17). The defendants did

not challenge the interpretation of the undisputed facts. (Appellants' Brief, pps. 27-31).

Margaret, in her deposition, testified that Stephen never told her to transfer the land to Tracy or exclude any of the other children from receiving Stephen's land. (A-198). When questioned by attorney Bruce Bair regarding her wishes, Margaret agreed that the five children (Dennis, Deborah, Sheila, Steve and Tracy) would receive equal shares of the property. (A-421-22). What parent, who loved all of his children equally, would agree to a transfer of virtually all of his property – approximately 4,000 acres – to one child and completely exclude his other four children? What parent, who never said that his children should be treated differently, would agree to transfer all of his land to one child and completely exclude his other four children? What parent would agree that his children (Dennis, Deborah, Sheila and Steve) would not receive property from their natural mother (Erna Hagerott Martin) and instead would allow a transfer of that property to non-relatives (Tracy and Rick)? A reasonable person could only draw one conclusion – that Stephen and Margaret had an agreement to treat the children equally – from the evidence presented to the district court. *See Ag Services of America*, 1998 ND 189, ¶ 9, 585 N.W.2d at 574.

IV. THE CLAIMS FOR BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, AND MISREPRESENTATION/DECEIT ARE SEPARATE AND DISTINCT CAUSES OF ACTION.

The defendants erroneously combine the claim for breach of contract not to revoke the mutual, reciprocal wills and the claims for Margaret's breach of

fiduciary duty, breach of implied covenant of good faith and fair dealing, and misrepresentation/deceit. (Appellees' Brief, pps. 5, 11-12). In doing so, the defendants argue that the Amended Complaint fails entirely if this Court determines that Stephen and Margaret did not have an agreement to treat the children equally upon the surviving spouse's death. (*Id.* at 5).

The claim for breach of the agreement not to revoke the mutual, reciprocal wills is based on an agreement which was reached in 1973. The plaintiffs seek enforcement of that agreement. Quite simply, Margaret accepted the benefits of that agreement and should not be allowed to repudiate the agreement after Stephen's death. On the other hand, the claims for breach of fiduciary duty, breach of an implied covenant of good faith and fair dealing, and misrepresentation/deceit arise from Margaret's role as the personal representative of Stephen's estate. These claims are wholly separate and distinct from the underlying agreement to treat the children equally. *See Estate of Chayka*, 176 N.W.2d 561, 565 (Wisc. 1970) (the duty of good faith is an implied condition in every contract, including a contract to make a will).

Margaret's statements after Stephen's death that the land had been placed in "trust" give rise to a cause of action for misrepresentation/deceit. Margaret made these statements to the plaintiffs (with the knowledge that they were not true) and the plaintiffs relied on the statements for more than 14 years. This reliance was reasonable as the plaintiffs had not been provided with a copy of the documents surrounding Stephen's estate. (A-71, 82, 85). The district court's failure to address all of the claims set forth in the Amended Complaint

requires a remand, regardless of this Court's decision on the breach of contract claim.

V. THE PLAINTIFFS DO NOT HAVE A DUTY TO INQUIRE ABOUT THE STATUS OF THE PROBATE PROCEEDING.

In their brief, the defendants acknowledge Margaret's statutory duties as the personal representative of Stephen's estate contained in N.D.C.C. § 30.1-18-05. (Appellees' Brief, pps. 11-12). Whether a personal representative breached her fiduciary duty is a question of fact. *Estate of Gleeson*, 2002 ND 211, ¶ 17, 655 N.W.2d 69 (citing *Matter of Estate of Peterson*, 1997 ND 48, ¶ 36, 561 N.W.2d 618). Nonetheless, without citing any law in support of their argument, the defendants' falsely accuse Dennis, Deborah, and Sheila of failing to inquire about the status of the probate proceeding. (*Id*.) First, the law does not create a duty on the heirs and devisees to make sure that the personal representative is fulfilling her statutory requirements. Second, Dennis, Deborah, and Sheila inquired about the status of the land and were told that it had been placed in "trust" for the benefit of the children. (A-68, 80-81, 86). The defendants' argument is a feeble attempt to divert this Court's attention from the statutory duties imposed on Margaret as the personal representative for Stephen's estate.

CONCLUSION

Dennis, Deborah, and Sheila respectfully request that this Court reverse the district court's Order on Motions for Summary Judgment. The plaintiffs request that this Court remand the case to the district court with instructions to enter judgment in favor of the plaintiffs on the breach of contract claim and

establish a constructive trust on the property owned by Stephen at the time of his death. Finally, the plaintiffs request that this Court instruct the district court to enter an order in favor of the plaintiffs on the fiduciary duty, implied duty of good faith and fair dealing, and misrepresentation/deceit claims and further order the calculation of damages arising from those claims.

Dated: March 23, 2005

MARING WILLIAMS LAW OFFICE, P.C.

By_____
Daniel J. Dunn (04869)
1220 Main Avenue, Suite 105
P.O. Box 2103
Fargo, North Dakota 58107-2103
Telephone: (701) 241-4141

Thomas P. Martin (05269)
P.O. Box 1745
Fargo, ND 58107-1745
(218) 291-0896

ATTORNEYS FOR PLAINTIFFS/
APPELLANTS

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Supreme Court No. 20050001
Court File No.: 33-04-C-1015

STATE OF NORTH DAKOTA)
) ss. **AFFIDAVIT OF SERVICE BY MAIL**
COUNTY OF CASS)

The undersigned, being first duly sworn, says that a copy of the attached:

REPLY BRIEF FOR THE APPELLANTS DENNIS S. MARTIN, DEBORAH J. MARTIN, AND SHEILA R. WELLS

was served upon:

Mr. Malcolm H. Brown
MALCOLM H. BROWN, P.C.
P.O. Box 2692
Bismarck, ND 58502-2692

by enclosing the same in an envelope addressed to such attorney at the above address with postage fully prepaid and by depositing said envelope in a United States Postal Service mailbox at Fargo, North Dakota, on the 23rd day of March 2005.

_____
Sharon Hegre, Certified PLS

Subscribed and sworn to before me this 23rd day of March 2005.

_____
(SEAL) Daniel J. Dunn, Notary Public
Cass County, ND