

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORIGINAL

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.

20050001

FILED
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STATE OF NORTH DAKOTA

Appeal from Summary Judgment
Oliver County District Court, The Honorable Robert O. Wefald
District Judge Presiding

**BRIEF FOR THE APPELLEES, TRACY (MARTIN) BERG, RICK BERG,
AND MARGARET MARTIN, INDIVIDUALLY, AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF STEPHEN MARTIN**

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STATEMENT OF THE ISSUE

Did the District Court properly grant Defendants a summary judgment of dismissal of the Plaintiffs' Complaint as a matter of law?

STATEMENT OF THE CASE

Plaintiffs, Dennis S. Martin, Deborah J. Martin, and Sheila R. Wells, are three of five children of the late Stephen Martin who died accidentally on December 20, 1988. (A-3/5) A fourth child, Steven H. Martin, of Washburn, North Dakota, is not a party to this action. The Defendant Tracy (Martin) Berg is also the daughter of the late Stephen Martin. (A-5) The Defendant Margaret Martin is the widow of Stephen. (A-5)

Broadly speaking, the Complaint alleges a contract to make a will or a contract not to revoke a will between the Decedent, Stephen Martin (Stephen") and his widow, Margaret Martin ("Margaret"). (A-5/6) The Complaint requests specific performance of the alleged agreement, an order imposing a constructive trust for the benefit of the Plaintiffs on assets formerly owned by Stephen, an order enjoining the Defendants from transferring any of the assets formerly owned by Stephen, from making additional transfers or conveyances of property owned by Stephen, for an accounting of all money transferred by Margaret to any other person, an appraisal of property conveyed to Margaret after the death of Stephen, and for damages.

The Defendants' Answer admits that Margaret and Stephen executed Wills on or about January 31, 1985, that could be considered to be "reciprocal" or "mutual"

Wills, but denied that there was any contract to make a will or a contract not to revoke a will. (A-63/64) Margaret admits that she was the sole beneficiary of Stephen's Will which was admitted to probate and admits that she has made certain transfers of real estate owned by her to the other Defendants. Defendants also affirmatively allege defenses of laches and statute of limitations and failure to state a claim upon which relief can be granted and that the Plaintiffs' claims are frivolous, not supported by existing law, are made without any evidentiary support and without reasonable cause, and that Plaintiffs should be subject to the sanctions provided by § 28-26-31 N.D.C.C. and Rule 11 N.D.R.Civ.P. (A-65)

Defendants moved for summary judgment of dismissal of the Plaintiffs' Complaint pursuant to Rule 56 N.D.R.Civ.P. on the grounds and for the reason that Defendants believed there were no issues of fact and that Defendants were entitled as a matter of law to a dismissal of the Plaintiffs' Complaint.

After briefing and hearing on December 15, 2004, District Judge Wefald granted the Defendants' Motion for Summary Judgment. (A-170 to 174)

FACTS

The Decedent, Stephen Martin, and Erna Hagerott were married in 1946. They had four children, the Plaintiffs, Dennis S. Martin, Deborah J. Martin and Sheila R. Wells, and also Steven H. Martin, not a party to this proceeding. Erna died in April of 1958. (A-3/4)

Stephen and Margaret were married in March of 1961. They had one child, the

Defendant Tracy (Martin) Berg, who was born in December of 1961. (A-4)

Relevant to a disposition of the legal issues in this case are the Wills of Stephen and Margaret. In October of 1973, Stephen and Margaret executed Wills drafted by Attorney Orville Schulz of New Salem, North Dakota. (A-20/21) These Wills are similar to the extent that if a spouse dies and the surviving spouse survives for more than 30 days, all of the Decedent's property would go to the surviving spouse or, if the surviving spouse did not survive for 30 days, to Stephen's five children, including the Defendant Tracy (Martin) Berg, in equal shares. These Wills also contain a specific bequest to Margaret's daughter from her previous marriage, Diane Eichorst; however, that issue is irrelevant to these proceedings.

Stephen and Margaret executed new Wills on January 31, 1985. (A-22 to 25) These Wills were drafted by Attorney Bruce Bair of Mandan, North Dakota. Again the Wills contain a specific bequest to Margaret's daughter, Diane, distribute all of the property to the surviving spouse or, if no surviving spouse, then to the 5 children, the Plaintiffs, Steven H. Martin, and the Defendant Tracy (Martin) Berg in equal shares.

Stephen died of drowning in a fishing accident on December 20, 1988. (A-5) The Will drawn by Attorney Bruce Bair dated January 31, 1985, was admitted to probate on January 9, 1989, and Margaret was appointed as Personal Representative.

Pursuant to the terms of the January 31, 1985, Will, Margaret received all of the probate property. (A-23 & 26) Much of Stephen's estate was real estate jointly

owned with Margaret. (A-274/275) Some of this real estate has been transferred to the Defendant Tracy (Martin) Berg. (A-28 to 62)

Subsequent to the probate of Stephen's 1985 Will and after all of the probate assets had been distributed to Margaret, in 1994 Margaret began deeding certain of her real estate to her daughter, Tracy (Martin) Berg and her husband, Rick Berg. (Rick would then deed his half interest in the property to Tracy, the idea being that Margaret was getting the benefit of a gift to both of them and Rick was then deeding his interest to Tracy as the ultimate objective was to have Tracy own the real estate in her own name. (A-28 to 62) All of these transfers were of lands formerly owned by Stephen and Margaret as joint tenants. (A 274/275)

Apparently Plaintiffs, or some of them, learned of these transfers in the fall of 2003, and this action was commenced in March 2004.

ARGUMENT

The substance of Plaintiffs' Complaint, and the legal issues upon which the Summary Judgment Motion was brought, are contained in paragraphs XV, XVI, XXVI, and XXVII of Plaintiffs' Amended Complaint. (A-7 to 11) These allegations are:

XV.

Defendant Margaret Martin executed a reciprocal Last will and Testament with Stephen Martin on October 23, 1973. The reciprocal Wills of Stephen Martin and Defendant Margaret Martin were executed pursuant to an agreement between the testators that the Plaintiffs would be treated equally upon the surviving spouse's death. Defendant

Margaret Martin received consideration for the agreement in the form of certainty with respect to the disposition of her property in the event Defendant Margaret Martin died before Stephen Martin.

XVI.

Defendant Margaret Martin executed a reciprocal Last Will and Testament with Stephen Martin on January 31, 1985. The reciprocal Wills of Stephen Martin and Defendant Margaret Martin were executed pursuant to an agreement between the testators that the Plaintiffs would be treated equally upon the surviving spouse's death. Defendant Margaret Martin received consideration for the agreement in the form of certainty with respect to the disposition of her property in the event Defendant Margaret Martin died before Stephen Martin.

XXVI.

Defendant Margaret Martin breached the agreement underlying the Last Wills and Testament by making inter vivos dispositions to Tracy (Martin) Berg and Rick Berg. In making these inter vivos transfers, Defendant Margaret Martin circumvented the agreement regarding the equal disposition of property upon the surviving spouse's death and the irrevocation of the reciprocal Wills.

XXVII.

Defendant Margaret Martin owed an implied covenant of good faith and fair dealing such that she would not act in a way which would circumvent the agreement for equal distribution of property upon the surviving spouse's death and the irrevocation of the reciprocal Wills.

While Plaintiffs also alleged other claims, such as a breach of Margaret's fiduciary duty as Personal Representative, breach of some implied covenant of good faith and fair dealing, etcetera, the Plaintiffs' entire Complaint fails if there was no contract as required by § 30.1-09-13 N.D.C.C. which provides:

“(2-701) **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.”

There was a change in the law between the time Stephen and Margaret executed their Wills in October of 1973 and the Wills in January of 1985. The Uniform Probate Code, a complete revision of the wills, succession, and probate portions of North Dakota law, was adopted by the 1973 North Dakota Legislature and became effective July 1, 1975.

In 1973, “A conjoint or mutual will is valid, but it may be revoked by any of the testators in like manner with any other will.” § 56-0208, North Dakota Revised Code of 1943. That statute remained unchanged until the effective date of the Uniform Probate Code in 1975. A North Dakota case, *Collins v. Stroup*, 3 N.W. 2d, 742 (ND-1942) defined a “mutual” will as a will where two or more persons make mutual or reciprocal provisions in favor of each other. *Id.* at 745. A fair reading, then, of the October 1973 Wills is that they were “mutual” Wills which could be revoked by “any of the testators” as provided by the North Dakota Revised Code of 1943. § 56-0208.

There is no separate agreement or statement contained within the 1973 Wills that would express an intention that Stephen and Margaret were contracting to make

the 1973 Wills or that they were contracting not to revoke the 1973 Wills.

Contracts to make a will must be proved by clear and convincing evidence. *Clark v. Clark*, 288 N.W. 2d 1 (MN-1979), *Craddock v. Bergman*, 645 P.2d 399 (MT-1982), *Simmons v. Ewing*, 529 P. 2d 776 (ID-1974).

Mutual and reciprocal provisions of wills, by themselves, do not create a contract not to revoke or modify a will. *Rieck v. Rieck*, 724 P. 2d 674 (CO-1986), *Rogers v. Rogers*, 356 N.W. 2d 288 (MI-1984), and *In re Estate of Thompson*, 407 N.W. 2d 738 (NE-1987).

A case similar to this arose in Iowa in the 1960's. Husband and wife executed mutual Wills in July of 1962 and similar codicils in June of 1963. The husband died in December of 1964. The wife made a new Will in March of 1965 and died in May of 1965. In Iowa, the Uniform Probate Code went into effect in January of 1964. The Iowa statute is identical to § 30.1-09-13 N.D.C.C. (2-701). The Iowa Court held that the effective date of the Uniform Probate Code, January of 1964, governed the issues in the case and that because the 1962 Wills and 1963 codicils did not "expressly" reference an intent to create a contractual will, that such an agreement did not occur and the wife was free to make a new will. *Floerchinger v. Williams*, 148 N.W. 2d 410 (IA-1967). Thus, we believe that the 1973 Wills are not relevant in the decision of this case and that we must look to the January 1985 Wills to determine whether or not Stephen and Margaret either made a contract to make a will or a contract not to revoke a will as referenced in § 30.1-09-13 N.D.C.C.

Not surprisingly, many states have had similar litigation to this and many states have adopted the Uniform Probate Code. The Minnesota Appellate Court, in reference to Minnesota Statute § 524.2-701(3), identical statute to § 30.1-09-13 N.D.C.C., has stated that “The purpose of this provision is to ‘tighten(s) the methods by which contracts concerning succession may be proved’”. *In re Estate of Trobaugh*, 380 N.W. 2d 152, 154 (MN.App-1986). In that case, the husband and wife made mutual Wills in November of 1985. The husband changed his Will in September of 1986 and then died. The second Will differed from the first Will. The second Will was admitted to probate. There were some writings by the decedent to family members discussing his estate plan, but none of the documents referenced a contract to make a will. The Minnesota Appellate court states, “...although documents may contain evidence of a contract to make a mutual will (which is not the case here), those contracts are revokable unless some *express* mention of an intention not to revoke is contained in the documents.” (Emphasis supplied.) *Oleson v. Mantz*, 438 N.W.2d 404, 408 (MN.App-1989) citing *In re Estate of Moore*, 669 P.2d 609, 612 (AZ.App-1983) (interpreting an identical statute).

This Court has stated, “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.” *Matter of Estate of Luken*, 551 N.W.2d 794, 798 (ND-1996). “We also may look to the Editorial Board Comments of the Uniform Probate Code to interpret its provisions.” *Matter of Estate of Zimmerman*, 1998 N.D. 116,

¶ 21, 579 N.W.2d 591.

Contracts to make wills are looked on with disfavor by the Courts because at the time of enforcement one of the parties is dead and obviously cannot confirm or deny the existence of a contract. *In re McKim Estate*, 606 N.W.2d 30 (MI. App-1999) citing *Orlando v. Prewett*, 705 P.2d 593 (MT-1985).

This Court has addressed these issues prior to the adoption of the Uniform Probate Code. In the case of *Hagen v. Schlechter*, 126 N.W.2d 899 (ND-1964) the Court stated "...the majority rule appears to be that the execution of a reciprocal will, where the instrument contains no reference to a contract or the terms thereof or to the other will, is not a memorandum sufficient to satisfy the statute of frauds. Id. at 903, and "The execution of reciprocal wills evidences no more than a coincidence of a common intent at the time the wills were executed", and "the execution of a will, which, under the statute (§ 56-02-08 N.D.C.C.) is presumptively revokable, cannot be a memorandum of a contract not to revoke." Id. at 903

The *Hagen* case is also instructive on another principal that dooms the Plaintiffs' Complaint. All of the land transfers of which Plaintiffs' complain were of property that was not a probate asset in Stephen's probate, because it was owned by Stephen and Margaret as joint tenants. As the *Hagen* case states, "the joint tenant who survives does not take the moiety of the other tenant from him or as his successor, but takes it by right under the conveyance or instrument by which the joint tenancy was created." Id. at 901. In other words, as the Court knows, and as is

hornbook law, the Wills of Stephen and Margaret have nothing to do with Margaret's rights to the real estate that she and Stephen owned as joint tenants prior to his death.

This Court has addressed the provisions of § 30-1.09-13 N.D.C.C. recently; "The Editorial Board Comments of the commissioners of Uniform State Laws makes clear that this section "tighten[s] the methods by which contracts concerning succession may be proved" and that "[o]ral testimony regarding the contract is permitted *if the will makes reference to the contract.*" (Emphasis supplied.) *Jordan v. Anderson*. 421 N.W. 2d 816, 820 (ND-1988), and *Estate of Wieland*. 1998 ND 130 ¶ 20, 581 N.W. 2d 140.

Margaret's deposition was taken on May 28, 2004. Margaret testified, commencing at page 267 of her deposition (A-251) in response to whether she and Stephen "had any kind of an agreement that neither of you could change those Wills after the first one died", answer "No" and that there is no written document between her and Stephen that references an agreement between the two of them not to change their Wills.

Attorney Bruce Bair, who drafted the 1985 Wills, was deposed on August 19, 2004. In reference to the question of whether or not he could have drafted a contract for Stephen and Margaret that would provide that they would not revoke the Wills, Attorney Bair testified that he would "draw a joint and mutual will"; "It's a will that they both sign, which is a contract." He also testified that if he were requested to do that, he would do it "totally different than the Wills that were signed in January of

1985.” (A-427/428)

The Editorial Board Comments to § 30.1-09-13 N.D.C.C. state that “This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence prove (sic) the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract.” N.D.C.C. Vol. 6, p 93.

The Defendants believe that the law is patently clear that there must be some separate writing or contract signed by the parties, and not the least by Stephen Martin, that would express an intention to make a contract to make a will or create a contract not to revoke a will. All the Plaintiffs have pointed to throughout this litigation is the 1973 and the 1985 Wills. These do not comply with the law either before or after the adoption of the Uniform Probate Code. The 1973 and 1975 Wills do not constitute a contract to make a will or not to revoke a will. All the Plaintiffs are trying to do is bootstrap themselves into some kind of a contract by documents that do not in fact create such a contract.

Finally, Plaintiffs complain that the District Court, by granting the Defendants’ Motion for Summary Judgment, did not adequately consider the Plaintiffs’ prayer for a constructive trust on Margaret’s assets and failed to address the Plaintiffs’ claims of misrepresentation/deceit and breach of fiduciary duty. While it is true that pursuant to § 30.1-18-05 N.D.C.C. Margaret, as Personal Representative of her husband’s estate, should have given notice of her appointment to the Plaintiffs, it is not as if the

Plaintiffs were unaware of the fact that Stephen died or, frankly, were unaware that there may be a probate proceeding. Of course, at any time any of them could have inquired of Margaret, which they apparently neglected to do, or checked the probate files in Oliver County.

However, given the fact that there was no contract to make a will or not to revoke a will between Margaret and Stephen, Margaret was free to do whatever she desired with the property she inherited from Stephen. It would have made little difference whether the Plaintiffs received notice of Margaret's appointment as Personal Representative or not.

CONCLUSION


The facts in this case that are relevant to a decision of the District Court in dismissing the Complaint of the Plaintiffs were not in dispute. Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. *Tarnavsky v. McKenzie County Grazing Assn*, 2003 ND 117, ¶ 7, 665 N.W.2d 18. Factual issues become appropriate for summary judgment “when reasonable minds can draw but one conclusion from the evidence.” *Opp V. Source One Mgmt., Inc.*, 1999 ND 52, ¶ 16. 591 N.W.2d 101. The party opposing summary judgment cannot simply rely upon factual assertions in a brief or pleading and cannot rely upon unsupported allegations; such conclusory assertions are insufficient to raise an issue of material fact. *Jones*

v. Barnett, 2000 ND 207, ¶ 5, 619 N.W.2d 490. Further, even if a factual dispute exists, summary judgment is appropriate if resolution of the factual dispute will not change the result under the law. *Swenson v. Raumin*, 1998 ND 150, ¶ 8, 583 N.W.2d 102. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of their claim and on which they will bear the burden of proof at trial.

As a matter of law, the January 31, 1985, Wills of Stephen and Margaret do not constitute either a contract to make a will or a contract not to revoke a will because there is no express reference in these Wills to the contract and no writing signed by Stephen evidencing the contract. As § 30.1-09-13 N.D.C.C. states, “The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.” In this case there must be some separate writing signed by Stephen and Margaret that would express their intent of a contract to make a will or a contract not to revoke a will. There is no such evidence, and the Plaintiffs’ Complaint was properly dismissed as a matter of law. The judgment of the District Court should be affirmed.

Dated this 7th day of March, 2005.

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CERTIFICATE OF SERVICE

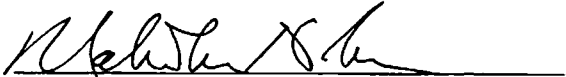
Supreme Court No. 20050001

The foregoing Brief for the Appellees, Tracy (Martin) Berg, Rick Berg, and Margaret Martin, individually, and as Personal Representative of the Estate of Stephen Martin was served upon the following by mailing a true and correct copy thereof to:

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the same having been placed in the United States Mail, with sufficient postage affixed, this 7 day of March, 2005.


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