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## STATEMENT OF THE ISSUES

[¶ 1] When there is testimony that a Will was in existence at the time of the decedent's death, did the district court err as a matter of law in applying the presumption of *animo revocandi*?

[¶ 2] Alternatively to the first issue, did the district court err in finding the presumption of *animo revocandi* had not been overcome?

## STATEMENT OF THE CASE

[¶ 3] A personal representative sought to probate the estate of the decedent in intestacy, contending that he could not find a Will of the decedent after her death. A step-grandson of the decedent then brought a petition to probate a copy of the decedent's Will received from the decedent's attorney after the decedent's death. In this Will, the step-grandson, his siblings, and the decedent's other grandchildren were all named as devisees. The personal representative, who was also the decedent's grandchild and who would receive a larger distribution from the decedent's estate if the decedent's Will was not probated, objected to the probate of the Will. He contended: (1) the Will was not duly executed; and (2) because he could not find the original Will after the decedent's death, it was presumed to be revoked under the doctrine of *animo revocandi.*

[¶ 4] After a bench trial in which testimony was presented that the Will was in existence at the time of the decedent's death, the court found that the Will was duly executed, but it held that the Will was revoked under the doctrine of *animo revocandi.* The court then denied the formal probate of the Will. The step-grandson appeals from this decision.

## STATEMENT OF THE FACTS

### A. Harriet Clemetson's Family

[¶ 5] Harriet Clemetson died on October 2, 2009. (App. 12.) Her husband of approximately 45 years, Earl Clemetson, died earlier in the year, on January 18, 2009. (App. 13.) The couple did not have any children together, but they each had a child from previous relationships. (App. 13.) Harriet had a son, Ritchie Evanson, who died in 2003. (App. 13.) Ritchie had six children: Dawn Chaffee, Ross Evanson, Laurie Bartlett, Shawn Evanson, Stephen Evanson, and Kenneth Evanson (hereinafter collectively referred to as "Evanson grandchildren"). (App. 13.) Earl had a daughter, Carolyn Sprague. (App. 13.) She is married to Kevin Sprague. (App. 13.) Together, Carolyn and Kevin have three children: Philip Sprague, Kevin Joseph Sprague II, and Jennifer Sprague (hereinafter collectively referred to as "Sprague grandchildren"). (App. 13.) For the Court's assistance, a family tree was introduced at trial to show the relationships between the parties. (*See* Exhibit P-8, Doc. # 74.)

[¶ 6] Harriet had a good relationship with all of her grandchildren–the Sprague grandchildren and the Evanson grandchildren. After Earl's death and until her death, she continued writing birthday checks to Carolyn and her children as well as the Evanson grandchildren. (*See* Tr. I at 59-60; Doc. # 87, P-6). Indeed, among her personal effects at her death was a birthday present that Harriet had purchased for Jennifer Sprague for her upcoming birthday. (Tr. I at 60.)

**B. Harriet Clemetson's Will**

[¶ 7] In 1995, Earl and Harriet had Wills prepared at the same time at the same law firm. (App. 13.) Earl's Will, which was probated, provides that certain of his farmland went to Harriet for life via a life estate, and the remainder of such farmland was devised to Carolyn Sprague. (Exhibit P-2, Doc. # 83.) The residue of his Estate was devised to Harriet. (*Id.*)

[¶ 8] Harriet's Will devises certain farmland and some specifically designated personal effects to the Evanson side of the family. (See Exhibit P-1, Doc. # 82). The residue of the Estate is then devised equally to the Sprague grandchildren and the Evanson grandchildren. (Id.) Thus, under the terms of Harriet's Will, the remaining approximately $1,000,000+ that Harriet owned jointly with Earl at his death would be split equally among both the Sprague grandchildren and the Evanson grandchildren, with each grandchild receiving 1/9 of the residue. (*See* Exhibit 55, Doc. # 92; Exhibit 56, Doc. # 93) (valuing Harriet and Earl's joint property as $1,051,615, which amount is included in Earl's entire estate valued at $1.7 million and then, after his death, in Harriet's Estate valued at $1.5 million).

**C. Tracing the chain of custody with regard to Harriet's Will**

[¶ 9] After Earl's death in January 2009, Harriet told Kevin Sprague and Carolyn Sprague that she and Earl had Wills prepared at the same law office at the same time. (App. 17-18.) It was generally known to the Spragues that the Clemetsons' Wills were

contained in their safe. (Tr. I at 40.)[1] So, after Earl's death, when Harriet asked the Spragues to help her get the necessary documents together to bring to her lawyer's office, they looked in the safe. (Tr. I at 39-40.) They found both Harriet's Will and Earl's Will in the safe, which was in the basement. (Tr. I at 40-41; 102.)

[¶ 10] Like Earl's Will, Harriet's Will was contained in a heavy, off-white envelope, and the envelope described its contents as Harriet's Will. (Tr. I at 40-41, 102.) Kevin read Harriet's Will (Tr. I at 102.) He then returned it to its envelope and placed it with Earl's Will in the safe. (Tr. I at 105.) Earl's Will was brought to the lawyer, Mike Juntunen, the next day. (Tr. I at 48, 105.)

[¶ 11] Harriet's Will was still in the safe, and later Carolyn helped Harriet clean out the safe. (Tr. I at 48.) Harriet put her Will in a box with other items from the safe; the Will was on top of the other items in the box. (Tr. I at 49.) Carolyn carried the box upstairs, and gave it to Harriet who put it in the "middle bedroom," which served as an office. (Id.) Carolyn lives in Michigan, and she returned to North Dakota in May 2009 for her father's burial. (Tr. I at 28, 52.) She and her family stayed with Harriet. (Tr. I at 52.) During her stay, she saw the Will on top of the same box she carried upstairs. (Tr. I at 52.) It was in the closet in the office. (Tr. I at 52.)

[¶ 12] In August 2009, Kevin returned to help Harriet with an auction sale. (Tr. I at 109.) At that time, Harriet, Kevin, and Mike Juntenen met at Harriet's house to

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[1]The Transcript for the first day of trial, August 10, 2010, will be referred to herein as Tr. I. The Transcript for the second day of trial, August 11, 2010, will be referred to herein as Tr. II.

finalize a promissory note in which the Spragues were purchasing a life estate from Harriet. (Tr. I at 109.) Harriet took the documents from this transaction, and she put them in the top drawer of her file cabinet in the office. (Tr. I at 109.) At that time, Kevin saw that Harriet's Will in the envelope was also in the top drawer. (Tr. I at 109.) The Will was on top of a box in the first drawer of the filing cabinet. (Tr. I at 109-10.)

[¶ 13] Cathy Knudson is Harriet's niece; her father and Earl's father were brothers. (Tr. I at 133.) After Earl's death, Cathy developed a close relationship with Harriet. (Tr. I at 133.) Cathy took Harriet to all her doctor's appointments; took her grocery shopping, and helped her in the house if she needed. (Tr. I at 133.) Harriet gave Cathy a key to her house. (Tr. I at 134.) After Harriet's death, Cathy used the key twice. (Tr. I at 135.) First, she used it to get a blouse for Harriet's funeral. (Tr. I at 133.) The next time, she wanted to get addresses of Harriet's grandchildren, so she could send them Christmas ornaments that her sister was making out of Earl's ties. (Tr. I at 135-36.) After Earl's death, Cathy wrote down the names and addresses of the grandchildren, both the Sprague grandchildren and the Evanson grandchildren, on a tablet for Harriet. (Tr. I at 137.) She wrote the names bigger for Harriet, who was vision impaired. (Tr. I at 35, 137.)

[¶ 14] So, after Harriet's death, Cathy went to Harriet's house to look for the list of addresses. (T. I at 136.) In doing so, she enlisted the help of her brother, Jeff Clemetson. (Tr. I at 138.) They started their search in the office. (Tr. I at 138.) In looking for the addresses, Jeff looked through the file cabinet in the office, and Cathy was standing near him. (Tr. I at 138-39.) When Jeff was searching, Cathy saw that in the

first drawer, there was a heavy envelope. (Tr. I at 139.) She remembered that it said "Will of Harriet Clemetson." (Tr. I at 139.) She continued with her search, eventually finding the list. (Tr. I at 138.) Her second and last visit to the house was shortly after Harriet's death. (Tr. I at 135.) When she left the house for the final time, she left her key. (Tr. I at 140.)

[¶ 15] Jeff, who was searching through the file cabinet, remembers that the box was labeled "things from safe" or "stuff from safe." (Tr. I at 159-160.) The box was white, the size of a shoe box or hat box, and it contained other items. (Tr. I at 159, 161.) It contained a stack of papers and close to the top was a thick envelope labeled as the Last Will of Harriet Clemetson. (Tr. I at 161.) He noticed that the envelope was sitting under a couple pieces of paper, and the envelope was hard, cardboard-like material. (Tr. I at 161.) He could tell there was something inside the envelope. (Tr. I at 162.) Jeff remembers that the visit to Harriet's house was either on October 5, 2009; October 6, 2009; or October 7, 2009. (Tr. I at 158, 177.) Harriet's funeral was on October 9, 2009. (Tr. I at 119.)

[¶ 16] Kenneth Evanson ("Kenny"), who lives in Fargo, looked for the Will once prior to seeking probate in intestacy. (Tr. I at 204, 205.) He did so prior to Harriet's funeral. (Tr. I at 205.) He said he could not find the Will when he looked that one time. (Tr. I at 212.) During that one occasion, he testified that he took some items from the file cabinet and brought them to Fargo. (Tr. I at 213.) At trial, Kenny testified he found a checkbook box in the file cabinet; at his deposition, he said he could not find any box in the file cabinet. (Tr. I at 202-03.) Kenny testified he was alone when he looked through

the file cabinet the one time prior to the funeral. (Tr. I at 217.) The file cabinet was not locked. (Tr. I at 214.) In the days surrounding the funeral, a number of people were in the house, including Kenny's siblings and their spouses. (Tr. I at 215-216.) Kenny indicated that the Spragues could not stay there during the funeral services because his brothers and sisters were going to be there. (Tr. I at 55.) The house that Harriet lived in was at the end of a long driveway in a rural area in Grand Forks, North Dakota. (Tr. I at 57.)

[¶ 17] When Kenny indicated that no Will was found after Harriet's death, Kevin told attorney Mike Juntunen that he saw the Will, and Kevin indicated that Harriet's Will was prepared at the same time as Earl's Will was prepared. (App. 18, Tr. II at 52-53.) After this information was relayed to attorney Juntunen, he was able to verify that a Will was, indeed, prepared for Harriet Clemetson at the same time as Earl's Will was prepared. (App. 18; Exhibit P-7, Doc. # 86; Exhibit P-12; Doc. # 77.)

[¶ 18] Nonetheless, Kenny objected to the probate of the Will, claiming: (1) Harriet's Will was not duly executed; and (2) because he could not find the original Will after the decedent's death, it was presumed to be revoked under the doctrine of *animo revocandi.* In rejecting Kenny's argument regarding execution, the Court credited the testimony of Kevin Sprague and Carolyn Sprague. (App. 17-18.) It noted further that with regard to the evidence on due execution: "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.) Indeed, during the trial, Kenny's only witness was himself. (*See generally* Transcripts).

[¶ 19] In finding that the Will of Harriet Clemetson was duly executed, the trial court specifically noted: "[T]here is testimony that a will existed at the time of Harriet's death." (App. 16.) Later, however, in the section discussing the doctrine of *animo revocandi*, particularly whether the Will existed at the time of Harriet's death, the Court noted: "The only evidence that was presented to establish that a will existed at the time of the death was the testimony of Kevin Sprague, Cathy Knudson, and Jeff Clemetson, who testified that they saw an envelope that said "Will of Harriet Clemetson." (App. 26.) The Court stated: "The credibility of these witnesses, however, is suspect." (App. 26.)

[¶ 20] The Court goes on to state why it believes the testimony of Kevin Sprague is suspect, even though it had just credited his same testimony with regard to finding due execution. (App. 27.) In any event, Kevin never testified that he saw the original Will after Harriet's death. (Tr. I at 108.) This testimony was from Cathy Knudson and Jeff Clemetson. The Court does not explain why it discredited their testimony.

[¶ 21] Then, the Court, assuming that the doctrine of *animo revocandi* applied, held that the Spragues "failed to rebut the presumption of *animo revocandi*[.]" (App. 32.)

## LAW AND ARGUMENT

### I. The trial court erred as a matter of law in applying the doctrine of *animo revocandi.*

#### A. The standard of review for determining whether the trial court correctly applied the doctrine of *animo revocandi* is *de novo.*

[¶ 22] The standard of review for the issue of whether the trial court properly applied the doctrine of *animo revocandi* is an issue of law, subject to *de novo* review.

In *Estate of Conley*, 2008 ND 148, 753 N.W.2d 384, this Court held, for the first time, that the presumption of *animo revocandi* applied under North Dakota's Uniform Code. In doing so, the Court relied upon cases from other Uniform Probate Code jurisdictions to answer this question. *Estate of Conley*, 2008 ND 148, ¶ 24. In particular, the Court relied upon *Estate of Mecello*, 633 N.W.2d 892 (Neb. 2001), which held: "Whether the trial court should have applied the doctrine of *animo revocandi* is a question of law." *Id.* at 901.

### B. Kenneth Evanson failed to prove the necessary facts giving rise to the presumption of *animo revocandi.*

[¶ 23] The trial court incorrectly applied the presumption of *animo revocandi* because the person seeking to apply the presumption, Kenneth Evanson, failed to prove the necessary facts giving rise to the presumption. The trial court erred by not placing a burden upon him to establish these facts. Indeed, the trial court specifically found facts that established that the presumption did not apply, namely that there was testimony that a Will was in existence at the time of Harriet's death. As explained below, this finding alone provides a basis for reversal. In addition, however, Kenny failed to establish that he took the requisite care in attempting to find the Will.

[¶ 24] As explained in *Estate of Conley*, the doctrine of *animo revocandi* involves a presumption, namely "when a will cannot be found upon the death of the testator, the presumption arises that the testator secretly chose to revoke the missing will." *Estate of Conley,* 2008 ND 148, ¶ 21. The North Dakota Rules of Evidence provide the effect of presumptions:

> **[I]f facts giving rise to a presumption are established by credible evidence**, the presumption substitutes for evidence of the existence of the fact presumed until the trier of fact finds from credible evidence that the fact presumed does not exist, in which event the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

N.D. R. Evid. 301(a) (emphasis added). In other words, in order for a presumption to apply, the party seeking to apply the presumption must first establish the necessary facts giving rise to the presumption. *Schweigert v. Provident Life Ins. Co.*, 503 N.W.2d 225, 229 (N.D. 1993) ("Accordingly, under North Dakota law, if a plaintiff persuades the trier of fact of facts giving rise to a presumption, the burden of persuasion shifts to the defendant to rebut that presumption.") (citing N.D. R. Evid. 301). Thus, Kenny, who sought to apply the presumption, had the burden to establish the necessary facts giving rise to the presumption. *Id.*

[¶ 25] The facts necessary to apply the presumption were set forth in *Estate of Conley*: "[W]hen a will cannot be found **upon** the death of the testator, the presumption arises that the testator secretly chose to revoke the missing will." *Estate of Conley*, 2008 ND 148, ¶ 21 (emphasis added). Thus, it was Kenny's burden, not the Spragues, to establish that Harriet's Will could not be found upon her death in order for the presumption to arise. *Id.*; N.D.R. Evid. 301(a). In its opinion, the trial court noted Kenny's testimony that he could not find Harriet's Will after her death, but this is not the same as finding that Harriet's Will: (1) could not be found (2) upon her death.

*1. Kenneth Evanson failed to prove that Harriet's Will was not found.*

[¶ 26] In the portion of the trial court's opinion analyzing whether Harriet Clemetson duly executed her Will, the trial court specifically found: "there is testimony that a will existed at the time of Harriet's death." (App. 16.) After reciting other evidence, the Court found: "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.) These findings, by themselves, establish that Kenny has failed to meet his burden to prove that a Will could not be found upon Harriet's death. *Silvers' Estate*, 274 So.2d 20, 21 (Fla. Ct. App. 1973) ("The reliance of the appellant on the principle that when a will which was in possession of a decedent cannot be found after his death there is a presumption that it was revoked, is misplaced here, where, although the 1962 will was never produced, there was some evidence of its existence at the time of the death of the decedent, suggesting possibility of the will having become lost after death of the decedent."); *see also Estate of Mecello*, 633 N.W.2d 892 (Neb. 2001) (reversing the trial court's finding that the presumption of *animo revocandi* applied when the party advocating the presumption failed to prove the facts giving rise to the presumption). The trial court's decision finding the presumption applied should be reversed for this reason, alone.

*2. Kenneth Evanson failed to meet his burden to prove that Harriet's Will could not have been found.*

[¶ 27] Not only does the evidence establish that the Will was found, Kenny has failed to meet his burden to prove that the Will could not have been found. The trial court did not place any burden upon Kenny in this regard. In order to meet this burden,

Kenny cannot just testify, as he did, that he looked once, by himself, and concluded he could not find it. Rather, as articulated by the Montana Supreme Court in *Matter of Hartman's Estate*, 563 P.2d 569, 571 (Mont. 1977) (a case relied upon by *Estate of Conley*), the presumption only applies when the Will "cannot be found after a *careful and exhaustive* search following death." (emphasis added). This squares with the requirements of applying for the appointment of an administrator in intestacy. In order to have a proper application to be named the Personal Representative of the Estate, the proposed Personal Representative is required to establish that "after the exercise of reasonable diligence," the proposed Personal Representative is not aware of any other unrevoked Will. N.D.C.C. §§ 30.1-14-01(1)(d)(1); 30.1-15-02(2).

[¶ 28] Thus, Kenny's testimony that he did not find the Will is not the same as and does not prove that: (1) after the exercise of reasonable diligence; (2) the Will could not be found. In other words, even if Kenny's testimony is believed (that **he** did not find the Will after one search by himself), this testimony does not satisfy his burden to prove that the Will could not have been found after the exercise of reasonable diligence. This is made clear by comparing the facts of this case with the case of *Estate of Mecello*.

[¶ 29] In *Estate of Mecello*, the Nebraska Supreme Court reversed the trial court's finding that the presumption of *animo revocandi* applied. In *Estate of Mecello*, the decedent's stepson, Geringer, alleged that a 1996 Will of the decedent, Mecello, was revoked. Like Kenny, Geringer stood to benefit if the Will was revoked, and Geringer last had access to the place where the decedent's Will was kept. Five days prior to her death, Mecello told one of the testifying witnesses that she had a Will and that the Will

was kept in her safety deposit box. After Mecello's death, no one saw the original Will, and Geringer indicated that he could not find it, even though he had access to Mecello's safety deposit box. The court noted:

> After Mecello's death, Geringer entered the box and emptied its contents. Thus, the facts show that a person other than Mecello who would benefit from the revocation of the 1996 will had access to the box which Mecello had stated contained her will.

*In re Estate of Mecello*, 633 N.W.2d 892, 902 (Neb. 2001). In addition, when Geringer emptied the box, "[n]o inventory was made of the contents, and no disinterested witness testified as to the contents of the box." *Id.* Under these circumstances, the Court concluded that the proponent of the presumption, Geringer, failed to establish the facts necessary to put the presumption in place. *Id.* at 903. Accordingly, it reversed the decision of the trial court, and it ordered the trial court to probate the lost Will. *Id.*

[¶ 30] In this case, the evidence is even more compelling than in *Estate of Mecello*. While, in *Estate of Mecello*, no disinterested witness was able to testify as to the contents of the box after the decedent's death, in this case, two disinterested witnesses, Cathy Knudson and Jeff Clemetson, testified that they saw an envelope entitled "Last Will and Testament of Harriet Clemetson" *after* Harriet's death. The envelope was in the filing cabinet in the white box that was labeled "things from safe." Thereafter, when Kenny searched the file cabinet, he did so by himself, no disinterested witness (indeed, no other witness at all) testified as to its contents, and he did not prepare an inventory of its contents. Therefore, he has failed to satisfy his burden that the presumption of *animo revocandi* applies because he has failed to establish that a Will

could not have been found upon Harriet's death. *Estate of Mecello,* 633 N.W.2d 892, 902 (Neb. 2001); *see also Estate of Wiarda*, 508 N.W.2d 740, 744 (Iowa 1993) (affirming the trial court's decision that a lost Will was not revoked when the conservator, who had access to the safety deposit box where the Will was supposed to have been, forgot to include a number of items in his inventory of the safety deposit box).

[¶ 31] The trial court incorrectly distinguished *Estate of Mecello*. First, the trial court stated that no one saw the entire original Will of Harriet since January 2009, which was "approximately 10 months before Harriet Clemetson's death as compared to the five day period in *Mecello.*" (App. 20.) Second, the trial court said that "[i]n *Mecello*, records were kept by the bank as to who had access to the safe-deposit box [but] anyone with a key to Harriet's house potentially had access to the will." (App. 20.)

[¶ 32] With regard to the trial court's first distinguishing factor, the trial court misstated the facts. In *Estate of Mecello* there was no evidence that anyone actually saw the Will at all. Rather, the evidence was that five days before her death, the decedent told a witness that she had a Will in her safety deposit box; thereafter, only Geringer, who would benefit from the Will's destruction, had access to the Will. Thus, the point of *Mecello*, is that: (a) there was evidence that a Will was in existence at a particular point in time (five days prior to her death); (b) thereafter, the decedent did not have access to the Will (because the bank records showed that she did not access her safety deposit box and therefore she could not revoke her Will by destruction), and (c) thereafter, a person who would benefit from the Will's destruction had access to the Will.

[¶ 33] Likewise, here: (a) there was evidence that Harriet's Will was in existence at a particular point in time (**after** her death); and (b) at such point and thereafter, the decedent did not have access to her Will (because she was dead and therefore she could not revoke it); and (c) thereafter, persons who would benefit from the Will's destruction had access to the Will, including Kenny and his siblings who stayed in the house in the days surrounding the funeral. Thus, with regard to the trial court's second distinguishing fact, that anyone with a key had access to Harriet's house, does not distinguish this case from *Mecello*. Indeed, the fact that multiple people had access to Harriet's house (**after** Harriet's death, Jeff Clemetson and Cathy Knudson saw an envelope labeled "Last Will of Harriet Clemetson") further supports that the Will was lost and/or destroyed.

[¶ 34] In two respects, Kenny failed to meet his burden to prove the necessary facts giving rise to the application of the presumption of *animo revocandi*. Accordingly, the Court should reverse and remand with instructions to probate the 1995 Will of Harriet Clemetson. *Estate of Mecello*, 633 N.W.2d at 903 (reversing the trial court's determination that the presumption applied, and remanding with instructions to probate the lost Will).

## II. Alternatively to the first issue, the trial court erred in determining that the presumption of *animo revocandi* had not been overcome.

### A. Standard of review.

[¶ 35] In making its decision that the presumption of *animo revocandi* had not been overcome, the trial court did not credit the testimony of key witnesses, Cathy Knudson and Jeff Clemetson. This Court has held: "While credibility of witnesses is

normally the province of the trial court, a trial court cannot disregard testimony that is uncontradicted and unchallenged where no basis for doing so appears in the record." *State v. Nelson*, 488 N.W.2d 600, 604 (N.D. 1992) (citation omitted).

**B. The presumption of *animo revocandi* was overcome by uncontroverted testimony that Harriet's Will was in existence at the time of her death.**

[¶ 36] Kenny was the only witness who testified on his behalf. The following witnesses testified on behalf of the Spragues: Carolyn Sprague, Kevin Sprague, Cathy Knudson, and Jeff Clemetson. As explained above, in finding that the Will of Harriet Clemetson was duly executed, the trial court specifically noted: "[T]here is testimony that a will existed at the time of Harriet's death." (App. 16.) After reciting other evidence, the Court found: "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.) Later, however, in the trial court's discussion of the doctrine of *animo revocandi*, particularly whether the Will existed at the time of Harriet's death, the Court noted: "The only evidence that was presented to establish that a will existed at the time of the death was the testimony of Kevin Sprague, Cathy Knudson, and Jeff Clemetson, who testified that they saw an envelope that said "Will of Harriet Clemetson." (App. 26.) The Court stated: "The credibility of these witnesses, however, is suspect." (App. 26.)

[¶ 37] The Court goes on to state why it believes the testimony of Kevin Sprague is suspect, even though it had just credited his same testimony with regard to finding due

execution. (App. 27.)[2] In any event, Kevin never testified that he saw the original Will after Harriet's death. (Tr. I at 108.) This testimony was from Cathy Knudson and Jeff Clemetson. The Court does not explain why it totally discredited their testimony on this critical issue.

[¶ 38] Even if it gave reasons for discrediting the testimony of Jeff Clemetson and Cathy Knudson, which it did not, a trial court cannot arbitrarily reject all of the witnesses for one party. The case of *Bergstrom v. Bergstrom*, 296 N.W.2d 490, 494 (N.D. 1980), is illustrative:

> By making these findings as to credibility so as to discount every one of Alan's witnesses, the trial court has, in essence, attempted to "sew up" Alan's chances on appeal by making it very difficult for us, as a reviewing court, to find these facts clearly erroneous. This type of finding cannot be used as a means to tie a reviewing court's hands so that it is impossible for the court to find error.

(citation omitted).

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[2]The Court noted, for instance, that although Kevin Sprague told Kenny where the Will was located, he never told Kenny that he read the Will. (App. 16.) By this statement, the Court is seemingly inferring that Kevin never read the Will prior to Harriet's death; however, earlier the Court credited his testimony in his regard, stating that he read Harriet's original Will prior to her death. (App. 6-7.) As the Court specifically found, by reading this Will, Kevin learned that Harriet's Will was prepared at the same time and place as Earl's Will, which fact was specifically verified by attorney Juntunen after Harriet's death. (App. 6-7.)

The Court also stated that Kevin admitted "he never offered to show Kenneth Evanson where the will was located, even though at one time he was in Harriet Clemetson's bedroom office discussing the will with Kenneth Evanson." (App. 16.) This does not accurately reflect Kevin's testimony. Kevin said that on the way to the funeral, he was in the bedroom for a very short time, and he pointed to the area where the Will was; particularly, he pointed to the file cabinet where the Will was located. (Tr. I at 120; Tr. II 56, 65.) He said he did not offer to show Kenny specifically where the Will was by opening drawers because they were on their way to the funeral, and he understood from Kenny that he had already taken the box that the Will was contained in back to Fargo. (App. 56, 65.)

[¶ 39] It appears that the trial court's rejection of the testimony of Cathy Knudson and Jeff Clemetson may have been induced by an erroneous assumption with regard to what the trial court was charged with determining in this case. In its opinion, the trial court summarized its task as follows:

> Here, Kenneth Evanson petitioned the Court for a declaration of intestacy. Spragues opposed the petition by petitioning the Court for formal probate of a will, asserting the original will was properly executed by Harriet Clemetson and kept in her home. **The Spragues further allege that Kenneth Evanson or one of his siblings fraudulently took or destroyed the original will of Harriet Clemetson in an attempt to defraud the Spragues from their right to inherit from their step-grandmother.** Before the Court can reach any other issues in this case, it must first determine whether the unsigned copy of the will of Harriet Clemetson is entitled to probate as a duly executed will.

(App. 16.) (emphasis added). In fact, however, the Spragues did not make the allegation that the Court attributed to them. Rather, the Petition states simply: "Petitioner submits that it is inappropriate for the decedent's estate to be distributed pursuant to intestate succession because, upon information and belief, the decedent executed an unrevoked Last Will and Testament that should be probated." (App. 8, ¶ 9.) It appears that the trial court erroneously believed that in order to rule for the Spragues it had to ascribe an evil intent to Kenny; and if it believed Kenny's testimony, then it could not credit the testimony offered by Jeff Clemetson and Cathy Knudson.

[¶ 40] The trial court, however, did not have to disbelieve Kenny's testimony in order to believe the testimony of Jeff Clemetson and Cathy Knudson. It is plausible that the Will of Harriet Clemetson was lost sometime between the time that Jeff Clemetson and Cathy Knudson saw its envelope and the time that Kenny searched for it. But, the

trial court was not required to determine what eventually happened to the Will. The bottom line is that the trial court gave no reason for discrediting the testimony of Jeff Clemetson and Cathy Knudson.

[¶ 41] Indeed, there was no reason for discrediting the testimony of Jeff Clemetson and Cathy Knudson. They have no interest in the Will or the Estate, since they are not heirs or devisees. Their testimony is consistent with the testimony of the Spragues. Carolyn Sprague testified that after Earl's death, she and Kevin Sprague found both Harriet's Will and Earl's Will in the safe; they read them and returned them to their envelopes. Carolyn helped Harriet clean out the safe. Harriet put the Will in a box. The box was carried upstairs to the office. In May 2009, Carolyn saw the Will envelope in the top of the box. In August 2009, Kevin saw the Will envelope in the box in the first drawer of the filing cabinet in the office. **After** Harriet's death, Cathy saw the Will envelope in the first drawer of the filing cabinet. At the same time, Jeff also saw the Will envelope, which he described as being in a box (the size of a hat box or shoe box) labeled "things from safe." This testimony was unrefuted.

[¶ 42] Moreover, as explained above, the testimony of Jeff Clemetson and Cathy Knudson is not inconsistent with Kenny's testimony. Certainly, the Will could have been lost between the time that Jeff and Cathy saw it and when he searched. Indeed, when he searched, he said he could not find any of the following items: (1) Harriet's Will; (2) an envelope entitled "Last Will and Testament of Harriet Clemetson; or (3) the white box labeled "things from safe" that was the size of a shoe box or hat box. At the time of his deposition, Kenny indicated he did not find any box at all in the filing cabinet. (At the

time of trial, Kenny indicated he found a checkbook-sized box, but not a white box, and not a box the size of a shoebox).

[¶ 43] As stated by the trial court: "[T]here is testimony that a will existed at the time of Harriet's death." (App. 16.) "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.) Accordingly, this Court should reverse the trial court's finding that the presumption of *animo revocandi* was not overcome. *Estate of Conley*, 2008 ND 148, ¶ 29, 753 N.W.2d 384 (finding that the presumption of *animo revocandi* is overcome when a Will is found to be in existence at the time of the decedent's death).

## CONCLUSION

[¶ 44] For the reasons stated above, Philip Sprague respectfully requests that the Order of the trial court be reversed and the case be remanded with instructions to the trial court to probate the 1995 Will of Harriet Clemetson, as proffered by Philip Sprague.

Dated: August 15, 2011.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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|---|---|---|
| In the Matter of the Estate of Harriet O. Clemetson, Deceased | ) | Supreme Court No. 20110108 |
| Philip Sprague, Petitioner and Appellant, | ) | **CERTIFICATE OF SERVICE** |
| v. | ) | |
| Kenneth Evanson, Personal Representative, Respondent and Appellee. | ) | |

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

I hereby certify that on August 15, 2011, I caused to be electronically filed the **Appellant's Brief** and **Appendix of Appellant** with the Clerk of the North Dakota Supreme Court and served the same electronically as follows:

Craig M. Richie ..... craig@richielaw.com

Dated: August 15, 2011.

Sara K. Sorenson

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