20110108

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 28, 2011
STATE OF NORTH DAKOTA

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, | ) | |
| v. | ) | |
| Kenneth Evanson, Personal Representative, | ) | |
| Respondent and Appellee. | ) | |

APPEAL FROM ORDER DENYING PETITION FOR FORMAL PROBATE OF WILL DATED FEBRUARY 17, 2011, OF THE DISTRICT COURT OF GRAND FORKS COUNTY, STATE OF NORTH DAKOTA, THE HONORABLE DEBBIE KLEVEN, PRESIDING

# APPELLANT'S REPLY BRIEF

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## INTRODUCTION

[¶ 1] It is undisputed that Kenneth Evanson stands to benefit if Harriet Clemetson's Will is not probated. Although the trial court found that Harriet's Will was duly executed, he argues that it was not. He believes that because he testified he could not find the original, executed Will of Harriet after her death, then "due execution" of such Will cannot be established. His arguments are not supported by the applicable law.

[¶ 2] Kenny further argues that his self-serving testimony that he could not find the Will after Harriet's death is sufficient to establish the presumption of revocation. However, the application of the presumption does not depend on whether **he** could find the Will at some point **after** the death of Harriet, the application of the presumption requires that he prove that the Will could not be found (by **anyone**, including him) **upon** Harriet's death. The trial court specifically found: "[T]here is testimony that a will existed at the time of Harriet's death." (App. 16.) Then, after reciting other evidence, the trial court found: "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.)

[¶ 3] The bottom line is that Kenneth Evanson has failed to establish the predicate facts necessary to apply the presumption of revocation; specifically, he failed to establish that Harriet's Will could not be found (by anyone) **upon** her death. Indeed, the unrefuted evidence is that the Will could be found upon Harriet's death. The trial court's application of the presumption was erroneous and its decision should be reversed.

## RESPONSE TO APPELLEE'S FACTUAL BACKGROUND

[¶ 4] In Appellee's Brief, there is a section labeled "Factual Background." (Appellee's Brief ¶¶ 5-9.) While a large part of this section appears to be largely quoted material from the trial court's opinion, Kenny notably does not quote the portion of the trial court's opinion in which the trial court found the Will was duly executed and, in doing so, the trial court stated: "[T]here is testimony that a will existed at the time of Harriet's death." (App. 16.) Kenny also does not quote any portion of the trial court's opinion reciting other evidence of due execution, or the trial court finding that: "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.)

[¶ 5] In addition, in the portions that are not quoted, Kenny takes liberties with the facts. For instance, he states that Harriet "changed" her beneficiary designation on certain annuities from Carolyn and revoked Carolyn's power of attorney. In fact, however, Harriet asked Jeff Clemetson to be the holder of her power of attorney, instead of Carolyn, so he could help her with the day-to-day billing, since Carolyn lived in Michigan. (Trial Tr. I, 144-45.) Moreover, Harriet never changed her beneficiary designation from Carolyn. (Post-Trial Memorandum, Doc. # 98 at 17-18) (Trial Tr. I, 152-53.) Nonetheless, as set forth below, these facts should not be relevant to the Court's inquiry in this matter.

## LAW AND ARGUMENT

### I. The trial court's finding that Harriet's Will was duly executed is not clearly erroneous.

[¶ 6] Kenny argues that because he could not find a signed copy of Harriet's Will after her death, this must mean that Harriet's Will was not duly executed. This is incorrect. Because a lost Will is lost, parties who seek to probate a lost Will may not have an actual, signed copy of the Will, and they may not even have an unsigned copy of the Will. These circumstances–even the failure to have *any* copy of the Will–is not fatal to the probate of a lost Will. Indeed, the Uniform Probate Code specifically contemplates that in probating a lost Will, there may be a failure to find *any* copy of the Will. This is evidenced by the Uniform Probate Code provision requiring that a petition for the probate of a lost Will "must also state the contents of the will." N.D.C.C. § 30.1-15-02(1)(c); *see also Estate of Conley*, 2008 ND 148, ¶ 19, 753 N.W.2d 384 ("[T]hese statutes clearly indicate the drafter's intent to allow, under certain circumstances, the probate of lost or missing wills.").

[¶ 7] Indeed, in *McGriff v. Owen*, 791 So. 2d 961 (Ala. Ct. App. 2001), no copy of the decedent's Will was found. The proponent of the Will established the contents of the Will as well as its execution by introducing the testimony of the attorney who drafted the Will and by introducing into evidence a copy of the Will of the decedent's husband. *Id.* at 970. The court found this evidence sufficient to construe and then probate the lost Will. *Id.* Because a signed copy of a Will or even an unsigned copy of a lost Will is not

always available in the case of a lost Will, "other evidence" aside from a signed copy of the Will itself can be presented to establish that the Will was duly executed. *See id.*

[¶ 8] Kenny has failed to establish or explain how the trial court's factual findings regarding due execution are clearly erroneous. The case that he cites, *Estate of Voeller*, 534 N.W.2d 24 (N.D. 1995), does not support his position and is not applicable to the facts in this case. In *Estate of Voeller*, "[o]nly one witness, James Miller, signed the 1988 codicil with Voeller. The second claimed witness, Hoffart, did not sign." *Id.* at 25. Here, the evidence supports that two witnesses signed the Will. Kevin Sprague testified that he saw Harriet's signature as well as the signature of two witnesses on her Will, which was executed the same day as Earl's Will. (App. 17.)

[¶ 9] Moreover, the testimony of Peggy Hajicek establishes due execution. (Hajicek Depo. Tr. at 8.) Ms. Hajicek worked for the Letnes Marshall law firm, and while there, she worked with attorney Daniel Letnes. (*Id.* at 6-7.) In that capacity, she helped him with his estate planning practice by typing wills he drafted and witnessing wills. (*Id.* at 7-8.) She said that typically, when a husband and wife would engage in estate planning, they would typically sign their wills together. (*Id.* at 8.) She verified her signature and Daniel Letnes' signature as witnesses on Earl's Will. (*Id.* at 9.) She said that if she and Mr. Letnes would have both witnessed Earl's Will, she would assume that they also would have witnessed Harriet's Will, based on their typical practice and the fact that the file indicates that the original Wills were given to Harriet and Earl on the same day. (*Id.* at 11.)

[¶ 10] Finally, because Harriet's Will was prepared at the Letnes Marshall law firm by an experienced attorney, Daniel Letnes, it is presumed that the Will was duly executed. *See, e.g., Estate of Wimpfheimer*, 797 N.Y.S.2d 878, 882 (2005); 80 Am. Jur. 2d Wills § 937 ("[I]f the evidence shows that the lost will was drawn by an experienced attorney who must have known the law concerning the formalities under which a will should be executed, it is presumed the attorney complied with the law and that the will was duly executed."). Kenny's arguments that Harriet's Will was not duly executed must be rejected.

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

[¶ 11] Because Kenneth Evanson sought to apply a presumption, he has the burden of establishing the predicate facts giving rise to the presumption. N.D. R. Evid. 301(a); *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). Kenny does not dispute this principle. Rather, he seems to argue, and the trial court found, that he met the predicate facts based simply upon his testimony that he could not find Harriet's Will. (App. 19.)

[¶ 12] The problem with this determination is that it incorrectly recites the predicate facts giving rise to the presumption. 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). In its opinion, the trial court noted Kenny's testimony that he did 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. In other words, the presumption should not apply simply because someone (who has an interest in having the Will destroyed or lost) says he cannot find the Will after death. Rather, in order to apply the presumption, such person is required to prove that the Will could not have been found upon the testator's death. *Estate of Conley*, 2008 ND 148, ¶ 21. Otherwise, every person who purposefully loses a Will or conducts a less-than-careful search for a Will or allows others who would benefit from destroying the Will to have access to the Will would be rewarded with the presumption of revocation simply by indicating that the Will was not found when he looked for it at a time after the decedent's death.

[¶ 13] Thus, the proponent of the presumption has the burden of establishing that the Will could not be found upon the death of the decedent, and this burden is not satisfied by the proponent's testimony that he could not find the Will after the decedent died. This is made clear by re-examining the case of *Estate of Mecello,* which was also discussed in the Appellant's principal brief. In *Mecello*, like here, the person seeking to apply the presumption, Geringer, testified that he could not find the Will after the death of the decedent Mecello. 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 where Mecello said her Will was kept. The trial court applied the presumption.
In reversing the decision of the trial court, the Nebraska Supreme 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.

*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.* In other words, Geringer's failure to inventory the contents and his failure to have a disinterested witness testify as to the contents of the box showed a less-than-careful search. 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). Under the circumstances set forth in *Estate of Mecello*, the Nebraska Supreme 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 ordered the trial court to probate the lost Will. *Id.*

[¶ 14] As explained in the Appellant's Brief, the evidence in this case 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. Meanwhile, persons other than Kenny who would benefit from the Will's revocation (his siblings) also had access to the filing cabinet. As in *Estate of Mecello,* there was evidence that Harriet's Will existed at the date of death and persons (Kenny and his siblings) who stood to benefit from the revocation of the Will had access to and took control of the area where the Will was placed. Under these circumstances, as in *Mecello*, the presumption does not apply. Notably, Kenny fails to discuss *Estate of Mecello* in the Appellee's Brief.

## III. The presumption of *animo revocandi* does not apply when there is evidence that the Will was in existence at the time of Harriet's death.

[¶ 15] Not only did Kenny fail to meet his burden to prove that the Will could not have been found upon Harriet's death, there is evidence that the Will was in existence at the time of Harriet's death, which makes the presumption inapplicable. Again, the trial court found: "[T]here is testimony that a will existed at the time of Harriet's death." (App. 16.) Then, after reciting other evidence, the trial court found: "None of this evidence was disproved or rebutted by Kenneth Evanson." (App. 18.) Accordingly, the presumption does not apply under these circumstances. *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.”).

[¶ 16] The presumption does not apply for two reasons, each of which independently require a reversal of the district court’s decision: (1) Kenny has failed to establish his burden that Harriet’s Will could not be found upon her death; and (2) there was evidence that the Will was in existence at the time of Harriet’s death.

## CONCLUSION

[¶ 17] 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: September 28, 2011.

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

I hereby certify that on September 28, 2011, I caused to be electronically filed the **Appellant's Reply Brief** with the Clerk of the North Dakota Supreme Court and served the same electronically as follows:

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

Dated: September 28, 2011.

/s/ Sara K. Sorenson
Sara K. Sorenson

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