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Statement of the Issues

[¶ 1] Did the district court correctly determine that the phrase "personal property located in my personal residence" excludes intangible property, which has no location?

[¶ 2] Did the district court err in determining that formal and supervised administration was unnecessary?

Law and Argument

I. The district court correctly determined that the phrase "personal property located in my personal residence" excludes intangible property, which has no location.

[¶ 3] In order to construe a Will, each word or phrase is to be to given effect. When giving effect to each word or phrase in the Will of Eugene R. Camas, the phrase "personal property located in my personal residence," is limited to tangible personal property. Intangible personal property has no physical existence, and it is not located anywhere. Accordingly, the phrase "personal property *located* in my personal residence" excludes intangible property. The trial court's decision in this regard is correct.

A. Intangible property has no location.

[¶ 4] Pursuant to Black's Law Dictionary, "intangible property" is "property that lacks a physical existence." *Black's Law Dictionary* (9th ed. 2009) (defining "intangible property" within the definition of "property") . Accordingly, the limitation that the personal property must be "*located* in my personal residence" necessarily excludes intangible property because such property is not and cannot be located anywhere. *See Greenough v. Tax Assessors of City of Newport*, 331 U.S. 486, 493 (1947) ("[I]ntangibles themselves have no real situs[.]") Thus, in order to properly tax

intangibles, a legal situs has to be ascribed to them for such purposes via a "legal fiction," as cogently explained in the following case:

> *Because of their very nature intangible assets and property rights have no physical location[.]* . . . . However, because these intangibles do constitute valuable property rights and should, therefore, bear their just burden of the cost of government, a situs has been ascribed to them for taxation purposes through a fiction of the law[.]

McNamara v. George Engine Co., Inc., 519 So. 2d 217, 220 (La. Ct. App. 1988) (emphasis added).

[¶ 5] So, authorities collecting cases regarding the meaning of the word "personal property" agree that if "personal property" is limited by location, then the phrase "personal property" is limited to tangible personal property. Thus, a C.J.S. article unequivocally provides: "A bequest of all furniture and personal property *located in and about a testator's residence* includes only tangible personal property." 96 C.J.S. Wills § 1167 (emphasis added) (citing cases). An Annotation in the *American Law Reports* on this issue likewise provides: "In most cases, the words "personal property" are limited to tangible property or good and chattels . . . *when description by location,* for example, the contents of a house, exclude choses in action, *which have no location.*" *See* Tracy A. Bateman, Annotation, *What Passes Under Term "Personal Property" in Will*, 31 A.L.R. 5th 499 § 2(b) (1995) (emphasis added) (citing cases).

[¶ 6] In accordance with these authorities, the trial court correctly held: "The phrase 'located in my personal residence' limits the term 'personal property' to exclude intangible property because intangible property cannot be located anywhere due to its lack of physical existence." (App. 5.) Notably, Sherry Jensen ("Jensen"), in

Appellant's Brief, does not quarrel with the finding that intangible property cannot be located anywhere due to its lack of physical existence.

B. The phrase "personal property located in my residence" does not include intangible property because intangible property cannot be "located in my personal residence" because intangible property has no location.

[¶ 7] As explained in more detail throughout this section, courts have construed the term "personal property," standing alone, as just including tangible property because that is its ordinary and popular meaning. The term "personal property," standing alone, can also mean both tangible and intangible property because that is its technical meaning. However, when the phrase "personal property" is modified solely by the phrase "located in my personal residence," even a technical reading would require that such phrase exclude intangible property because intangible property has no location.

[¶ 8] The popular meaning of the word "personal property" is "only goods and chattels, tangible things." *Estate of Thompson*, 511 N.W.2d at 377. Jensen argues, however, that the phrase "personal property" must include intangible property because the technical meaning of the phrase "personal property," standing alone, includes intangible property. While "personal property" has a technical meaning, this does not mean that it is a "technical term" requiring a technical application. *Compare Estate of Brown*, 1997 ND 11, ¶ 17, 559 N.W.2d 818 (using statutory construction principles regarding "technical terms" to determine what the decedent's "estate may claim under the Unified Credit of Section 2010 of the Internal Revenue Code.") *with McCullagh v. Fortune*, 38 N.W.2d 771, 777 (N.D. 1949) (declining to attach a technical meaning to the words "trap" and "nuisance," which also have a popular meaning).

[¶ 9] Indeed, North Dakota case law provides that when a word has both a technical and a popular meaning, the popular meaning should control unless the context suggests otherwise. *See McCullagh*, 38 N.W.2d at 777 ("When a word which has both a technical and a popular meaning is used in a statute, the court, in construing the statute, will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense."); *see also Estate of Thompson*, 511 N.W.2d at 377 ("There is no presumption that the term ["personal property"] when used in a will has a technical meaning rather than its popular meaning."). Thus, Jensen's argument that "personal property" is a "technical term" requiring a technical application should be rejected.

[¶ 10] Even assuming, however, that Jensen's premise is correct–that "personal property" is a technical term requiring a technical application–Jensen's argument still fails. Jensen's argument fails because it ignores the qualifying phrase "located in my personal residence," which necessarily excludes intangible property, which has no location. This point is borne out by a pair of Virginia cases: one that had a Will containing qualifying language for the phrase "personal property" and one that did not. In *Bowles v. Kinsey*, 435 S.E.2d 129, 130 (Va. 1993), the Virginia Supreme Court determined that the phrase "all of my personal property" included both tangible and intangible forms of property because that was the technical meaning of the phrase "personal property." The Will in *Bowles*, however, did not have any qualifying language, such as "located in my residence." *See generally id.* When, in a subsequent case, *Turner v. Reed*, a party attempted to apply the precedent in *Bowles*, the Virginia Supreme Court refused, holding:

> In *Bowles*, the word "all" defined the entire corpus of the testatrix's personal property, **unqualified by kind or situs**. Here, that adjective defines only a select portion of the testatrix's personal property, that is, "furniture and personal property" and only such property as was "located in and about [her] residence". Thus, we share the chancellor's view that the testatrix's intention in the disputed portion of paragraph 2 was to limit her bequest to tangible personal property located in the residence.

Turner v. Reed, 518 S.E.2d 832, 834 (Va. 1999) (emphasis added).

[¶ 11] Jensen relies upon *Bowles* and other cases in which the phrase "personal property," *standing alone*, is construed to mean both tangible and intangible property. In other words, she relies upon cases that discuss the term "personal property" without any limiting language about such property being "located in the testator's residence." *See, e.g.*, *Sandy v. Mouhot*, 438 N.E.2d 117 (Ohio 1982) (construing the phrase "all of my personal property and household goods"); *Emmert v. Hearn*, 522 A.2d 377 (Md. 1987) (construing the phrase "all of my personal property"). By doing so, Jensen misses the point made in *Turner*: qualifying language cannot be disregarded in construing the term "personal property." 518 S.E.2d at 834; *see also Estate of Neshem*, 1998 ND 57, ¶ 7, 574 N.W.2d 883 ("In construing a will, a court must, if possible, harmonize all parts of the will so each word and phrase is given effect.").

[¶ 12] The qualifying language "located in my residence" excludes intangible personal property, which has no location. Not only does the qualifying language evidence an intent that Jensen's bequest be limited to receiving tangible personal property, other language of the Will does as well. As noted by the district court:

> The will states, "I give all of the rest, residue and remainder of my property and estate of every kind and character whatsoever, and wheresoever situated to my son, KEVIN CAMAS." This provision indicates that the Decedent's intent was for Camas to have every other type of property that existed in the estate, including businesses and other accounts and interests, other than "an undivided one-half (½) interest in

> . . . the personal property located in my personal residence" which was to go to Jensen.

(App. 6.) In addition, Kevin Camas is named the Personal Representative to manage the Estate. (Doc. # 2, Article IV.) Tellingly, Jensen is not named as the alternate Personal Representative; instead, the alternate is Becky Camas. (*Id.*) Thus, construing the Will as a whole (in addition to construing each phrase of the Will) supports the finding that the Will reflects an intent by the decedent that Kevin Camas was to receive every other type of property, including intangible, business property.

[¶ 13] Jensen seeks to downplay the effect of the clause giving "all of the rest, residue and remainder of my property and estate of every kind and character whatsoever, and wheresoever situated to my son, KEVIN CAMAS." Relying upon *Sandy v. Mouhout*, 438 N.E.2d 117 (Ohio 1982), Jensen states: "The attorney who drafted this Will, in his professional position to ensure that there was no intestacy as to any property, included within the Will a standard residual catchall bequest." (Appellee's Brief ¶ 25.) This position is not supported. To begin, there is no evidence in the record as to who drafted the Will, much less the position of the party drafting the Will. Jensen's statements in a brief are not evidence. *Medd v. Fonder,* 543 N.W.2d 483, 487 (N.D. 1996). ("Allegations in pleadings are not evidence.").

[¶ 14] More importantly, however, the clause at issue in this case is not a "standard residual catchall bequest" described in *Sandy v. Mouhout*, 438 N.E.2d 117 (Ohio 1982) in which "all the assets [are devised] through prior clauses and none remain for the residuary clause[.]" *Id.* at 119. Rather, assets were specifically contemplated to be distributed through the residuary clause in the Camas Will because the only prior bequest clause described *one-half* of "the personal property located in my personal

residence." (*See generally* Doc. # 2.) Thus, Jensen's reliance upon *Sandy v. Mouhout* is misplaced, and the trial court correctly relied upon the language of the entire Will (in addition to construing each phrase of the Will) in reaching its decision. *Estate of Neshem*, 1998 ND 57, ¶ 7 ("In construing a will, a court must, if possible, harmonize all parts of the will so each word and phrase is given effect.").

C. Jensen's arguments serve to underscore that intangible property has no location.

[¶ 15] The difficulty and fallacy of Jensen's position is revealed by her argument on two irreconcilable positions, both of which she would like the Court to adopt: (1) the Will *unambiguously* includes intangible property (App. 12), but then (2) she also seeks to offer extrinsic evidence to show *which* intangible property was "located in the residence." (App. 11.) The positions are irreconcilable because when a Will is unambiguous, extrinsic evidence is not allowed to determine the testator's intent. *Estate of Eggl*, 2010 ND 104, ¶ 10, 783 N.W.2d 36 (citations and quotations omitted). ("If the language of a will is clear and unambiguous, the testator's intent must be determined from the language of the will itself. . . . If a will is ambiguous, extrinsic evidence can be used to clarify the ambiguity.").

[¶ 16] Jensen argues that the phrase "personal property located in my personal residence" *unambiguously* includes intangible property. The fallacy of Jensen's position is evidenced by two of the cases upon which Jensen relies: *Sandy* and *Jacoway v. Brittain*, 360 So. 2d 306 (Ala. 306). As explained above, *Sandy* is not applicable because it contains more limited language than is at issue here. *See supra* ¶ 12. *Jacoway* is not applicable because of the "broader, more encompassing language" used in that case. (App. 5.) Beyond those differences, *Jacoway* and *Sandy* are not applicable because in

both of those cases extrinsic evidence was used to determine the testator's intent. *Jacoway*, 360 So. 2d at 308 (allowing the testimony of the scrivener to determine the meaning of the word "personal property"); *Sandy*, 438 N.E.2d at 119 (allowing the testimony of the appellee, holding that "a Probate Court may consider extrinsic evidence when a will is susceptible to various meanings."). Thus, because extrinsic evidence was allowed in these cases, the cases do not support a finding that the phrase "personal property located in my personal residence" *unambiguously includes* intangible property. *Estate of Eggl*, 2010 ND 104, ¶ 10 (finding extrinsic evidence cannot be used to interpret an unambiguous Will). Jensen's position should be rejected.

[¶ 17] Indeed, Jensen's position only serves to establish that the language of the Will unambiguously *excludes* intangible property, which has no location. Jensen argued at the trial court that if the district court ruled in her favor, then she would need to present evidence concerning *which* "intangible property" is "located" in the residence by showing "indicia" of ownership. (App. 11.) Of course, Jensen cannot show the actual location of such intangible property in the residence because intangible property has no location. Moreover, if "indicia" of ownership was sufficient to establish that "intangible property" was "located" at a particular place, such property is conceivably going to be simultaneously "located" at a number of locations (*e.g.*, at an accountant's office, at an attorney's office, and at the owner's house). At bottom, Jensen's argument that she needs to present extrinsic evidence to establish the "location" of intangible property underscores that such property has no location.

[¶ 18] The phrase "personal property located in my personal residence" unambiguously excludes intangible property, which has no location. The district court's decision should be affirmed.

II. The district court did not err in declining to exercise formal or supervised administration.

[¶ 19] With regard to Jensen's request for supervised administration, the district court did not find formal or supervised administration of the decedent's estate was necessary. (App. 6.) Without citing any cases, Jensen concludes that the district court erred in its finding. She asserts that the district court should have ruled in her favor with regard to construing the Will, and if the district court had done that, then supervised administration would be required to protect her interest in the Estate with regard to distributions from the Estate. This is incorrect, as detailed by the comment to N.D.C.C. § 30.1-16-02, which provides a variety of remedies with regard to protecting distributions. The district court's decision denying formal or supervised administration should be affirmed.

Conclusion

[¶ 20] Kevin Camas, as the Personal Representative of the Estate of Eugene R. Camas, respectfully requests that the decision of the district court be affirmed in its entirety.

Dated: October 13, 2011.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Eugene R. Camas, Deceased, Sherry Jensen f/k/a Sherry Nesemeier, Appellant, vs. Kevin Camas, Individually and as Personal Representative of the Estate of Eugene R. Camas, Deceased, Appellee.	Supreme Court File No. 20110217 District Court File No. 09-2011-PR-00085 **CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2011, I caused the **Brief of Appellee** 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 attorneys for appellant, Susan E. Johnson-Drenth and Jade M. Rosenfeldt, by e-mailing a true and correct copy to each as follows:

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

Dated this 13th day of October, 2011.

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