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STATE OF NORTH DAKOTA

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 NO. 20110217** Civil No. 09-2011-PR-00085

ON APPEAL FROM ORDER DATED JULY 12, 2011,
DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT,
CASS COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

REPLY BRIEF OF APPELLANT, SHERRY JENSEN F/K/A SHERRY NESEMEIER

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TABLE OF CONTENTS

Page/Paragraph ("¶")

TABLE OF AUTHORITIES

Paragraph ("¶")

North Dakota Cases

Statutes

Cases From Other Jurisdictions

Other Authority

LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THE TERM "PERSONAL PROPERTY," AS USED IN DECEDENT'S WILL, INCLUDES ONLY ITEMS OF TANGIBLE PERSONAL PROPERTY.

A. "Personal Property" Is A Technical Term Requiring Technical Application.

1. The Personal Representative, Kevin Camas (hereinafter "Camas"), has not provided any persuasive authority for the proposition that the "popular meaning" of "personal property" includes only tangible personal property *and* that the "popular meaning" should be applied in this case. Camas argues that the "popular meaning" of "personal property" is "only goods and chattels, tangible things," (Appellee's Brief at ¶ 8) and in doing so, cites an Iowa case to support this proposition. Simply put, Camas is citing to unpersuasive authority and disregarding the North Dakota Century Code that very clearly delineates that property is either real or personal and that personal property is everything other than real property. N.D.C.C. § 47-01-07. Furthermore, a review of the authority cited by Camas reveals that the Iowa Supreme Court recognized that "personal property" is in fact susceptible to more than one meaning and that in its technical or broader meaning it "includes everything that is the subject of ownership except lands or interest in lands." Estate of Thompson, 511 N.W.2d 374, 377 (Iowa 1994) (citing In re Estate of Chadwick, 78 N.W.2d 31, 33-34 (Iowa 1956)).

2. Camas also argues that while "personal property" has a technical meaning, that does not mean that it is a technical term requiring technical application. This argument ignores the relevant and persuasive North Dakota jurisprudence on this issue. See Matter of Estate of Brown, 1997 ND 11, ¶ 17, 559 N.W.2d 818 (citing 80 AmJur2d *Wills* § 1158 (1975) and N.D.C.C. § 1-02-03) (part) ("Technical words and phrases and

such others as having acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition."). Based upon this well-established jurisprudence and the statutory definition given to the phrase "personal property," the term "personal property" should be afforded its technical meaning when interpreting Decedent's Will.

B. <u>The Phrase "Located In My Personal Residence" Does Not Exclude Intangible Personal Property</u>.

3. Camas further relies upon the unpersuasive argument that intangible personal property has no location and therefore the bequest of "personal property located in my personal residence" must exclude intangible personal property. First, this argument lacks merit in that the authority cited by the Personal Representative pertains to taxation of property in a foreign jurisdiction under a foreign statutory scheme and not to the construction of a will. <u>See</u> <u>Greenbough v. Tax Assessors of City of Newport</u>, 331 U.S. 486, 493 (1947) (discussing the taxation of property). Second, this argument again disregards the North Dakota Century Code that very clearly delineates that property is either real or personal, and that personal property is everything other than real property. N.D.C.C. § 47-01-07.

4. Finally, while it might be easy to claim that intangible property is property that has no location and therefore cannot be "located" in the decedent's personal residence – that conclusion is simply not supported by the authority. In <u>Jacoway v. Brittain</u>, 360 So.2d 306 (Ala. 1978), for example, the Supreme Court of Alabama held that the bequest of personal property, "located in my home" included $25,000 in cash and certificates of deposit located in bank, where passbook and a key to safety deposit box were on testator's property. In the instant matter, there could be tangible personal

property located in Decedent's home that links to intangible personal property. If so, Petitioner is entitled to half. But to say that because intangible personal property has no location it cannot therefore be included in the definition of "personal property in my home" disregards statutory authority and the possibility that there is tangible property in Decedent's residence linking to intangible personal property.

5. Camas, in an effort to distinguish the most persuasive authority, claims that the court in Jacoway v. Brittain, 360 So.2d 306 (Ala. 1978), should not be afforded deference because the court stated that "standing alone" the words "personal property" would include intangible personal property. The Personal Representative, however, has misconstrued the context within which this statement was made by the court. A clear reading of the case indicates that the court, in addressing an argument that the phrase "located in my home, or on my property" was intended as a limitation on the bequest of personal property, stated that (1) standing alone, "personal property" would include money on hand and on deposit, whether in a bank or savings and loan association account; and (2) that the court did not find the phrase "located in my home, or on my property" as a clear intention of limitation on the bequest of personal property. Jacoway, 360 So.2d at 308. Based upon such, the court concluded that it could not "find within the four corners of the will any language indicating that the testator intended to make a distinction between tangible and intangible personal property and it is undisputed that the passbook and the key to the safety deposit box were on the testator's property." Id. Accordingly, Camas' attempt to limit Jacoway's persuasive value should also be disregarded.

6. A clear reading of the Decedent's Will, along with the supporting jurisprudence and statutory authority, supports the construction that "personal property"

includes both intangible or tangible personal property. At this point, it is simply unknown if a checkbook, a key to a safe deposit box, business materials, or similar personal property were present in Decedent's home when he passed away. If so, Jensen should be entitled to half under the Will.

C. The Residuary Clause Does Not Support The Conclusion That The Bequest Includes Only Tangible Property.

7. Camas also argues that the residuary clause in the Will is not the "standard residual catchall bequest" described in Sandy v. Mouhout, 438 N.E.2d 117, 199 (Ohio 1982). Once again, however, a clear reading of the Sandy case demonstrates that Camas' argument not only lacks authority, but is deceptive on its face. The Supreme Court of Ohio clearly stated that the "purpose of a residuary clause is to provide a plan to distribute *any remaining assets not specifically devised or bequeathed*." Sandy, 438 N.E.2d at 119. Thus, according to the court, a "carefully planned will *may* allocate all the assets through prior clauses and none would remain for the residuary clause." Id. But, even in that type of situation, "a residuary clause is frequently used to cover potential contingencies which may develop in the planned distribution." Id. Simply put, the Ohio Supreme Court articulated the purpose of a residuary clause and that purpose squarely aligns with the Will in the instant matter. As such, the Decedent's intent cannot be derived from the residuary clause.

CONCLUSION

8. For the above reasons, Jensen respectfully requests the judgment and order of the district court be reversed, vacated, and the matter remand to the district court with instructions that "personal property," as used in Decedent's Will, includes both tangible

and intangible personal property and that based upon such, formal supervised probate is necessary to protect Jensen's interest in the Decedent's estate.

Respectfully submitted this 24th day of October, 2011.

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