20180162
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 22, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Jacquelynn D. Blikre, Deceased --- Jean Nordahl, as Personal Representative of the Estate of Jacquelynn D. Blikre, Deceased, Petitioner and Appellee, v. Sharron Jensen, Respondent and Appellant, and Jennifer Jensen, Interested Party and Appellant, and Tamra Engle, Interested Party and Appellee,	Supreme Court No. 20180162 District Court No. 2016-PR-00140

Appeal from the Order for Formal Probate of Jacquelynn D. Blikre Will Dated April 20, 2005, and Appointment of Jean Nordahl as Personal Representative entered on February 26, 2018 and the Order on Remand entered on February 19, 2019, in District Court Case Number 2016-PR-00140

County of Mountrail, North Central Judicial District
Honorable Richard L. Hagar, Presiding

-- ORAL ARGUMENT REQUESTED --

APPELLANTS' BRIEF

Andrew D. Cook, ND ID #06278
Sara K. Sorenson, ND ID #05826

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
West Fargo, ND 58078-0458
PHONE: 701-282-3249
E-MAIL: acook@ohnstadlaw.com
ssorenson@ohnstadlaw.com
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Paragraph

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

[¶1] Whether the district court erred as a matter of law by concluding the April 20, 2005 Will was valid when the Will was not witnessed by two individuals in accordance with North Dakota law.

[¶2] Whether the district court erred in probating a copy of the April 20, 2005 Will when the Will was missing at the time of the decedent's death and was presumed to be revoked by operation of North Dakota law.

[¶3] Whether the district court erred as a matter of law by declining to probate the decedent's handwritten instructions as a holographic will when the handwritten instructions satisfied the requirements of the statute.

STATEMENT OF THE CASE

[¶4] This case concerns the Estate of Jacquelynn Blikre ("Blikre"). Blikre passed away on September 1, 2016. On September 21, 2016, Blikre's sister, Sandra J. Nordahl ("Sandra"), filed a Petition for Formal Probate of Will and Appointment of a Personal Representative. APP. 7. The Petition sought to probate a copy of a Will purportedly executed by Blikre on April 20, 2005 (the "2005 Will"). Id. On October 27, 2016, Blikre's other surviving sister, Sharron Jensen ("Sharron"), filed a Petition Objecting to Formal Probate of Will and Appointment of Personal Representative. APP. 12. Sharron's Petition objected to probating the 2005 Will because it was missing and presumed to have been revoked. Id.

[¶5] The district court appointed Sandra as Personal Representative on November 22, 2016. APP. 14. However, Sandra passed away on July 3, 2017, after which time Sharron, and Sandra's surviving husband, Jean Nordahl ("Jean"),

petitioned to be appointed as successor Personal Representative. APP. 16 - 22. The district court held a hearing on the cross-petitions, as well as on the pending issue of whether to probate the 2005 Will, on October 30, 2017.

[¶6] On February 26, 2018, the court entered an Order for Formal Probate of Jacquelynn D. Blikre Will Dated April 20, 2005, and Appointment of Jean Nordahl as Personal Representative. APP. 23. Under this Order, the court admitted the 2005 Will to probate and appointed Jean as Personal Representative. Id.

[¶7] On April 18, 2018, Jennifer Jensen ("Jennifer"), Sharron's daughter and a surviving niece of Blikre's who was not notified of the prior proceedings, filed a Petition for Formal Probate of Holographic Will and to Set Aside Probate of Prior Will. APP. 33. The Petition sought to probate handwritten instructions left by Blikre as a holographic will and to set aside the probate of the 2005 Will. Id.

[¶8] On April 27, 2018, Sharron filed a Notice of Appeal from the district court's February 26, 2018 Order. APP. 43. In light of Jennifer's pending Petition, this Court remanded the case back to the district court on May 15, 2018. APP. 44. On remand, Jennifer moved for summary judgment with respect to the revocation of the 2005 Will by operation of law. APP. 45. The district court denied the motion on August 29, 2018. APP. 46.

[¶9] On December 21, 2018, Jennifer and Sharron moved for summary judgment with respect to the validity of the 2005 Will, after discovering the 2005 Will was not executed before two witnesses. APP. 50. The same day, Jean moved for summary judgment with respect to Jennifer's claims based on the holographic will. APP. 51. The district court heard argument from counsel on the pending motions at

a hearing held on January 25, 2019. The court further heard testimony and evidence concerning Jennifer's pending Petition at the hearing.

[¶10] Following post-trial briefing, the district court entered an Order on Remand on February 20, 2019. APP. 58. The court granted Jean's motion for summary judgment after concluding Blikre's handwritten instructions did not constitute a holographic will. Id. The court also denied the Jensens' motion for summary judgment challenging the validity of the 2005 Will. Id. On February 27, 2019, Sharron and Jennifer filed a Second Notice of Appeal. APP. 103.

STATEMENT OF THE FACTS

[¶11] Jacquelynn Blikre was the sister of Sharron Jensen and Sandra Nordahl, and the aunt of Jennifer Jensen and Tamra Engle ("Tamra"). In 2005, Sandra and her husband, Jean Nordahl, traveled to North Dakota from their Montana residence to assist Blikre in preparing the 2005 Will. APP. 67-69; APP. 80. The visit was a rare occurrence, as Sandra and Jean had only visited Blikre once or twice in the preceding 20 years. Id. The 2005 Will left Blikre's entire estate to Sandra. APP. 10.

[¶12] Upon arriving in North Dakota, Jean drove Blikre, her mother Erma, and Sandra in a pickup truck to attorney Wade Enget's office on April 20, 2005. APP. 77-78. Enget knew Blikre personally because his parents did business with Blikre and her mother. Trial Tr. 10:12-20 (Oct. 30, 2017). Sandra and Blikre went into Enget's office for approximately 30 minutes, while Erma and Jean remained in the truck. APP. 80, 82. Sandra and Blikre then returned to the truck and Jean took them downtown shopping while Enget prepared the documents. APP. 86.

[¶13] After returning to Enget's office shortly thereafter, Enget came out to the truck to have Erma and Blikre sign legal documents, including the 2005 Will. APP. 82-83. Jean made clear "[o]nly Wade" walked out to the truck. APP. 82. On three more occasions, Jean declared "[j]ust Wade" approached the truck, "he did not bring any staff members with him," and "in the pickup at that time it was [Jean], Sandi, Jackie, and Erma[.]" APP. 82-83. In each instance, Jean confirmed only Enget was present — not anyone from his staff or anyone else besides Blikre, Erma, Jean, and Sandra. Id.

[¶14] The 2005 Will depicts Blikre's signature taking place on April 20, 2005. APP. 10. However, the second page of the 2005 Will lists two attesting witnesses, Kaylen Nordloef and Cheryl Engebretson, who were not among the individuals present at the time Blikre signed the 2005 Will. APP. 11.

[¶15] The 2005 Will was never seen again after April 20, 2005. Sandra testified she had no idea where the 2005 Will was located. Trial Tr. 24:1-2 (Nov. 14, 2016). Sharron was unaware of the 2005 Will until Sandra disclosed its existence following Blikre's death. Trial Tr. 135:21-136:17 (Oct. 30, 2017). Despite a thorough search at that time, the 2005 Will was never located anywhere among Blikre's belongings. APP. 26.

[¶16] In the months leading up to her death on September 1, 2016, Blikre's health began deteriorating. Trial Tr. 28:19-22 (Oct. 30, 2017). In mid-April 2016, Blikre was admitted to the hospital, where she suffered a heart attack. Id. at 28:24-29:4. The heart attack left Blikre unable to speak and she would breathe through a tracheostomy tube for the remainder of her life. Id. at 29:8-18.

[¶17] Blikre spent her final months in the hospital or a nursing home. Id. at 30:5-13. Sharron stayed with Blikre for 4 weeks while she was in the ICU. Id. at 131:23-25. After that event, Sharron continued to visit Blikre often and assisted her by running errands, such as obtaining items Blikre requested or addressing pending matters on the farm. Id. at 30:5-13; 132:10-15. Sharron also managed Blikre's affairs as her power of attorney at the time, including paying Blikre's bills. Id. at 145:7-14.

[¶18] During one visit, Sharron asked Blikre if she had a will. Trial Tr. 44:7-11 (Jan. 25, 2019). Blikre, unable to speak, responded by shaking her head "no" to indicate she did not have any will in place. Id.; see also id. at 68:15-18.

[¶19] Blikre proceeded to handwrite several pages of instructions depicting her final wishes. Trial Tr. 31:2-8 (Oct. 30, 2017). For instance, Blikre wrote she wanted her ashes distributed over the land she lived on her entire life. Trial Tr. 32:5-11 (Jan. 25, 2019). Blikre further directed a series of her assets were to go "to Sharron Jensen and Jennifer Jensen; to Sandra Nordahl and Tamra Engel." Tr. 139:4-24 (Oct. 30, 2017). Sharron interpreted these instructions as a will because they set forth Blikre's intent concerning her final wishes. Id.; see also id. 140:2-7.

[¶20] Since the original 2005 Will was never found, the handwritten pages left by Blikre are the only documents expressing Blikre's intent. Despite this fact, the district court probated a copy of the missing 2005 Will and refused to give effect to the handwritten pages as a holographic will. The Jensens now appeal the district court's determinations.

ARGUMENT

I. Standard of Review

[¶21] There are three issues in this appeal: (1) whether the 2005 Will is valid when it was executed outside the presence of the attesting witnesses; (2) whether the missing 2005 Will is revoked by operation of law; and (3) whether Blikre executed a valid holographic will. These issues present mixed questions of law and fact.

[¶22] The first and third issues concern the validity of the 2005 Will and the holographic will, respectively. "The right to make a will disposing of one's property is statutory and unless a testator complies with the prescribed statutory formalities, the will is invalid." Matter of Estate of Voeller, 534 N.W.2d 24, 25 (N.D. 1995). "Interpretation and application of a statute are questions of law that are fully reviewable on appeal." Id.

[¶23] The second issue concerns the presumption of animo revocandi, "which presumes a missing will has been intentionally destroyed and thus revoked by the testator." In re Estate of Clemetson, 2012 ND 28, ¶ 9, 812 N.W.2d 388 (internal quotation marks and citation omitted). "Once the presumption arises, the party petitioning for the probate of a missing will must demonstrate, by a preponderance of the evidence, that the will existed at the time of the testator's death, that the will was fraudulently destroyed in the lifetime of the testator, or by other evidence demonstrating the testator did not intend to revoke the missing will." Id. (internal quotation marks and citation omitted). "Whether a presumption arises, and whether a presumption has been rebutted, are questions of fact governed by the clearly erroneous standard of review under N.D.R.Civ.P. 52(a)." Id. at ¶ 11. "A finding of

fact is clearly erroneous only if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after review of the entire record, [this Court] [is] left with a definite and firm conviction a mistake has been made." Id.

II. The district court erred as a matter of law in concluding the April 20, 2005 Will was valid because the Will was not witnessed by two individuals, as required by North Dakota law.

A. North Dakota Law Requires Two Witnesses to a Will

[¶24] As the proponent of the 2005 Will, the Personal Representative bears the burden of establishing the Will was validly executed. In re Estate of Clemetson, 2012 ND 28, ¶ 8. "To be 'duly executed,' a will must comply with the statutory requirements for execution." Matter of Estate of Wagner, 551 N.W.2d 292, 295 (N.D. 1996). The Personal Representative's burden is particularly noteworthy here, because the Personal Representative occupies the role of a fiduciary tasked with administering the Estate in accordance with the law and protecting the best interests of the heirs. Jones v. Fondufe, 908 A.2d 1161, 1163 (D.C. 2006).

[¶25] At the time Blikre executed the 2005 Will, North Dakota law required wills to be signed "by at least two individuals, each of whom signed within a reasonable time after witnessing either the signing of the will [by the testator] . . . or the testator's acknowledgment of that signature or acknowledgment of the will." N.D.C.C. § 30.1-08-02(1)(c) (2005). This Court explained the importance of requiring witnesses to properly attest a will as follows:

> The purpose of the legislature in requiring witnesses to attest and subscribe the will is undoubtedly to demand something more than the mere act of writing their names upon the will. The word 'witness' and the word 'attesting' both imply that the witness must have some knowledge of the facts concerning the execution of the will.

...

> The cases hold, with rare exceptions, that it is the duty of an attesting or subscribing witness to a will to observe and judge of the mental capacity of the testator, and satisfy himself of the existence thereof. Such duty is corollary, it is said, to his duty to see the will signed or to ascertain otherwise that the signature affixed is the signature of the testator.

Stormon v. Weiss, 65 N.W.2d 475, 502 (N.D. 1954) (internal quotation marks and citation omitted). Because the attesting witnesses play a vital role in the execution of a will, this Court invalidates wills when the statutory requirements are not followed.

[¶26] For example, in Matter of Estate of Voeller, 534 N.W.3d 24, 25 (N.D. 1995), the personal representative attempted to probate a codicil signed by only one witness. Although two witnesses were present, the second witness did not sign the codicil. Id. Because "[t]he formalities for execution of a witnessed will have been reduced to a minimum" by the Legislature, the Court "reject[ed] the idea that we should allow less than the minimum requirements to validate a testamentary act." Id. at 25-26. Consequently, the Court affirmed the trial court's decision denying probate of the codicil because the document was not properly executed and witnessed in accordance with the statute. Id. at 26.

B. The Personal Representative Testified the Two Attesting Witnesses were not Present During the Signing of the 2005 Will

[¶27] The requirements of N.D.C.C. § 30.1-08-02(1)(c) were not followed because, according to the Personal Representative's own sworn testimony, the two witnesses identified in the 2005 Will did not actually witness Blikre sign the document. Blikre signed the 2005 Will in a pickup truck at Enget's office. APP. 83. The Personal Representative declared on at least *six separate occasions*, under oath,

that only Enget came to the truck when Blikre signed the Will — not anyone else. APP. 82-83; APP. 87.

[¶28] The Personal Representative's sworn testimony constitutes direct evidence the statutory requirements were not followed. As discussed above, the purpose of the statute is not simply to have two individuals write their names on the document, but to "have some knowledge of the facts concerning the execution of the will." Stormon, 65 N.W.2d at 502. The attesting witnesses have a duty "to observe and judge . . . the mental capacity of the testator" and to assure the will is what it purports to be. Id. The only way in which the witnesses can fulfill this duty is if they are actually present to observe the decedent sign the will.

[¶29] As this Court noted in Matter of Estate of Voeller, 534 N.W.3d at 25-26, courts cannot allow less than is required by the Legislature to validate the will. Simply put, when this Court refused to probate a will where there were two witnesses present, but only one witness signed the document, surely the 2005 Will must be invalid when the two subscribing witnesses were not even present.

[¶30] Two additional cases are particularly instructive. In In re Weber's Estate, 387 P.2d 165, 167 (Kan. 1963), the decedent and a neighbor drove to a bank to prepare a will. The neighbor brought the president of the bank out to the decedent's car. Id. The bank president obtained directions from the decedent and then went back into the bank to prepare a will. Id. The bank president arranged for three employees to stand by a window to observe the decedent sign the will in his car. Id. The bank president reentered the vehicle, the decedent and the witnesses waved

at each other, and the decedent signed the will. Id. The bank president then returned inside the bank, where the witnesses signed their names. Id. at 167-168.

[¶31] On appeal, the court reversed the trial court's decision to admit the will to probate. Id. at 168. In order to verify the decedent is signing the same will, and possesses the requisite capacity, the court reasoned the witnesses must be in the presence of the decedent. Id. Consequently, the proximity between the witnesses and decedent was not sufficient to satisfy the statutory requirements. Id. at 171.

[¶32] A similar transaction took place in Green v. Davis, 153 So. 240, 240-241 (Ala. 1934), where the decedent summoned a cashier to his parked car at a bank. The decedent handed the cashier his will and asked the cashier and the bank vice president to sign as subscribing witnesses. Id. at 241. As the decedent remained in the vehicle, the cashier returned inside the bank, where the cashier and the vice president signed the will. Id. The court concluded the witnesses did not subscribe their names in the presence of the decedent. Id. There was no evidence "a person seated in the automobile where [the decedent] remained during the entire time could even see the witnesses, much less their acts of subscribing their names to the alleged will." Id. at 242. As a result, the proponent of the will failed to carry his burden of showing the statutory requirements were satisfied. Id.

[¶33] These decisions are strikingly familiar to this case. Like the decedent in Green, Blikre remained in the vehicle during the execution of the 2005 Will. The witnesses were not present to view Blikre sign the Will. In In re Weber's Estate, 387 P.2d at 167, the court held the will was invalid despite the fact the witnesses observed the decedent sign through a nearby window. By contrast, the witnesses here

were not present. When it is not enough to have witnesses watch through a window, clearly it is insufficient where no witnesses were present in any manner.

C. The Personal Representative Failed to Prove the Validity of the 2005 Will

[¶34] The Personal Representative did not put on any contrary evidence at the January 25, 2019 hearing. However, he submitted two affidavits in response to the Jensens' summary judgment motion, including an affidavit from himself and an affidavit from Enget. The district court erroneously relied upon these affidavits to conclude there was "credible evidence that the witnesses were physically present when Jacquelynn's 2005 Will was executed[.]"[1] APP. 64; see also APP. 52-57.

1. The Personal Representative's sham affidavit does not overcome his sworn testimony

[¶35] First, the Personal Representative attempted to contradict his own sworn testimony through an affidavit where he alleged, "I think that I made a mistake about what I remembered." APP. 52. The Personal Representative alleged he did not "know for certain that Jacquelynn's will was signed while she was in my pickup" because he does not know what Blikre and Sandra may have discussed while inside Enget's office. APP. 53.

[¶36] "A 'sham affidavit' is defined as 'an affidavit that contradicts clear testimony given by the same witness, usually used in an attempt to create an issue of fact in response to a motion for summary judgment.'" Hysjulien v. Hill Top Home

[1]The district court also questioned its jurisdiction to address the invalidity of the 2005 Will on remand. This concern is misplaced because, among other reasons, this Court remanded for disposition of Jennifer's pending Petition, and the Petition broadly sought to set aside the probate of the 2005 Will.

of Comfort, Inc., 2013 ND 38, ¶ 23, 827 N.W.2d 533 (quoting Black's Law Dictionary 67 (9th ed. 2009)). When a party seeks to vary from his earlier testimony through a contradictory affidavit, "the party raises a 'sham issue of fact instead of a genuine one." Id. (internal quotation marks and citation omitted).

[¶37] The Personal Representative's affidavit constitutes a sham affidavit because it directly contradicts his earlier sworn testimony. The Personal Representative's testimony unequivocally laid out the sequencing of events and the central fact Blikre signed the 2005 Will in the truck after returning to Enget's office. See Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986) (disregarding an affidavit because the earlier testimony was unequivocal). He described with certainty the individuals present, the locations they visited, and a specific timeline of events. Moreover, while the Personal Representative's affidavit made a blanket assertion he was confused, the testimony itself reflects no confusion concerning the events. Id.

[¶38] For instance, while the Personal Representative's affidavit claimed he did not know what was discussed during the initial visit inside Enget's office, his testimony explained that Sandra and Blikre visited for 30 minutes before departing for shopping so Enget could prepare the Will. APP. 80, 82, 86. He confirmed the 2005 Will was not signed until after they returned, at which point "only Wade" came to the truck. APP. 86-87. Once again, the absence of the witnesses was not a one-off stray remark, but something the Personal Representative confirmed *six times* after being given multiple opportunities to explain. Under these circumstances, the court erred in relying upon the Personal Representative's sham affidavit that was designed to elude his clear testimony.

2. Mr. Enget's affidavit is made without personal knowledge and it consists of speculation

[¶39] The only other evidence cited by the district court was Enget's affidavit, which begins by conceding Enget did not remember the execution of the Will. APP. 55-56. Enget states, "upon review of [the 2005 Will]," he believes the witnesses would have been present. APP. 56. The court noted Enget stated "he would not have notarized the signatures of the witnesses to Jacquelynn's Will unless the witnesses were physically present at the time of the signature." APP. 64

[¶40] The court's reliance on Enget's affidavit contradicts the court's earlier factual finding that Enget "did not recall any specifics of the April 20, 2005, meeting[.]" APP. 25. At the October 30, 2017 hearing, Enget repeatedly declared, "I do not have any independent recollection of that date." Trial Tr. 22:18-19 (Oct. 30, 2017); see also id. at 14:5-9 (stating he did not "have any separate recollection" of what was said when the Will was executed); id. at 17:25-18:2 (agreeing he had no recollection of the Will preparation); id. at 13:17-20 (same).

[¶41] Given Enget's testimony he had no recollection, his affidavit is not made on personal knowledge, it does not set out admissible facts, and it does not show he is competent to testify on the Will execution. Johnston Law Office, P.C. v. Brakke, 2018 ND 247, ¶ 14, 919 N.W.2d 733. The court cannot rely upon an affidavit based on Enget's "best recollection," when Enget already testified — and the court already found — Enget had *no* recollection.

[¶42] Ultimately, Enget's affidavit consists of mere speculation because he hypothesized about what *could* have happened based solely on his review of the Will,

not on his personal knowledge. See Law Capital, Inc. v. Kettering, 836 N.W.2d 642, 647 (S.D. 2013) (concluding the affiants engaged in speculation because they did not remember signing or being present); Black's Law Dictionary (10th ed. 2014) (defining "speculation" as "[t]he act or practice of theorizing about matters over which there is no certain knowledge"). Indeed, when he was asked about details concerning the 2005 Will, Enget expressly refused "to speculate 'cause I – I really don't have any independent recollection of that day." Trial Tr. 24:1-4 (Oct. 30, 2017).

[¶43] Instructive here is Beckler v. Bismarck Public School District, 2006 ND 58, ¶ 12, 711 N.W.2d 172, where the plaintiff fell on stairs at a school after children returned from recess. The plaintiff presented evidence showing the stairs were usually wet after recess when the children returned inside with snow on their shoes. Id. The plaintiff noticed her pants were wet after she crawled on the stairs, but that could have been caused by either the stairs being wet or from a wet rug she laid on. Id. The Court concluded this evidence "becomes speculative in light of direct evidence that no water was on the stairs on the day she fell." Id. at ¶ 11. The Court cited the plaintiff's own testimony that she did not recall seeing water, and it noted there were no witnesses who could definitively state water was present at the time. Id. at ¶¶ 11-12. "Therefore, [the plaintiff's] speculations and conclusions that there had to be water on the stairs because there often is after recess is insufficient to defeat [the defendant's] summary judgment motion without some proof that there was water on the stairs when and where she fell." Id. at ¶ 12.

[¶44] Based on Beckler, the district court erroneously relied upon Enget's affidavit stating he "would not have" ordinarily notarized the signatures if the

witnesses were not present. The affidavit must be supported by specific facts, which Enget already disclaimed having in his possession. Moreover, the Personal Representative, who did not disclaim having any recollection of the events during his testimony, stated the 2005 Will was signed in the absence of the subscribing witnesses. Like Beckler, Enget's affidavit "becomes speculative in light of direct evidence" from the Personal Representative that the witnesses were not present when the 2005 Will was signed. Id. at ¶ 11.

[¶45] In sum, the requirements of N.D.C.C. § 30.1-08-02 are not demanding. According to the Personal Representative's own sworn testimony, the two attesting witnesses required by statute were not present when Blikre signed the 2005 Will. The court erroneously relied upon affidavits from the Personal Representative and Enget attempting to backtrack from their sworn testimony. Under these circumstances, the district court erred in not invalidating the 2005 Will as a matter of law.

III. The district court erred in probating a copy of the April 20, 2005 Will because the Personal Representative failed to overcome the presumption the missing Will was not revoked by operation of law

[¶46] Even if the Court concludes the 2005 Will is valid, the 2005 Will still should not have been probated. Because the 2005 Will was missing, it is presumed Blikre revoked the Will. Accordingly, the district court erred as a matter of law by probating the 2005 Will.

A. Missing Wills are Presumed to be Revoked

[¶47] In re Estate of Conley, 2008 ND 148, ¶ 21, 753 N.W.2d 384, this Court adopted the presumption of animo revocandi, which recognizes

> persons in general keep their wills in places of safety, or, as we here technically express it, among their papers of moment and concern.

> They are instruments in their nature revocable: testamentary intention is ambulatory till death; and if the instrument be not found in the repositories of the test[at]or, where he had placed it, the common sense of the matter, prima facie, is that he himself destroyed it, meaning to revoke it . . .

"The presumption intends to protect the testator's right to change his will at pleasure and recognizes that wills are almost always destroyed secretly." Id. (internal quotation marks and citation omitted). "Consequently, 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." Id.

[¶48] The party seeking to probate a lost will bears the burden of overcoming the presumption. Id. at ¶ 28. That party "must demonstrate, by a preponderance of the evidence, that the will existed at the time of the testator's death, that the will was fraudulently destroyed in the lifetime of the testator, or by other evidence demonstrating the testator did not intend to revoke the missing will." Id. at ¶ 29.

B. The Personal Representative Failed to Overcome the Presumption

[¶49] The district court correctly applied the presumption after finding the 2005 Will was missing. However, the court then erroneously concluded the Personal Representative overcame the presumption.

[¶50] The court's conclusion conflicts with its own fact findings. The court found, "**no one, with the possible exception of [Blikre], has seen the original will since [April 20, 2005, the date it was executed**]." APP. 26 (emphasis added). Since the Personal Representative must demonstrate the 2005 Will existed at Blikre's death, and the court found nobody had seen the Will since 2005, the Personal Representative plainly could not overcome the presumption Blikre did not revoke the Will.

[¶51] For instance, in In re Estate of Clemetson, 2012 ND 28, ¶¶ 24-25, 812 N.W.2d 388, this Court affirmed the application of the presumption, despite evidence the person who searched the home would benefit if the will were revoked. The proponent failed his burden because "the last time anyone actually saw [the decedent's] will in the home was in January 2009 after [her husband's] death, but almost ten months before [the decedent] died." Id. at ¶ 21. If the presumption was not overcome in Clemetson, despite evidence it was seen years after execution and placed in a known location, then surely the presumption cannot be overcome here where no one saw the 2005 Will since it was executed.

[¶52] Ultimately, "[t]he purpose of requiring an original version of a will rather than a copy is to ensure that the testator did not, subsequent to the execution of the will, express a different testamentary intent by taking the affirmative action of physically destroying the original version of the will[.]" Kennedy v. Ferguson, 679 F.3d 998, 1002 (8th Cir. 2012). "This purpose relates to proof of events that occur *after* execution of the will." Id. (emphasis in original). Because there is no proof of events occurring after execution, according to the court's own findings, the presumption of revocation must be applied by law.

C. The Presumption Cannot be Overcome by Speculation

[¶53] Instead of giving effect to its finding no one had seen the 2005 Will, the court relied on Sharron's access to the home "where the will would have been located." APP. 32. The court concentrated on two events in particular. First, during her hospitalization, Blikre directed Sharron to retrieve a black security box from the home. Trial Tr. 33:9-34:10 (Oct. 30, 2017). Most of the documents in the box

pertained to Blikre's arrangement with another individual over her cows. Id. at 38:8-10. However, the court believed Sharron "was somewhat unclear and contradictory" concerning the timeline and the contents of the box. APP. 28.

[¶54] Second, the court highlighted testimony concerning a black box safe purportedly removed from Blikre's home. APP. 29. Two individuals indicated they saw Sharron remove what they thought was a safe, but there was no evidence concerning the contents of the safe. Id.

[¶55] The fundamental problem with the court's analysis is there was no evidence showing the 2005 Will was ever located, at any time, in the security box or safe. Once again, this is inherent in the court's finding no one had seen the Will since leaving Enget's office. The only evidence concerning the whereabouts of the Will was Sandra's testimony that she had no idea where it was located. Trial Tr. 24:1-2 (Nov. 14, 2016).

[¶56] Sharron's activities surrounding the security box and safe cannot overcome the presumption because there is no evidence placing the 2005 Will in either location in the first instance. Simply put, Sharron could not have destroyed the 2005 Will by accessing the security box or safe unless the Will was there to begin with, and no evidence established that precursory fact. See In re Tipton's Estate, 173 Neb. 520, 526–29 (Neb. 1962) (reversing the decision to probate a copy of a will where no one saw the will and there was no evidence showing it was located in a trunk in question).

[¶57] In support of its determination, the district court cited Estate of Mecello, 633 N.W.2d 892 (Neb. 2001), which this Court examined in Clemetson. While the

district court believed its determination found support through this Court's discussion of Mecello, the opposite is true because this Court *rejected* the application of Mecello. Unlike the testator in Mecello who told a friend five days before her death that she had a will in a safe-deposit box, no one in Clemetson had seen the testator's will for almost 10 months before the testator died. Clemetson, 2012 ND 28, ¶ 21. When this Court distinguished Mecello because a will had not been seen for almost 10 *months*, Mecello cannot govern here where the 2005 Will had not been seen for over 10 *years*.

[¶58] Beyond this Court's discussion in Clemetson, Mecello has no application to this matter. The evidence in Mecello demonstrated the will existed at the time of the testator's death, as the testator had multiple conversations mere days before her death advising others of the will's existence and specific location. Mecello, 633 N.W.2d at 902. Mecello itself distinguished an earlier case, Muse v. Stewart, 113 N.W.2d 644 (Neb. 1962), where there the testator stated she was going to place the will in a safe-deposit box, but the original will was never seen after it was placed in the box. Id. While there was an inference a person who would benefit from the will being destroyed had an opportunity to do so, the court held there was no evidence this occurred. Id. Consequently, the court applied the presumption of revocation. Id.

[¶59] Unlike Mecello, Blikre did not tell anyone the 2005 Will was located in her security box, safe, or anyplace else — whether it be 5 days or even 2,500 days before her death. Like Muse, there is no evidence the 2005 Will was ever seen following its execution. Indeed, the evidence is even less here than in Muse, where it was clear the original will was placed in a safe-deposit box. Id. Once again, if the

presumption applied in Muse based on this evidence, the presumption must apply here where no evidence concerning the Will's location was ever produced.

[¶60] Even assuming there was evidence placing the 2005 Will in the security box or safe, the court's concentration on Sharron's activities amounts to nothing more than improper insinuation and speculation. "The mere fact a person who would benefit from destruction of a will possessed it or had access to it, standing alone, is not sufficient to rebut the presumption the testator himself revoked the will by destroying it." In re Estate of Pallister, 611 S.E.2d 250, 257 (S.C. 2005); see also Estate of Parson, 416 So.2d 513, 515 (Fla. D.C. App. 1982) ("Evidence of access [to the will by a person with an adverse interest] by no means automatically overcomes the presumption of revocation."); Lovell v. Lovell, 272 Ala. 409, 411–12 (1961) ("[M]ere opportunity . . . to destroy the will would not be sufficient to rebut the presumption").

[¶61] For example, in Daul v. Goff, 754 So.2d 847, 848 (Fla. D.C. App. 2000), the decedent's daughter often visited the decedent's home to assist the decedent after an illness set in. Id. The daughter helped inventory the contents of a safe-deposit box and received some documents from the decedent. Id. "While these facts could show that [the daughter] had the opportunity to destroy [the decedent's] will, mere opportunity is insufficient to rebut the presumption of revocation." Id. Consequently, the appellate court reversed the district court's decision to probate a copy of the lost will because the petitioner failed to present competent evidence sufficient to overcome the presumption. Id.

[¶62] As the foregoing authorities establish, even assuming Sharron had access to the security box, and an implied motive to destroy the 2005 Will, it is not enough to overcome the presumption as a matter of law. Therefore, the district court erred as a matter of law by relying solely on insinuation and speculation.

D. The District Court Ignored the Evidence in the Record

[¶63] In contrast to the district court's speculation, the evidence is consistent with Blikre revoking the 2005 Will. First, Blikre personally denied having the 2005 Will in place. Trial Tr. 44:7-11 (Jan. 25, 2019); see also id. at 68:15-18. Thus, not only did no one see the 2005 Will after its execution, but Blikre herself disclaimed it was still operative before her death.

[¶64] Second, both Sharron and the Personal Representative agreed Blikre had no reason to intentionally omit Sharron from her will. Trial Tr. 45:6-14 (Jan. 25, 2019). The undisputed testimony established Sharron got along well with her sister and there were no problems in their relationship. Id. The evidence further showed Blikre wanted her land to stay in her family. Id. at 46:3-4.

[¶65] Third, the revocation of the 2005 Will was entirely consistent with Blikre's personality. Blikre often avoided direct confrontation with others and would let them take control to satisfy them. Id. at 32:21-24. However, she was appeasing only to a point, as she would ultimately not follow through with their direction if it did not align with her wishes. Id. at 32:25-37:5.

[¶66] By contrast, Sandra was described as someone with a "forceful" personality who "[p]retty much got her way." Id. at 37:6-8. For example, Sandra asked Sharron to turn over her interest in the farm to Blikre. Id. at 37:23-38:12. This

demand took place after Sandra assisted Blikre with the 2005 Will, unbeknownst to Sharron. Id. Since the 2005 Will gave Blikre's Estate to Sandra, Sandra's demand would have had the effect of transferring Sharron's interest in the farm to Sandra. Id.

[¶67] Sandra also sometimes took advantage of Blikre, while Blikre "didn't fight back with her." Id. at 142:24-143:3. Thus, it was entirely consistent for Blikre to have agreed to execute the 2005 Will with Sandra's assistance, only to later revoke the Will on her own. While none of this evidence is necessary to apply the presumption of revocation, it further supports the view Blikre revoked the 2005 Will.

IV. The district court erred as a matter of law by granting summary judgment and declining to probate the decedent's handwritten instructions as a holographic will because the handwritten instructions satisfied the requirements of the statute

[¶68] Finally, even if the 2005 Will was not revoked by operation of law, it was replaced by a holographic will Blikre executed prior to her death. The district court erred as a matter of law by concluding the holographic will was invalid on summary judgment.

A. Blikre's Handwritten Documents Satisfy North Dakota's Minimal Requirements for Creating a Holographic Will

[¶69] A will is valid as a holographic will "if the signature and material portions of the document are in the testator's handwriting." N.D.C.C. § 30.1-08-02(2). "Intent that a document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting." N.D.C.C. § 30.1-08-02(3).

[¶70] The Personal Representative did not dispute Blikre drafted the pages in her handwriting. APP.71-74. Sharron agreed Blikre handwrote the pages in question.

Trial Tr. 28:11-14 (Jan. 25, 2019). Based on the evidence, the district court found "the notes and instructions . . . were drafted by Jacquelynn." APP. 27; see also APP. 62.

[¶71] However, the court concluded the documents did not constitute a holographic will because, except for the words "To Sharron, Jennifer" and "To Sandra, Tamra," the documents did not express donative intent on Blikre's part. APP. 62. The court further concluded Blikre did not intend the two separate exhibits introduced at trial to constitute a single document, based in large part on the different times in which the documents appear to have been drafted. Id.

[¶72] The court's conclusions are unsupported both by the evidence and the law. First, the court determined Blikre lacked testamentary intent in drafting the document, despite the fact all parties agreed Blikre maintained testamentary intent when she prepared the pages. The Personal Representative conceded Blikre intended for Sharron, Jennifer, and Tamra to receive assets from her Estate. APP. 75. The Personal Representative explained Blikre "wrote it down, so I believe it would have been [her intent to distribute assets]." Id. Sharron agreed with the Personal Representative that Blikre's intent was to distribute assets to Sharron, Jennifer, and Tamra. Trial Tr. 30:4-10 (Jan. 25, 2019). Accordingly, all parties who testified on the issue agreed Blikre maintained the requisite intent. See Matter of Estate of Krueger, 529 N.W.2d 151, 154 (N.D. 1995) (concluding the testator's bequest of books and a diploma to another reflected the testator's intent).

[¶73] Moreover, Blikre's testamentary intent may be derived from the document itself. Matter of Estate of Ostby, 479 N.W.2d 866, 871 (N.D. 1992). "If

a duly executed will contains the decedent's general instructions for its contents, testamentary intent exists." Id. at 870. As this Court has explained, "the executed will *is* the decedent's testamentary intent." Id. at 871 (emphasis in original); see also N.D.C.C. § 30.1-09-03 ("The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions."). The court's conclusion Blikre lacked testamentary intent runs afoul of North Dakota law because Blikre expressly identified what should happen "when I leave this life" and all parties agreed she intended to bequest her assets to Sharron, Jennifer, and Tamra. APP. 89.

[¶74] Second, the court concluded the handwritten pages did not constitute a holographic will because they were contained in separate exhibits and likely written on separate dates. APP. 62. This determination imposes additional requirements not found in North Dakota law, as nothing in N.D.C.C. § 30.1-08-02(2) mandates each page be written on the same date. A holographic will "may consist of several sheets of paper, and it does not in and of itself matter that one of such sheets standing alone would not constitute an executed will," nor is it "essential that the entire will be written on the same date. In re Moody's Estate, 257 P.2d 709, 713 (Cal. Ct. App. 1953).

[¶75] In short, N.D.C.C. § 30.1-08-02(2) only requires the signature and material portions to be in the testator's handwriting. All parties agreed that was the case here. The court therefore erred as a matter of law in concluding the handwritten pages did not constitute a valid holographic will.

B. The Holographic Will Replaced the 2005 Will

[¶76] The only remaining question is what effect the holographic Will had on the 2005 Will, assuming the 2005 Will was still valid. Generally, a will is revoked "[b]y executing a subsequent will that revokes the previous will or part expressly or by inconsistency." N.D.C.C. § 30.1-08-07(1)(a). "If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will." N.D.C.C. § 30.1-08-08(2). A testator is presumed to have intended a later will to supplement an earlier will if the later will does not completely dispose of the estate. N.D.C.C. § 30.1-08-07(4). However, this presumption may be rebutted with evidence showing the testator intended the later will to replace the earlier will. Id.; N.D.C.C. § 30.1-08-08(2).

[¶77] The circumstances demonstrate Blikre's intent to have the holographic will replace, not supplement, the 2005 Will. At the time she executed the holographic will, Blikre's health was in a persistent state of decline. Blikre's failing health gave her cause to express her wishes concerning her personal affairs.

[¶78] During this same time, Blikre stated she did not have a will in place. Trial Tr. 44:7-11 (Jan. 25, 2019); see also id. at 68:15-18. Blikre's response must be given effect because it bears directly on her intent. Clearly Blikre did not intend the holographic will to supplement the 2005 Will when she recognized the 2005 Will was no longer in effect.

[¶79] Given Blikre's statement, her handwritten pages are properly viewed as an expression of her complete testamentary intent. There would be no need for Blikre to handwrite instructions regarding the disposition of her assets if she desired

the 2005 Will to distribute all of her assets to Sandra. Trial Tr. 142:1-3. (Oct. 30, 2017)

[¶80] Moreover, the fact the 2005 Will was missing demonstrates Blikre intended the holographic will to replace the 2005 Will. In contrast to Blikre's refusal to maintain the original 2005 Will, Blikre provided the holographic will directly to Sharron to be preserved. Blikre further directed that Sandra be provided copies of the holographic will, which the Personal Representative agreed Blikre would have done so Sandra could understand Blikre's wishes. APP. 74.

[¶81] The Personal Representative also admitted there was no reason Blikre would have disinherited Sharron. APP. 84. This aligns with the district court's findings that Sharron remained in regular contact with Blikre, including caring after Blikre while she was ill. APP. 25-27. These actions exemplified the close relationship the sisters had with one another, and belie any suggestion Blikre disinherited Sharron out of some unknown animus.

[¶82] Similarly, Blikre valued the property that was in her family for three generations, and she expressed her intent to keep the property within the family. Tellingly, the only persons listed in the holographic will were Blikre's two sisters and two nieces, her only living relatives. APP. 98. The Personal Representative was not listed among the distributees. It bears noting Sandra was in failing health when Blikre drafted her holographic will, and it was unclear whether Blikre or Sandra would survive one another. Thus, it is untenable to distribute Blikre's entire estate to Sandra's husband when Blikre never expressed such an intent.

[¶83] All of these circumstances considered together establish Blikre intended the holographic will to replace the 2005 Will. See Matter of Estate of Brown, 1997 ND 11, ¶ 15, 559 N.W.2d 818 ("Courts must construe a will to find the testator's intent from full consideration of the will in light of surrounding circumstances."). The district court erred as a matter of law by disregarding these circumstances and refusing to probate the holographic will.

V. This case is appealable because it is not a supervised administration and there are no pending claims

[¶84] Finally, the Court directed the parties to address the appealability of this matter. Although an order approving distribution and discharging the personal representative is generally required before a supervised administration may be appealed, this is not the case with an unsupervised probate. Matter of Estate of Starcher, 447 N.W.2d 293, 295-96 (N.D. 1989). There is no petition or order for supervised administration in this case, which is required to be considered a supervised administration under N.D.C.C. § 30.1-16-02. Accordingly, no final order approving distribution or discharging the personal representative is necessary before this appeal may be heard. Moreover, the Appellants have no pending claims or matters left to be determined by the Court. As a result, this matter is appealable.

CONCLUSION

[¶85] The 2005 Will has no effect for two independent reasons. First, according to the Personal Representative's own testimony, the attesting witnesses were not present when Blikre signed the Will. Consequently, the 2005 Will was not executed in accordance with the minimal requirements of N.D.C.C. § 30.1-08-02(1)(c) (2005).

[¶86] Second, the presumption of animo revocandi presumes the 2005 Will was revoked because it was missing upon Blikre's death. The court erroneously concluded the Personal Representative rebutted the presumption based on nothing more than improper insinuation and speculation as to Sharron's access and motivation to destroy the will. There is not a single piece of evidence establishing the 2005 Will was placed in the security box or safe in question, and the court itself found no one had seen the 2005 Will since leaving Enget's office. Even assuming the Will was located in the security box, Sharron's access to the box and implied motivation to destroy the Will would not be sufficient to overcome the presumption.

[¶87] Finally, the district court erred as a matter of law by dismissing the claim to probate the holographic will. A document qualifies as a holographic will under N.D.C.C. § 30.1-08-02 when material portions are handwritten by the testator. The will itself, as well as the surrounding circumstances, may be considered to determine the testator's intent. Here, Blikre stated she did not have a will, she was in failing health, and she proceeded to handwrite instructions concerning her personal affairs and assets. As a result, the requirements of the statute are satisfied and the court erred in not probating the holographic will.

[¶88] Under any of the three scenarios discussed above, the result is the same: the 2005 Will cannot be probated and Blikre's estate should have been distributed equally among Blikre's siblings. Therefore, this Court should reverse the district court's probate of the 2005 Will.

Dated: May 22, 2019.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID #06278
Sara K. Sorenson, ND ID #05826

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
Fargo, ND 58078-0458
TEL (701) 282-3249
FAX (701) 282-0825
acook@ohnstadlaw.com
ssorenson@ohnstadlaw.com
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellant in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 7,982 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 8,000 words.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID #06278
Sara K. Sorenson, ND ID #05826

OHNSTAD TWICHELL, P.C.
444 Sheyenne Street, Suite 102
P.O. Box 458
Fargo, ND 58078-0458
TEL (701) 282-3249
FAX (701) 282-0825
acook@ohnstadlaw.com
ssorenson@ohnstadlaw.com
Attorneys for Appellants

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Jacquelynn D. Blikre, Deceased	)	
	)	Supreme Court No. 20180162
----------	)	
Jean Nordahl, as Personal Representative of the Estate of Jacquelynn D. Blikre, Deceased,	)	District Court No. 2016-PR-00140
Petitioner and Appellee,	)	
v.	)	
Sharron Jensen,	)	
Respondent and Appellant,	)	
and	)	
Jennifer Jensen,	)	
Interested Party and Appellant,	)	
and	)	
Tamara Engle,	)	
Interested Party and Appellee,	)	
_____	)	

CERTIFICATE OF SERVICE

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

I hereby certify that on May 22, 2019, I caused to be electronically filed the **Appellant's Brief and Appellant's Appendix** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

By North Dakota Supreme Court E-Filing Portal:

Charles L. Chapman . . . . . chapmanlaw@chaplawnd.com

By U.S. Mail:

Tamra Engle
P.O. Box 12
Eureka, MT 59917

Dated: May 22, 2019.

/s/ Andrew D. Cook
Andrew D. Cook, ND ID #06278