

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kelly Grenz, as Personal Representative ) **SUPREME COURT NO. 20190363**  
of the Estate of Leo Grenz, )  
) Probate No. 15-2015-PR-00007  
Petitioner-Appellant, )  
) vs. )  
) Donavin Grenz, David Grenz, Lee Atta )  
Horner, and Kelly Grenz, as Personal )  
Representative of the Estate of Sally Grenz, )  
) Respondents-Appellees. )

In the Matter of the Estate of Leo Grenz, Deceased.

**APPEAL FROM MEMORANDUM OPINION AND ORDER  
DATED FEBRUARY 7, 2018,  
JUDGMENT DATED FEBRUARY 16, 2018, AND  
ORDER DATED OCTOBER 1, 2019  
STATE OF NORTH DAKOTA  
EMMONS COUNTY DISTRICT COURT,  
SOUTH CENTRAL JUDICIAL DISTRICT  
THE HONORABLE JOHN W. GRINSTEINER**

**ORAL ARGUMENT REQUESTED**

**APPELLANT’S BRIEF**

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## Table of Contents

	<b><u>Page No.</u></b>
Table of Authorities .....	3
	<b><u>Paragraph No.</u></b>
Oral Argument Requested.....	1
Statement of the Issue on Appeal.....	2
Statement of the Case.....	4
Statement of the Facts .....	10
Law and Argument .....	14
Conclusion .....	23
Certificate of Compliance with Rule 32(a) .....	25
Certificate of Service .....	26

## Table of Authorities

### Paragraph No.

#### Cases

*In re Estate of Samuelson*, 2008 ND 190, ¶ 11, 757 N.W.2d 44 .....14

#### Statutes

N.D.C.C. Title 30.1 .....16

N.D.C.C. § 30.1-04-02 .....18

N.D.C.C. § 30.1-04-01(1) .....2, 16, 20, 21

N.D.C.C. § 30.1-04-02(4) .....17

N.D.C.C. § 30.1-04-03(1) .....18

N.D.C.C. § 30.1-08-02 .....22

N.D.C.C. § 30.1-08-02(2) .....22

N.D.C.C. § 30.1-08-13 .....22

#### Other Authorities

Page on Wills § 15.12 (2003) .....20

Page on Wills § 21.112 (2003) .....20

### **ORAL ARGUMENT REQUESTED**

[¶1] Kelly Grenz requests oral argument. The legal issues involve the interpretation of statutes which could have important consequences for wills and estates in North Dakota.

### **STATEMENT OF ISSUE ON APPEAL**

[¶2] Whether the District Court erred in rewriting the residuary clause in Article Five of Leo Grenz's Last Will and Testament to give his stock in JT Ranch Inc. to Donavin Grenz and David Grenz, instead of distributing the JT Ranch Inc. stock under the laws of intestacy, pursuant to N.D.C.C. Section 30.1-04-01(1).

[¶3] Whether the Order dated October 1, 2019, distributing the assets of the estate pursuant to the Order dated February 7, 2018, and the Judgment dated February 16, 2018 should be reversed.

### **STATEMENT OF THE CASE**

[¶4] This is an appeal by Kelly Grenz (“Kelly”), as personal representative of Leo’s estate, from the Memorandum Opinion and Order (App. 18), Judgment (App. 32) and Order (App. 34) partially invalidating the residuary clause in Leo’s will due to the exercise of undue influence, awarding Leo’s interest in JT Ranch, Inc. to Donavin and David as a result, and the Order dated October 1, 2019 awarding the JT stock to Donavin and David.

[¶5] Leo died on February 27, 2015 at the age of 89 years. (App. 7). Kelly filed an Application for Informal Probate of Will and Appointment of Personal Representative on March 25, 2015 (*Id.*) and the Court entered a Statement of Informal Probate of Will and Appointment of Personal Representative (App. 13) on March 25, 2015, and issued Letters

Testamentary (App. 15) to Kelly on March 26, 2015. As a result, Leo's October 8, 2009 will (App. 10) was admitted to informal probate and Kelly was appointed personal representative.

[¶6] On March 4, 2016, Donavin filed an objection to probate of the will (App. 16), alleging that Leo lacked testamentary capacity and mental ability to prepare a valid will, that he was subjected to undue influence and pressure to sign the will, and that the provisions of the will were contrary to the expressed intentions and desires of Leo when he had the testamentary capacity and mental ability to prepare a valid will. Donavin then requested that the will be declared null, void, and unenforceable and that Leo's estate be distributed either pursuant to an heir's agreement or in the alternative, under the laws of intestate succession. *Id.* David subsequently joined in Donavin's objection.

[¶7] Following a hearing on the objection on July 26, 2017, the trial court entered a Memorandum Opinion and Order (App. 18), finding that the portion of Article Five of Leo's will leaving Leo's shares in the JT Ranch to Leo's wife Sally ("Sally") as part of the residue of the estate was the subject of undue influence by Sally and Kelly, and that the will should be partially invalidated as a result.

[¶8] The trial court then determined that Leo's shares in JT Ranch should go to Donavin and David and struck, rearranged and renumbered Article Five of Leo's will as follows:

ARTICLE FIVE. RESIDUE.

- A. (1) I give and devise ~~an undivided one-third of my stock in JT Ranch, Inc., to each of my sons, namely, Donavin Grenz [and] David Grenz and Kelly Grenz.~~
- (2) Surviving Spouse. I give and devise all of the rest, residue and remainder of my property of every kind and description, wherever

situated and whether acquired before or after the execution of this Will, to my spouse, Sally Grenz, if she shall survive me.

B. Children: In the event that my spouse does not survive me, I make the following bequests:

- (1) I give and devise to my daughter, Leatta Horner, the sum of \$10,000.00.
- (2) I give and devise all of the rest, residue and remainder of my property of every kind and description, wherever situated and whether acquired before or after the execution of this Will, to my son and daughter-in-law, Kelly Grenz and Kelley Grenz, in equal shares.

(App. 18).

[¶9] Kelly filed this Notice of Appeal on November 19, 2019. (App. 36). Although Kelly does not agree that Leo's will was the product of undue influence, Kelly accepts the Court's findings of fact on that issue and is not appealing those findings. The issue before this Court is the effect of the undue influence by Sally and Kelly on the disposition of Leo's JT Ranch shares. The trial court determined that Leo's JT Ranch shares should be distributed to Donavin and David. Kelly's position is that the trial court has no authority to strike, rearrange and renumber Article Five of Leo's will, and that Leo's JT Ranch shares must be distributed under the laws of intestacy, because they were not effectively disposed of by Leo's will and became part of Leo's intestate estate.

#### **STATEMENT OF THE FACTS**

[¶10] Leo and his first wife, Phyllis, had three children, Donavin, David and Lee Atta. Leo and Phyllis were divorced in 1966. (App. 18, 20).

[¶11] In approximately 1962, members of the Grenz family including Leo, his parents and his brothers, Herbert and Walter, formed a cooperative association under the laws of North Dakota. The cooperative association was known as the JT Ranch. The JT Ranch

owns approximately 5,000 acres of farm and ranch land in Emmons County. At the time of his death, Leo owned approximately 46.84% of the outstanding stock of the JT Ranch. (App. 20).

[¶12] In the early 70's, Leo married Sally Lawler ("Sally"), and they had a son named Kelly shortly thereafter. (App. 18, 20). Sally died on July 31, 2019, and Kelly Grenz, as Personal Representative has been substituted as a party in the case. (App. 34).

[¶13] Over the years, Leo told several people that on his death his shares of JT Ranch would go to Donavin and David (App 23, 24). Leo executed a will on October 8, 2009. (App. 10). Article One identified Leo's place of residence and his family. Article Two appointed Kelly as personal representative. Article Three directed payment of expenses of administration and claims against the estate. Article Four provided for a list of tangible personal property to be left to devisees named on the list. Article Five provided as follows:

ARTICLE FIVE. RESIDUE.

- A. Surviving Spouse. I give and devise all of the rest, residue and remainder of my property of every kind and description, wherever situated and whether acquired before or after the execution of this Will, to my spouse, Sally Grenz, if she shall survive me.
- B. Children. In the event that my spouse does not survive me, I make the following bequests:
- (1) I give and devise an undivided one-third of my stock in JT Ranch, Inc., to each of my sons, namely, Donavin Grenz, David Grenz and Kelly Grenz.
  - (2) I give and devise to my daughter, Leatta Horner, the sum of \$10,000.00.
  - (3) I give and devise all of the rest, residue and remainder of my property of every kind and description, wherever situated and whether acquired before or after the execution of this Will, to my

son and daughter-in-law, Kelly Grenz and Kelley Grenz, in equal shares.

- C. In the event any of said devisees named in (1), (2) or (3) above, shall then be deceased and leave lawful descendants, the lawful descendants of such deceased child shall take by right of representation the equal pro rata share their parent would have taken had he or she survived me.

### **LAW AND ARGUMENT**

[¶14] The standard of review is de novo when the trial court's interpretation of the intestate statutes is reviewed. *In re Estate of Samuelson*, 2008 ND 190, ¶ 11, 757 N.W.2d 44 (“Issues regarding the interpretation and application of a statute are questions of law and are fully reviewable on appeal.”). Therefore, the trial court’s determination of the effect of undue influence on the disposition of Leo’s estate, and its failure to apply the laws of intestacy to the distribution of Leo’s JT Ranch shares is a conclusion of law, fully reviewable on appeal.

[¶15] The trial court’s Memorandum Opinion and Order cites no authority, statutory or otherwise, for striking, rearranging and renumbering Article Five of Leo’s will. Nor do Donavin or David.

[¶16] Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in N.D.C.C. Title 30.1, except as modified by the decedent's will. N.D.C.C. § 30.1-04-01(1). Applying this law to the facts of the case, because Leo’s will did not effectively dispose of his JT Ranch shares due to undue influence by Sally and Kelly, the JT Ranch shares pass by intestate succession to Leo’s heirs.

[¶17] Under our intestacy laws, Sally’s share of Leo's JT Ranch shares (the intestate estate) is the first \$150,000, plus one-half of the balance, as provided by N.D.C.C. § 30.1-



04-02(4):

**30.1-04-02 Share of Spouse.**

The intestate share of a decedent's surviving spouse is:

...

4. The first one hundred fifty thousand dollars, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

[¶18] The remainder of Leo's JT Ranch shares then go equally to his children, Donavin, David, Lee Atta and Kelly, under N.D.C.C. § 30.1-04-03(1):

**30.1-04-03. (2-103) Share of heirs other than surviving spouse.**

Any part of the intestate estate not passing to a decedent's surviving spouse under section 30.1-04-02, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

1. To the decedent's descendants by representation.

[¶19] Partially invalidating Article Five of Leo's will does not leave his JT Ranch shares to Donavin and David. Donavin and David have provided no authority which authorizes the court to rewrite Leo's will to conform to their wishes, even if Leo stated orally on several occasions that his testamentary intent was to leave his JT Ranch shares to Donavin and David.

[¶20] Even without N.D.C.C. § 30.1-04-01(1) being dispositive of the issue, the authorities are in agreement as to the effect of undue influence on a will. Partial revocation of a residuary gift to one of several residuary legatees does not inure to the benefit of the other residuary legatees; but the interest which has been revoked passes as intestate property. *Page on Wills* § 21.112 (2003). If undue influence has been exerted as to the residuary clause only, the residuary clause is invalid but the other gifts are valid; and the residue will be distributed as in intestacy. *Page on Wills* § 15.12 (2003).

[¶21] Donavin and David claim that N.D.C.C. § 30.1-04-01(1) is inapplicable, because disposition of Leo's JT Ranch shares is effectively disposed of by Leo's will, after giving effect to the partial invalidation. That interpretation is without merit, because the will as partially invalidated does not effectively dispose of Leo's JT Ranch shares. It is only by striking, rearranging and renumbering Article Five (for which Donavin, David or the trial court do not provide any authority, statutory or otherwise) that the JT Ranch shares can be distributed to Donavin and David.

[¶22] To allow Leo's will to be rewritten according to his alleged orally expressed testamentary intent that his JT Ranch shares go to Donavin and David upon his death would turn the statutory requirements for a valid will in North Dakota on their head. For a will to be valid under North Dakota law, it must be in writing, be signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction, and either signed by at least two individuals or acknowledged by the testator before a notary. N.D.C.C. § 30.1-08-02. The exceptions are holographic wills (under N.D.C.C. § 30.1-08-02(2)), and listings of tangible personal property incorporated by reference into a will (under N.D.C.C. § 30.1-08-13). However, even those exceptions must be in writing and be signed by the testator in order to be valid. There is no statutory authority to recognize or permit an oral will or an oral codicil to a will. If such an exception and remedy were permitted here, it would be permissible in other situations as well, whenever someone claimed that a testator said that it was the testator's intent to give a portion of his or her estate to someone, but there was nothing in writing with the testator's signature to support the oral statement. This would be true regardless of whether or not the case involved undue influence.

**CONCLUSION**

[¶23] For the reasons stated herein, it is respectfully requested that the Judgment in this matter be reversed, and that the case be remanded to the trial court with instructions to distribute the estate including Leo's JT Ranch shares under the laws of intestacy, in the following manner: (1) the first \$150,000, plus one-half of any balance, to the Estate of Sally Grenz; and (2) the remainder equally to Donavin Grenz, David Grenz, Le Atta Horner and Kelly Grenz.

[¶24] Dated this 27<sup>th</sup> day of December, 2019.

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**Certificate of Compliance with Rule 32(a)**

[¶25] The undersigned, as attorney for the Defendants/Appellees in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportionally-spaced, 12 point font typeface, and the total number of pages of the above Brief totals 13 pages, inclusive.

By /s/ Tim Lervick  
TIM LERVICK (#03495)

**Certificate of Service**

[¶26] I hereby certify that on December 27, 2019, I electronically filed the following documents:

1. Appellant's Brief
2. Appendix of Appellant

with the Clerk of the North Dakota Supreme Court and electronically served them on the following:

Ronald H. McLean	rmclean@serklandlaw.com
Ian R. McLean	imclean@serklandlaw.com
SERKLAND LAW FIRM	

By /s/ Tim Lervick  
TIM LERVICK (#03495)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kelly Grenz, as Personal Representative	)	<b>SUPREME COURT NO. 20190363</b>
of the Estate of Leo Grenz,	)	
	)	Probate No. 15-2015-PR-00007
Petitioner-Appellant,	)	
	)	
vs.	)	
	)	
Donavin Grenz, David Grenz, Lee Atta	)	
Horner, and Kelly Grenz, as Personal	)	
Representative of the Estate of Sally Grenz,	)	
	)	
Respondents-Appellees.	)	

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In the Matter of the Estate of Leo Grenz, Deceased.

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**CERTIFICATE OF SERVICE**

[¶1] Laura Jurgens, being duly sworn on oath, deposes and states that she is of legal age and that on December 31, 2019, she served the **Appendix of Appellant** in the above matter electronically as follows:

Ronald H. McLean  
[rmclean@serklandlaw.com](mailto:rmclean@serklandlaw.com)

Ian McLean  
[imclean@serklandlaw.com](mailto:imclean@serklandlaw.com)

[¶2] And, being duly sworn on oath, deposes and states that on December 31, 2019, she served the **Brief of Appellant and Appendix of Appellant** in the above matter by placing a true and correct copy of the same in an envelope addressed as follows:

Lee Atta Horner  
115 SE First Street  
Linton, ND 58552

and depositing the same, with postage prepaid, in the United States Mail, at Bismarck, ND.

Dated this 31<sup>st</sup> day of December, 2019.

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By: /s/ Tim Lervick  
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