

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of Leo Grenz, Deceased.	Supreme Court No. 20190363
Kelly Grenz, as Personal Representative 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,	
Respondent/Appellees,	

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 PRESIDING

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEES DONAVIN GRENZ AND DAVID GRENZ

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I. ORAL ARGUMENT REQUESTED

[¶1] Donavin Grenz and David Grenz request oral argument. This appeal presents the issue of whether courts in North Dakota have the authority to partially invalidate a will. This Court’s decision will have important consequences for wills and estates in North Dakota.

II. STATEMENT OF THE ISSUES

[¶2] Whether the Emmons County District Court erred in partially invalidating Article Five of the Last Will and Testament of Leo Grenz as a result of undue influence exercised by Sally Grenz and Kelly Grenz over Leo Grenz.

III. STATEMENT OF THE CASE

[¶3] This is an appeal from the Emmons County District Court’s Memorandum Opinion and Order dated February 7, 2018, which partially invalidated Article Five of the Last Will and Testament of Leo Grenz (the “Will”) on the ground that specific clauses in Article Five of the Will were the product of undue influence exerted by Sally Grenz and Kelly Grenz (“Sally” and “Kelly”) over the testator Leo Grenz (“Leo”). (App. 20-33). The partial invalidation of Article Five resulted in Leo’s shares in J T Ranch, Inc. (the “J T Ranch”) being distributed by the Will to Donavin Grenz and David Grenz (“Donavin” and “David”) instead of to Sally (and by extension Kelly).

[¶4] Donavin, David, and Kelly are Leo’s three sons. Kelly petitioned the district court to probate the Will, which was signed by Leo on October 8, 2009. (App. 9-11). Donavin and David objected to the probate of the Will on the basis that the Will was the product of undue influence exercised by Kelly and Sally, Leo’s wife (mother to Kelly and stepmother to Donavin and David). (App. 18-19). Donavin and David alleged that Sally

and Kelly exercised undue influence over Leo in order to have Leo execute the Will leaving his shares in the J T Ranch to Sally instead of to Donavin and David, which had been Leo's longstanding testamentary intent.

[¶5] The Emmons County District Court held a trial on this matter on July 26, 2017. The parties presented numerous witnesses and exhibits to the district court. The parties then provided post-trial briefing to the district court. In their post-trial briefing, Donavin and David requested the district court partially invalidate Article Five of Leo's Will resulting in Leo's shares in the J T Ranch being distributed to Donavin and David instead of to Sally and/or Kelly.

[¶6] On February 6, 2018, the Emmons County District Court entered its Memorandum Opinion and Order. (App. 20-33). The district court found that the evidence was "clear" that Leo intended to leave the J T Ranch shares to Donavin and David. (App. 30, ¶43). The district court found that both Sally and Kelly exercised undue influence over Leo resulting in the Will leaving the J T Ranch shares to Sally. (App. 30-31). As a result, the district court partially invalidated Article Five of the Leo's Will on the basis of undue influence which resulted in the J T Ranch shares being distributed to Donavin and David via the Will. (App. 32-33).

[¶7] Judgment was entered on February 16, 2018. (App. 34-35). On October 1, 2019, the Court entered an Order approving compensation for Kelly, in his capacity as personal representative, denying a petition for family allowance, granting a motion to substitute the Estate of Sally Grenz as a party (due to Sally's passing in July 2019) and granting the petition for distribution. (App. 36-37). Kelly, in his capacity as personal

representative of Leo’s estate, filed a notice of appeal on November 19, 2019. (App. 40-42).

IV. STATEMENT OF THE FACTS

A. **Introduction to Grenz Family and J T Ranch, Inc.**

[¶8] Leo was born in 1925 to Godfrey and Lydia Grenz (“Godfrey” and “Lydia”). (App. 22)¹. Leo married Phyllis Grenz (“Phyllis”) and together they had three children, Donavin, David, and Lee Atta Horner (“Lee Atta”). Id. Leo and Phyllis divorced in 1966. Id.

[¶9] Leo was a lifetime resident of Emmons County, North Dakota, who worked as a farmer and rancher all his life. Id. Over the span of his life, Leo accumulated substantial holdings in agriculture land and livestock. In 1962, Leo established J T Ranch, Inc. with his father and Leo’s two brothers. Id. The J T Ranch is a cooperative association created under the laws of North Dakota, which consists of over 5,000 acres of land in Emmons County and is used for both farming and raising livestock. Id. At the time of his death in 2015, Leo owned approximately 46.84% of the outstanding stock of J T Ranch. Id.

[¶10] Leo, Phyllis, and their children Donavin, David, and Lee Atta lived at the J T Ranch. Id. Even as they grew up and started their own families, Donavin and David continued to assist at the J T Ranch in any manner which was required. Id. Donavin and David’s children (Leo’s grandchildren) also spent considerable time in their childhood and early adult life playing and working at the J T Ranch. Id.

¹ On appeal, Kelly is not disputing the district court’s findings that Kelly and Sally exercised undue influence over Leo regarding Article Five of the Will. As such, Donavin and David are condensing much of the factual background which supports the Court’s findings regarding Kelly and Sally’s exercise of undue influence.

B. Introduction to Leo’s “Second Family” and the Braddock Farm.

[¶11] In the early 1970s, Leo married Sally Lawler (“Sally”). (App. 22). Leo and Sally have one child together, Kelly Grenz (“Kelly”). Id. In the 1970s, Leo purchased a large tract of farmland near Braddock, North Dakota (the “Braddock Farm”). Id. Leo lived with Sally on the Braddock Farm as they raised Kelly. Id. Leo and Sally continued to live on the Braddock Farm with Kelly and Kelly’s wife, Kelley, until Leo moved to the Strasburg Care Center in 2014. Id. At the time of Leo’s death, the Braddock Farm had an equity value of over \$5.7 million.

C. Leo’s Long-Stated Testamentary Intentions and Estate Planning.

[¶12] As the district court concluded, the evidence is “clear” that Leo intended to leave his J T Ranch shares to Donavin and David and the Braddock Farm to Sally and Kelly. (App. 30). At least eight witnesses testified regarding Leo’s repeated statements over many decades concerning his testamentary intent to leave his shares of the J T Ranch to Donavin and David². (App. 30-31).

[¶13] In 2009, Donavin and Kelly had a conversation regarding Leo’s estate planning. (App. 30). Kelly informed Donavin that Leo was intending to draft a will which provided Leo’s J T Ranch shares to Donavin and David (as he had always intended), the Braddock Farm to Sally and Kelly, and that Leo was going to provide a certain section of land owned by the J T Ranch (called “Section 29) to Kelly. Id. Donavin informed Kelly

² For example, in 2009, Donavin inquired into purchasing part of Leo’s shares in the J T Ranch and Leo responded by stating there was no sense in purchasing his shares when Donavin and David were going to inherit the shares. (App. 25). Leo also informed his brother, the majority shareholder of J T Ranch, that he was leaving his J T Ranch shares to Donavin and David. Id. Leo also informed his good friend Durant Schiermeister, who rented a large amount of land from J T Ranch, that he was leaving his shares to Donavin and David. (App. 26).

that it was impossible for Leo to leave a specific section of land on the J T Ranch to Kelly because the land was owned by the J T Ranch as a cooperative. Id. The district court correctly found that this conversation resulted in Sally and Kelly unduly influencing Leo to sign a will which left all of Leo's shares in the J T Ranch to Sally (and by extension Kelly). (App. 30).

D. Leo Signs the October 9, 2009 Will.

[¶14] On August 13, 2009, Sally, Kelly, and Kelley brought Leo to an estate planning attorney in Bismarck to prepare his Last Will and Testament. (App. 26). Kelly and Kelley stayed in the attorney's office with Sally and Leo while Leo's and Sally's estate planning was discussed with the attorney. Id. Thereafter, on October 8, 2009, Leo and Sally returned to the attorney's office to execute their respective wills. Id. Once again, Kelly and Kelley accompanied Leo and Sally to the attorney's office, sat in on the meeting and witnessed the execution of the wills. Id.

[¶15] Leo's two-page Will contained the following-language concerning the distribution of his Estate:

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 J T Ranch, Inc., to each of my sons, namely, Donavin Grenz, David Grenz, and Kelly Grenz.
 - (2) I give and devise to my daughter, Leatta (*sic*) 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 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.

(App. 13). At the same time, Sally executed a Will which left her estate to Leo, and if Leo predeceased Sally, then to Kelly and Kelley. See Case No. 15-2019-PR-00012 (“In the Estate of Sally Grenz”).

[¶16] In December 2010, Leo contacted Donavin, a licensed attorney, for his assistance in drafting a limited power of attorney. (App. 27). Leo desired to have Donavin prepare a limited power of attorney naming Sally as his attorney-in-fact but ensuring that Sally had no ability to transfer any of his shares of the J T Ranch. Id. Leo’s actions make little sense if he had actually desired to leave his shares of the J T Ranch to Sally in his Will.

E. Leo, Sally, Kelly, and Kelley Establish Grenz Farm, LLP.

[¶17] In January 2013, Leo was experiencing serious issues with Parkinson’s. Nevertheless, Leo, Sally, Kelly and Kelley again met with Leo’s estate planning attorney. (Doc. #59). As a result of this meeting, the attorney prepared a number of documents which formed Grenz Farms, LLP. Kelly and Kelley collectively were provided with 50-percent ownership of Grenz Farms, LLP. The Braddock Farm was taken out of Leo’s probate estate and placed into the Grenz Farm, LLP. (Docs. ##61-62). Leo also transferred all livestock, machinery, and equipment into the Grenz Farm LLP. (Doc. #63). At the same time, Leo and Sally executed a Quit Claim Deed which left real property concerning the Braddock

Farm to Kelly and Kelley while retaining a life estate for their home. (Doc. #64). In effect, in January 2013, Leo transferred his interests in the Braddock Farm, worth in excess of \$5.7 million, to Sally and her family.

F. Leo Passes Away.

[¶18] On February 27, 2015, Leo passed away. (App. 20). After Leo passed away, Leo's estate planning attorney provided a copy of Leo's Will to Donavin. After reviewing the Will, Donavin contacted Kelly because the Will was contrary to Leo's long-stated intention to leave the J T Ranch shares to Donavin and David. Kelly, despite being present at all meetings between Leo and Leo's estate planning attorney, informed Donavin that he was shocked by the contents of the Will.

G. Kelly Moves to Probate the Will and Donavin and David Request Partial Invalidation of Will.

[¶19] On March 25, 2015, Kelly filed an Application for Informal Probate of Will and Appointment of Personal Representative. (App. 15-16). On April 7, 2015, Donavin and David filed an objection to the probate of Leo's Will on the grounds that included undue influence. (App. 18-19). On July 26, 2017, the Court held a bench trial on Donavin and David's objection to the Will. The Court heard testimony from at least twelve witnesses and received approximately 34 exhibits.

[¶20] Thereafter, the parties engaged in post-trial briefing. In their post-trial briefing, Donavin and David specifically requested the district court partially invalidate Article Five of Leo's Will to result in Leo's shares of the J T Ranch to be distributed to Donavin and David as Leo had long-intended. (Doc. #41).

H. The Court’s February 6, 2018, Order Partially Invalidating the Will.

[¶21] On February 6, 2018, the Court entered its Memorandum Opinion and Order (the “Order”). (App. 20-33). The district court found that Sally and Kelly exercised undue influence over Leo resulting in Article Five of the Will leaving Leo’s shares in the J T Ranch to Sally (and by extension Kelly) instead of to Donavin and David. *Id.* As a result, the district court struck and renumbered Article Five of the Will to carry out the testamentary intent of Leo Grenz. Specifically, Article Five of the Will was partially invalidated in order to provide:

Article Five: Residue.

A. (1) I give and devise ~~an undivided one third of~~ my stock in J T 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 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 (*sic*) 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. 32-33).

I. Sally Grenz Passes Away and Kelly Files Notice of Appeal.

[¶22] On July 31, 2019, Sally Grenz passed away. *See* Case No. 15-2019-PR-00012 (“In the Estate of Sally Grenz”). Kelly was appointed as personal representative of

Sally's estate. Id. Kelly moved to probate the will executed by Sally on October 8, 2009, as her last will and testament. Id. Sally's will provides that her entire estate is to be distributed to Kelly and Kelley with the exception of \$25,000 bequests to two daughters of Sally's from a previous relationship (Leo's step-daughters).

[¶23] On November 19, 2019, Kelly filed a Notice of Appeal in the above-captioned matter. Kelly is not appealing the district court's Order to the extent it finds that Sally and Kelly exercised undue influence over Leo resulting in Article Five of Leo's Will leaving the J T Ranch shares to Sally. Instead, Kelly is only appealing the issue of whether the district court had the authority to partially invalidate Article Five of the Will resulting in the shares of the J T Ranch going to Donavin and David. Kelly's position is that the Will should be declared void in its entirety and the shares of the J T Ranch should pass intestate which would result in Sally's estate (i.e., Kelly) obtaining the first \$150,000 of the value of the shares, and then Sally's estate receiving a 1/2 distribution of the shares, and Leo's children Donavin, David, Lee Atta, and Kelly each receiving 1/8th distribution of the J T Ranch shares³. In effect, despite Sally and Kelly unduly influencing Leo to leave his J T shares to Sally (and by extension Kelly) instead of Donavin and David, Kelly would still receive the majority of Leo's J T Ranch shares.

³ Kelly's position is that the Estate of Sally Grenz (i.e., Kelly) would receive the first \$150,000 of Leo's estate and then one-half of the remaining balance pursuant to N.D.C.C. § 30.1-04-02. Leo's four children, Donavin, David, Lee Atta, and Kelly would then each receive equal shares of the remaining one-half balance (i.e., 1/8th each). N.D.C.C. § 30.1-04-03. In such a scenario, Kelly would be effectively receiving the first \$150,000 of the J T Ranch shares (and the corresponding dividends) and then 5/8^{ths} of the J T Ranch shares while Donavin, David, and Lee Atta would each receive 1/8th.

V. STANDARD OF REVIEW

[¶24] Kelly is not appealing the district court’s findings and conclusions that Kelly and Sally exercised undue influence over Leo concerning Article Five of his Will resulting in Leo leaving his J T Ranch shares to Sally. Rather, Kelly is claiming the district court erred by partially invalidating Article Five of Leo’s Will. The issue of whether the district court has the authority to partially invalidate a will presents a question of law which would be reviewed de novo. State v Kostelecky, 2018 ND 12, ¶ 6, 906 N.W.2d 77 (stating that de novo standard of review is utilized in determining whether or not the district court misapplied or misinterpreted the law). However, the issue of whether the district court erred in partially invalidating Article Five in the manner it did presents a matter of discretion, which is reviewed under the abuse of discretions standard. See Waldie v. Waldie, 2008 ND 97, ¶ 11, 748 N.W.2d 683 (citations omitted)(“When a district court may do something, it is generally a matter of discretion” which is reviewed under the abuse of discretion standard).

VI. LAW AND ARGUMENT

A. **The District Court Correctly Determined it Had the Authority to Partially Invalidate Leo’s Will.**

[¶25] The “great majority” of jurisdictions, including North Dakota, have recognized the doctrine of partial invalidity of testamentary instruments affected by undue influence or fraud. See In re Estate of Turpin, 19 A.3d 801, 808 (D.C. 2011); Black v. Smith, 58 N.D. 109, 224 N.W. 915, 924-25 (N.D. 1929). Courts will partially invalidate testamentary instruments when the valid provisions can be separated from the invalid and accomplished without doing injustice to other beneficiaries or the defeating the general intent of the testator. See 64 A.L.R. 3d 261, *Partial invalidity of a will* (providing the

general rule that that courts may partially invalidate wills which are products of undue influence; 79 A.M. Jur. 2d Wills § 357, *Partial invalidity* (providing that “[w]here part of a testamentary instrument is shown to have been the result of undue influence or fraud, other portions of the will may be given effect if they can be separated from the invalid parts leaving intact the intelligible instrument.”); In re Estate of Kremer, 845 N.W.2d 70, 74 (Iowa Ct. App. 2014)(stating “that if a will is valid as to some of its provisions and invalid as to others; the valid provision can be separated from the invalid and upheld if this can be accomplished without doing injustice to any of the beneficiaries under the will or defeating the general intent of the testator.”).

[¶26] This Court has long recognized the doctrine of partially invalidity. In Black v. Smith, this Court held a showing of fraud would only invalidate the provisions of a testator’s will affected by the fraud and would not render the will altogether void. Black v. Smith, 58 N.D. 109, 224 N.W. 915, at 916, 924-25. Specifically, this Court stated:

Assuming the testator had capacity to make a will and did not know of his wife’s death, the failure of the beneficiaries, with a good or innocent motive, to communicate to the testator the fact of his wife’s death, is not, in the view of the majority, such a fraudulent concealment of a material fact as to render the will altogether void, but, at most, void only to the extent that it would operate upon the property which the testator had unknowingly inherited immediately before the execution of the will.

Id. at 916. As such, as a matter of law, the district court correctly concluded it had the authority to partially invalidate Article Five of Leo’s Will on the grounds of undue influence.

B. The District Court Did Not Abuse its Discretion in Partially Invalidating Leo’s Will in a Manner which Left the J T Ranch Shares to Donavin and David.

[¶27] The district court did not abuse its discretion in partially invalidating Leo’s Will in the manner which resulted in Leo’s Will distributing the J T Ranch shares to

Donavin and David. Kelly is not appealing the district court's finding that Kelly and Sally exercised undue influence over Leo resulting in Article Five of Leo's Will leaving the J T Ranch shares to Sally, and in the unlikely scenario Sally predeceased Leo, then to Donavin, David, and Kelly in equal 1/3rd shares. The district court correctly concluded it could partially invalidate Article Five in a manner which resulted in the Will leaving the J T Ranch shares to Donavin and David while leaving the other provisions of the Will intact.

[¶28] Kelly does not argue on appeal that the district court's partial invalidation of Leo's Will results in any injustice to any of the beneficiaries. Rather, the partial invalidation only has the effect of changing the beneficiaries of the J T Ranch shares from Sally (and by extension Kelly) to Donavin and David. Kelly also does not argue that the partial invalidation defeats the general intent of the testator. In fact, the partial invalidation results in Leo's testamentary intent being accomplished – the J T Ranch shares going to Donavin and David and the Braddock Farm to Sally and Kelly.

[¶29] Instead, Kelly's argument is that the district court acted improperly by "re-arranging" Article Five of Leo's Will. However, this is not a case in which the district court inserted new beneficiaries or inserted any new language into the will. The district court did not re-write the Will. Specifically, Article Five of Leo's Will, as written, provides:

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 J T Ranch, Inc., to each of my sons, namely, Donavin Grenz, David Grenz, and Kelly Grenz.
- (2) I give and devise to my daughter, Leatta (*sic*) 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 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.

[¶30] The district court then partially invalidated Article Five as follows:

ARTICLE FIVE. RESIDUE

A. (1) I give and devise ~~an undivided one third of my stock in J T 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 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 (*sic*) 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.

[¶31] The district court struck/invalidated the portion of Article Five which left a portion of the J T Ranch shares to Kelly and then renumbered the sections so that the

specific bequests of the J T Ranch shares to Donavin and David were placed above the clause which left the residue of the estate to Sally.

[¶32] Kelly's argument is that the Court erred by re-numbering the sections in Article Five to leave the J T Ranch shares to Donavin and David. However, this "re-numbering" did not insert any new language, clauses, or beneficiaries to the Will. Importantly, the district court did not need to "re-number" or "re-arrange" the section in Article Five in order to achieve the same result (i.e., Donavin and David receiving the J T Ranch shares). The district court plainly did so only for the sake of clarity. For example, the below partial invalidation would also result in the J T Ranch shares going to Donavin and David:

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 J T 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 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.

[¶33] The above-example does not “re-arrange” or “re-number” any of the provisions of Article Five. Instead, the above-example would bequeath the J T Ranch shares to Donavin and David and then leave the residue of the estate to Sally. This is exactly the same result of the district court’s partial invalidation.

[¶34] The district court concluded the evidence was clear that Leo’s testamentary intent was to leave his J T shares to Donavin and David. North Dakota has a strong presumption against distributing estates via intestacy. Matter of Estate of Klein, 434 N.W.2d 560, 562 (N.D. 1989). The district court’s partial invalidation served this purpose by not invalidating the Will in its entirety but rather only the parts which were the product of undue influence. The district court correctly concluded it could partially invalidate Article Five of Leo’s Will to serve Leo’s testamentary intent of leaving the J T Ranch shares to Donavin and David and the Braddock Farm to Sally and Kelly. The partially invalidated Will results in an intelligible instrument, does not result in any injustice to other beneficiaries, and does not defeat the general intent of Leo (rather it serves the intent of Leo).

[¶35] The district court’s partial invalidation resulted in Leo’s testamentary intent being accomplished – the shares of the J T Ranch were distributed to Donavin and David. Conversely, Kelly’s argument would result in the opposite result. Kelly requests the Court invalidate the will in its entirety on the basis of undue influence which will result in Kelly obtaining a 5/8th share of the J T Ranch shares (in addition to the first \$150,000 of the estate) while Donavin and David will both obtain a 1/8th share. As such, Kelly’s argument will result in Kelly greatly benefiting from his wrongdoing while Leo’s testamentary intent goes unfulfilled. The district court did not err in the manner it partially invalidated Article

Five and Donavin and David respectfully request the Court affirm the district court's Order⁴.

VII. CONCLUSION

[¶36] For the aforementioned reasons, Donavin and David respectfully request this Court affirm the district court's Order dated February 6, 2018, partially invalidating Leo's Will resulting in the Will distributing Leo's J T Ranch shares to Donavin and David as Leo had intended.

Dated this 27th day of January, 2020.

/s/ Ian R. McLean

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⁴ Additionally, the district court has the power to order an equal distribution of the estate (using probate and non-probate assets) to accomplish the testator's intent. See Matter of Estate of Peterson, 1997 ND 48, 14-16, 561 N.W.2d 618; Matter of Estate of Johnson, 501 N.W.2d 342, 346 (N.D. 1993). Here, the district court had the power to distribute the J T Ranch shares to Donavin and David regardless if the property was non-probate or a probate asset as long as the distribution was to accomplish the testator's intent. Here, the district court concluded the evidence was clear that Leo's testamentary intent was to leave the J T Ranch shares to Donavin and David.

CERTIFICATE OF COMPLIANCE WITH RULE 32

¶37] The undersigned, as attorney for the Respondent/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 20 pages, inclusive.

By: /s/ Ian R. McLean
IAN R. MCLEAN (#07320)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Kelly Grenz, as Personal Representative of
the Estate of Leo Grenz,

Petitioner/Appellant,

vs.

Donavin Grenz, David Grenz, Lee Atta
Horner, and Kelly Grenz, as Personal
Representative of the Estate of Sally Grenz,

Respondent/Appellees,

Supreme Court No. 20190363

Probate No. 15-2015-PR-00007

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on January 27, 2020, the following documents:

1. BRIEF OF APPELLEES DONAVIN GRENZ AND DAVID GRENZ

was served electronically with the Clerk of Court via: supclerkcourt@ndcourts.gov and that an electronic copy was also served via email upon the following:

CROWLEY FLECK

Tim Lervick: tlervick@crowleyfleck.com

and true and correct copies were sent via U.S. Mail with the appropriate postage to the following:

**Lee Atta Horner
115 SE 1st Street
Linton, ND 58552**

Dated this 27th day of January, 2020.

/s/ Ian R. McLean

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