

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

REPLY BRIEF

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STATEMENT OF ISSUE ON APPEAL

¶1 In their brief, Donavin Grenz and David Grenz ("Donavin " and "David") assert that the issue is whether the district court erred in partially invalidating Article V of the last will and testament of Leo Grenz ("Leo") as a result of undue influence exercised by Sally Grenz and Kelly Grenz ("Sally" and "Kelly") over Leo. (Appellees' Brief at ¶2). Sally and Kelly assert that the issue is whether the District Court erred in rewriting the residuary clause in Article V of Leo's will to give his shares of JT Ranch, Inc. to Donavin and David, instead of distributing the JT Ranch shares under the laws of intestacy, pursuant to N.D.C.C. §30.1-04-01(1), and whether the district court's Memorandum Opinion and Order dated February 6, 2018 (App. 20), Judgment dated February 16, 2018 (App. 34) and Order dated October 1, 2019 (App. 36) should be reversed as a result.

¶2 The issue is not whether that portion of the residuary clause leaving the JT Ranch shares to Sally can be invalidated due to undue influence, but rather, the issue is what happens to the JT Ranch shares after that portion of the residuary clause is invalidated.

¶3 The district court did not find that the gift to Sally of the entire residue of the estate was invalid as a result of undue influence by Sally and Kelly. Instead, the district court found that Leo's gift of his JT Ranch shares to Sally as a part of the residue of his estate was the product of undue influence. Accordingly, the district court invalidated the residuary clause *only* to the extent that it gave Leo's JT Ranch shares to Sally. It did not invalidate the effect of the residuary clause giving the remainder of the residue to Sally.

STATEMENT OF THE FACTS

¶4 Donavin and David's brief goes into considerable detail concerning the facts. Although Sally and Kelly do not entirely agree with Donavin and David's recitation of the facts, the facts as recited by Donavin and David are largely irrelevant. While Sally and Kelly do not agree with the district court's findings of fact that they exercised undue influence over Leo with respect to the JT Ranch shares, they acknowledge that it is the district court's duty to determine the facts, the district court's determination of the facts is not clearly erroneous, and is not being appealed.

STANDARD OF REVIEW

¶5 Donavin and David correctly state that 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, citing *State v. Kostelecky*, 2018 ND 12, ¶6, 906 N.W.2d 77. Likewise, the issue of the legal effect of a partial invalidation of a will is also a question of law.

¶6 Donavin and David allege that the issue of whether the district court erred in partially invalidating Article V in the manner it did should be reviewed under the abuse of discretion standard, citing *Waldie v. Waldie*, 2008 ND 97, ¶11, 748 N.W.2d 683. Donavin and David's argument is misplaced. In *Waldie*, the issue was whether the court abused its discretion in deciding a motion to redistribute property in a divorce proceeding. N.D.C.C. §14-05-24(2) states that the court may redistribute property and debts in a post-judgment divorce proceeding. Because the court *may* do something, it is a matter of discretion. However, there are no applicable statutory provisions that would allow the court to rewrite Leo's residuary clause. Accordingly, the abuse of discretion standard is inapplicable to this case.

LAW AND ARGUMENT

[¶7] Donavin and David assert that Sally and Kelly's position is that Leo's will should be declared void in its entirety and his JT Ranch shares should pass intestate. (Appellees' Brief at ¶23). To the contrary, Sally and Kelly do not dispute that the court has the authority to partially invalidate a will as a result of undue influence. This court must determine what the legal effect of such a partial invalidation is. Sally and Kelly acknowledge that in ¶23 of Appellant's Brief they requested 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. That request is inconsistent with Sally's and Kelly's position throughout their briefs. It was stated in error and should have been limited solely to Leo's JT Ranch shares, rather than the entire residuary estate.

[¶8] Donavin and David cite *In re Estate of Turpin*, 19 A.3d 801 (D.C. 2011) in support of their position that the court has the authority to partially invalidate portions of a will which were affected by undue influence. Again, Sally and Kelly do not dispute whether or not the court has such authority. Instead, it is the legal effect of such partial invalidity that is at issue. In *Turpin*, the residuary clause was partially invalidated due to undue influence. However, the court held that only a portion of the residuary clause was valid and that the one-half of the residuary devise that was invalid must pass by intestacy. *Id.* at 812. Other courts have reached a similar result. See *In re Koller's Estate*, 219 N.W. 4, 9 (Neb. 1928), and *In re Ankeny's Estate*, 28 N.W.2d. 414, 420 (Iowa 1947).

[¶9] Donavin and David allege that the district court did not rewrite Leo's will. (Appellees' Brief at ¶29). That assertion is directly contrary to paragraph 4 of the

Judgment (App. 34), which states: “(a) Accordingly, Article V of the will shall be *rewritten* (emphasis added) 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 for or after the execution of this Will, to my son and daughter-in-law, Kelly Grenz and Kelley Grenz, in equal shares.

[¶10] If deleting, changing and rearranging words is not re-writing, then what is? Whether or not any new language was inserted into the will, rearranging the words of the will amounts to rewriting the will. The district court's rearranging of the will changes Donavin and David's contingent residuary distribution of the JT Ranch shares (contingent upon Sally not surviving Leo) to a specific bequest of the JT Ranch shares, before distribution of the residue to Sally.

[¶11] Donavin and David assert that the district court did not need to “re-number” or “rearrange” the residuary clause in order to achieve the same result of Donavin and David receiving the JT Ranch shares. Donavin and David then give an example of a partial invalidation that would also result in the JT Ranch shares going to Donavin and David.

(Appellees' Brief at ¶32). However, paragraph (A) of their example gives the entire residue of the estate to Sally if she survives Leo. By Sally receiving the entire residue of the estate in paragraph A, there are no assets remaining to be distributed pursuant to paragraph B. Donavin and David's example has no relevance to the issues in this case.

[¶12] Donavin and David allege that the district court's partial invalidation resulted in Leo's testamentary intent being accomplished with the JT Ranch shares being distributed to Donavin and David. However, Leo's orally expressed testamentary intent was never put into a will. Donavin and David do not allege that the will was ambiguous. As a result, any evidence of testamentary intent based upon Leo's oral statements are irrelevant. The district court does not have the power to re-write Leo's will.

[¶13] Donavin and David allege that 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. (Appellees' Brief at ¶35) See *Matter of Estate of Peterson*, 1997 N.D. 48, 14–16, 561 N.W.2d 618; *Matter of Estate of Johnson*, 501 N.W.2d. 342, 346 (N.D. 1993). Donavin and David's arguments are misplaced. Both of those cases involved ambiguous wills. In *Peterson*, the will contained an equalization clause, which took into account property gifted during the testator's lifetime which, when combined with property of the estate, was to be divided equally among the decedent's four children. In *Johnson*, the will included an equalization clause which directed that non-probate POD accounts should be considered when equalizing distributions from the estate to the testator's children. Accordingly, in both cases, the power to order an equal distribution of the estate was based on interpretations by the court of ambiguous wills. Donavin and David's assertion that the district court had the power to distribute the JT Ranch shares to

Donavin and David, regardless of whether the property was a non-probate or probate asset as long as the distribution was to accomplish the testator's intent is wrong, and is not supported by *Peterson* or *Johnson*.

CONCLUSION

[¶14] Donavin and David do not claim, and the district court did not find, that the finding of undue influence by Sally and Kelly affected any distributions of the residue to Sally other than the JT Ranch shares. Because the JT Ranch shares were not effectively disposed of by Leo's will, they must be distributed under the laws of intestacy, with the first \$150,000, plus one-half of the balance of the JT Ranch shares to the estate of Sally Grenz, and the remaining JT Ranch shares distributed equally to Donavin Grenz, David Grenz, Lee Atta Horner and Kelly Grenz.

[¶15] Dated this 10th day of February, 2020.

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Certificate of Compliance with Rule 32(a)

[¶16] 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 10 pages, inclusive.

By /s/ Tim Lervick
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Certificate of Service

[¶17] I hereby certify that on February 10, 2020, I electronically filed the following documents:

1. Reply Brief
2. Certificate of Service

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

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