STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0123

In re: Estate of Loretta M. Chisholm, Decedent.

Filed January 22, 2018
Affirmed
Jesson, Judge

Clay County District Court
File No. 14-PR-12-4412

Michael T. Andrews, Ann E. Miller, Anderson, Bottrell, Sanden & Thompson, Fargo, North Dakota (for appellant Randal Chisholm)

Berly D. Nelson, Ian R. McLean, Serkland Law Firm, Fargo, North Dakota (for appellant Kevin Chisholm)

Todd E. Zimmerman, Benjamin J. Hasbrouck, Aubrey J. Zuger, Fredrickson & Byron, P.A., Fargo, North Dakota (for respondents Barbara Seelhammer, Darcy Nordick, Daryl Chisholm, and SuRae Schmidt)

Sara Sorenson, Christopher McShane, Ohnstad Twichell, P.C., West Fargo, North Dakota (for Heartland Trust Company as special administrator of the Estate of Loretta M. Chisholm)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

After Loretta Chisholm passed away, the original version of her will was missing and a copy was submitted to probate. Against a backdrop of interfamily feuds and

deteriorating relationships, the district court determined the will was missing because Loretta intended to revoke it. The court concluded that the will was invalid and that Loretta's assets should be distributed through the laws of intestacy. Two of her children now appeal, arguing the district court was precluded from determining the validity of the will, the district court erred in determining it was revoked, and the dependent relative revocation doctrine should have applied. We affirm.

FACTS

Loretta Chisholm passed away in 2012, leaving behind multiple wills that have since become the focus of two appeals, including this one.[1] Loretta was survived by her seven children, including her sons Randal and Kevin, appellants in this current appeal. Respondents are four of Loretta's other children: Barbara, Darcy, SuRae, and Daryl.[2] The last two years of Loretta's life provide the majority of the facts on appeal, but the interfamily dispute is longstanding.

Loretta and her husband owned several pieces of farmland, in addition to their family home. Loretta's husband passed away in 1994 and left two trusts containing much of the farmland. Loretta was the sole income beneficiary of each trust. Randal and Daryl were the original trustees, but Kevin eventually replaced Daryl. Randal and Kevin served as trustees through Loretta's death, and both initially rented farmland from the trusts.

[1] Loretta's estate was the issue of a 2015 probate appeal before this court. *See In re Estate of Chisholm*, No. A14-1347, 2015 WL 4528782, at *1 (Minn. App. July 6, 2015).
[2] A seventh child, Byron, is not a named party.

In May 2010, Loretta executed a will (2010 will), which gave Randal and Kevin the bulk of the farmland and did not give any farmland to Barbara, Darcy, Daryl, or SuRae. It also devised the family home to her daughters, Barbara, Darcy, and SuRae. This will was prepared by Loretta's longtime attorney, Tom Opheim. Opheim officially retired in 2011, but began ending his practice earlier and stopped representing Loretta by the end of 2010. In September 2010, Loretta contacted a new attorney, Ken Norman, about potential changes to her estate planning. In a March 2012 letter, Norman wrote to Loretta stating that he understood, based on previous discussions, that she intended to leave the farmland to Kevin, and any other land in her name, such as the family home, to her daughters. In July 2012, Norman sent Loretta estate planning documents, including a draft of a will that left most of her assets to Kevin. Notably, Randal would receive much less under these proposed plans than in the 2010 will.[3] Loretta did not execute the will sent to her.

In August 2012, Loretta, who had cancer, was hospitalized for three days. While in the hospital, Darcy and Barb visited her frequently, but did not permit any other visitors. After Loretta was discharged, Barb moved in with Loretta, and both Darcy and Barb began round-the-clock supervision of Loretta. Barb and Darcy had unfettered access to Loretta and her documents and determined who was able to visit her. Loretta was admitted to hospice care in September 2012. Barbara arranged for a meeting between Norman and Loretta to discuss estate planning. A few days later, Loretta executed a new will (2012

[3] In these plans Randal either received nothing or very little, when in the 2010 will, he received a large portion of the farmland.

will), which gave most of the farmland to Barbara, Darcy, Daryl, and SuRae, while giving little land to Kevin, and nothing to Randal. In October 2012, Loretta passed away.

Daryl, Barbara, Darcy, and SuRae filed a petition for probate of the 2012 will. Randal and Kevin objected and urged the district court to instead determine the 2010 will was valid and should be submitted to probate. A trial was held in February 2014, where the majority of the testimony focused on the validity of the 2012 will.[4] In a 2014 order, the district court determined that the 2012 will was invalid and should not be admitted to probate due to a lack of testamentary capacity and undue influence, and the 2010 will should instead be submitted to probate. While the court did not make any determinations regarding the validity of the 2010 will, it did compare the contents of the 2010 will to the contents of the 2012 will to assess the validity of the 2012 will. The version of the 2010 will that was submitted as an exhibit in the case was not the original, but merely a copy. The district court's order was appealed to this court, where it was affirmed. This court did not discuss the validity of the 2010 will, although it did state, "Loretta's original 2010 will was consistent with her long-expressed intent."[5]

After the 2012 will was determined to be invalid, respondents Daryl, Barbara, Darcy, and SuRae filed a motion for clarification regarding the validity of the 2010 will. Respondents argued that the validity of the 2010 will was not an issue in the earlier

[4] The only references to the validity of the 2010 will were mentioned in passing or in conclusory statements. For example, Norman testified that the will was effective to the best of his knowledge, and Kevin testified that there was a valid will in place from 2010.

[5] For more details on this original appeal, please refer to our previous decision, *In re Estate of Chisholm*, No. A14-1347, 2015 WL 4528782, at *1.

proceedings and that the 2010 will was invalid. They pointed out that the original version of the 2010 will was missing, and under Minnesota law, this means it is presumed to be revoked and invalid. In support of their motion, respondents submitted a receipt showing Loretta took the original version of the 2010 will from her attorney Opheim's office in October 2011. Appellants Kevin and Randal both filed separate responses opposing respondents' motion. They contended that respondents were precluded from contesting the validity of the 2010 will pursuant to several different legal theories.

In March 2016, the district court determined a trial was needed to assess the validity of the 2010 will. At the outset of trial, the district court clarified that the first trial solely considered the validity of the 2012 will, and the 2010 will was not at issue:

> I want to make one thing very clear here. That in my prior ruling invalidating the 2012 will I did not find that the 2010 will was valid. I said that it should be submitted to probate. Probate is a Latin word that means to prove. So my intent was to submit it to that process whereby it would be proved that that was a valid will and should be implemented. I did not order that it be implemented. I ordered that it be submitted to probate. And I later issued a clarification on that. So I definitely am of the view that I did not make a finding on the validity and continued operational effect of the 2010 will.

The trial lasted for three days. The testimony focused on the validity of the 2010 will, which centered around three subjects: (1) Randal's falling out with Loretta; (2) the physical status of the 2010 will; and (3) Loretta's intent and knowledge of revoking wills.

The poor relationship between Loretta and Randal took center stage at the trial. Soon after the execution of the 2010 will, a full-blown dispute developed between Loretta and Randal regarding Randal's role as trustee. Daniel Johnson, Loretta's trust-related

attorney, testified that Loretta informed him that she decided to remove Randal as a trustee. Loretta explained that Randal failed to meet her standards for trustee responsibilities and used farming practices she opposed. In April 2011, Johnson sent a letter to Randal on Loretta's behalf, requesting that he voluntarily resign or legal action would be taken. Randal refused to resign, upsetting Loretta. Later, Randal attached conditions to resigning, which further distressed his mother. Soon afterwards, Loretta told Johnson to start legal proceedings to remove Randal. She listed several reasons to justify his removal ranging from deficiencies in his duties as trustee to insults and threats he made toward her.

Testimony showed that Randal attempted to meet with Loretta over the trust dispute, but Loretta refused. In a September 2011 letter, Johnson wrote to Randal that Loretta did not intend to disinherit Randal or to stop him from renting the trust land. Johnson testified that he interpreted this to mean that Loretta would not disinherit Randal or prevent him from renting land if he resigned as trustee, but she would potentially take those steps if he refused to resign. This interpretation was consistent with a subsequent letter, where Johnson informed Randal that Loretta was not going to allow him to rent the land. And indeed, at the end of the farmland lease, Loretta did not allow Randal to continue to rent the land. At no point did Randal resign as trustee.

Several other individuals testified regarding Randal and Loretta's deteriorated relationship. Barbara testified that Loretta wanted to remove Randal from the land because of his farming practices. She also testified that in 2010 or 2011, Randal and Loretta got in an argument, and Randal threw a cross at her. Kevin testified that the falling out began in 2005 and escalated from there. Their strained relationship continued up through Loretta's

death, and Randal did not attend the funeral. Norman testified that Loretta's intent regarding estate planning was in a state of flux and included plans to leave the bulk of her estate to Kevin or the daughters. Norman also testified that Loretta was upset with Randal in 2012 and that there were no discussions to leave any assets to Randal.

The physical status of the 2010 will also was a focus at trial. When Loretta's attorney Opheim retired, she needed to retrieve legal documents he had in his possession. In October 2011, Loretta went to Opheim's office to obtain the original of the 2010 will, and she received it in a blue folder. The following year, on August 21, 2012, Loretta brought a large box of items and documents to Norman's office for safekeeping. These were the items and documents Loretta thought were the most important. Kevin testified that he accompanied Loretta to Norman's office but did not look at the contents of the box. However, he did recall seeing a blue folder in the box, similar to the blue folder that Loretta received at Opheim's office. A later inventory of these boxed documents showed it did not contain the original version of the 2010 will.

No witnesses testified that they had seen the original version of the 2010 will after Loretta obtained it. Barbara and Darcy both testified they never saw the 2010 will prior to litigation. Barbara testified that she and the other daughters cleaned out Loretta's house after her death, and there was no 2010 will. She further stated that any legal documents they found were provided to lawyers. Kevin testified that he believed the original 2010 will was at Loretta's home, but had not actually seen it there.

Finally, evidence was presented regarding Loretta's knowledge of destroying wills and her past habits. Opheim stated that whenever he drafted a new will, Loretta would

give him the previous will to destroy. He further explained that as far as he knew, Loretta never destroyed a will on her own. Norman testified that after Loretta became his client, he informed her about storing, revoking, and destroying wills. Norman also testified that Loretta had no intent to die without a will or to leave any assets to Byron. He further testified that there were no indications Loretta wished to proceed under the 2010 will.

In its findings of fact, the district court determined that Loretta was the last individual to be in possession of the original 2010 will and that it was missing at the time of litigation. This created a presumption that it was revoked. The court held, in light of the falling out between Randal and Loretta and the evidence establishing Loretta did not want to proceed under the 2010 will, that Loretta personally destroyed the will before August 21, 2012. The court found that August 21 was the latest date Loretta could have destroyed the will, because that was the day she brought her most important documents to Norman, and the 2010 will was not there. The district court acknowledged Loretta did not want to die intestate, but found that she would have actually preferred to die intestate than have her assets distributed in accordance to the 2010 will, because of her falling out with Randal. The court concluded that the 2010 will was revoked and invalid and that her estate should be divided according to the laws of intestacy. This appeal follows.

D E C I S I O N

Appellants argue the district court erred in three different manners by: (1) reaching the issue of the 2010 will's validity because that issue was precluded under several legal theories; (2) determining the 2010 will was revoked and invalid; and (3) holding the dependent relative revocation doctrine did not apply. We address each issue in turn.

I. The district court was not precluded from determining whether the 2010 will was invalid.

Appellants provide several different legal theories to support their argument that the district court should not have reached the validity issue of the 2010 will: (1) law-of-the-case doctrine; (2) Minnesota Statutes sections 524.3-412 (2016); (3) collateral estoppel; and (4) res judicata.[6] These arguments boil down to appellants' contention that either the validity of the 2010 will was addressed during the probate proceedings for the 2012 will, so it cannot be litigated a second time, or that respondents missed their opportunity to litigate the validity of the 2010 will during the earlier proceeding. The district court did not address each argument explicitly, but instead rejected them all on the grounds that it never reached the issue of the 2010 will during the first trial.

[6] Appellants also argue respondents waived their argument that the 2010 will was invalid. Waiver "is the intentional relinquishment of a known right." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009) (quotation omitted). Knowledge and intent are both necessary elements of waiver. *Id.* Here, the petition for probate was for the 2012 will, the first trial was regarding the validity of the 2012 will, and the appeal addressed the 2012 will. After this appeal, respondents for the first time asserted their argument about the 2010 will. Because this issue had not yet been argued, and the previous trial determined a different issue, this is not a rare instance where this court should find waiver as a matter of law. *See id.*, 764 N.W.2d at 367 (stating waiver should "rarely" be inferred as a matter of law). Furthermore, appellants do not cite to any caselaw holding waiver in similar circumstances apart from a readily distinguishable Texas decision. *See Brown v. Traylor*, 210 S.W.3d 648, 667 (Tex. App. 2006) (analyzing waiver in the context of a sufficiency-of-the-evidence argument and holding the argument was waived when it was not raised with the district court in an appropriate motion or objection). Appellant Kevin also argues that respondents' argument was barred by rule 60.02 of the Minnesota Rules of Civil Procedure. But this was the extent of the argument and not accompanied by legal authority or analysis. As a result, the issue is forfeited. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are not properly before the appellate court).

Whether these legal theories are available to the district court is a question of law that we review de novo. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 837, 840 (Minn. 2004) (stating whether res judicata applies to a set of facts is reviewed de novo and whether collateral estoppel applies is a mixed question of law and fact that we review do novo); *Correll v. Distinctive Dental Servs., P.A.*, 607 N.W.2d 440, 443 (Minn. 2000) (stating questions regarding statutory construction are legal issues this court reviews de novo). But for several of these theories, including res judicata, if they can apply, *whether* to apply them is within the trial court's discretion.[7] *See Dixon v. Depositors Ins. Co.*, 619 N.W.2d 752, 755 (Minn. App. 2000) (stating the district court's decision to apply res judicata, once it is determined to be available, is reviewed for abuse of discretion). Based upon our review, we conclude that these preclusion arguments are inapplicable for two reasons. First, the majority of these theories require that the validity issue of the 2010 will was litigated in the first trial or appeal, which it was not. Second, the res judicata theory that conceivably could have applied is a discretionary doctrine, and the facts of this case do not lead us to disturb the district court's exercise of that discretion.

The law-of-the-case doctrine, collateral estoppel, and Minnesota Statutes sections 524.3-412 all require the issue in question—here the validity of the 2010 will—to have been previously litigated for it to be subsequently precluded. The law-of-the-case doctrine applies when an appellate court has ruled on a legal issue and remanded the case for further

[7] We note that the argument involving Minnesota Statutes sections 524.3-412 is a statutory question of law reviewed de novo and is not discretionary. *See Correll*, 607 N.W.2d at 443.

proceedings on other matters. *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993). It does not reach issues that could have been, but were not, litigated. *Sigurdson v. Isanti Cty.*, 448 N.W.2d 62, 66 (Minn. 1989). Similarly, Minnesota Statutes sections 524.3-412 states that formal testimony orders are final with respect to all issues the "court considered" or "might have considered incident to its rendition relevant to the question of whether the decedent left a valid will."[8] Lastly, collateral estoppel precludes parties from arguing subsequent issues in a later action only if the issue is "the same as that adjudicated in the prior action and it must have been necessary and essential to the resulting judgment in that action."[9] *Hauschildt*, 686 N.W.2d at 837. The issues must have been "distinctly contested and directly determined in the earlier adjudication." *Id.* at 837-38. To apply, these preclusion arguments demand that the 2010 will validity issue was litigated in the first proceeding.

Here the law-of-the-case doctrine, collateral estoppel, and Minnesota Statutes sections 524.3-412 are inapplicable because the issue of the 2010 will's validity was not

[8] Minnesota Statutes sections 524.3-412 also reaches issues that might have been considered "incident to" the issue of the validity of the 2012 will. While we do not comment on whether the district court may have considered the validity of the 2010 will during the first trial, we note that "incident to" is narrower than may or could have. *See Black's Law Dictionary* 879 (10th ed. 2014) (defining "incident" as, "Dependent on, subordinate to, arising out of, or otherwise connected with"). The 2010 will's validity would not have been considered "incident to" the validity of the 2012 will. Instead the validity of the 2010 will is a separate issue from—and does not need to be reached in order to determine—the validity of the 2012 will.

[9] For collateral estoppel to apply, it requires that "(1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 531 (Minn. 2003).

considered in the first proceeding. The district court explicitly stated in subsequent orders it never considered the validity of the 2010 will in the first proceeding,[10] there was no evidence presented establishing or attacking the validity of that will, and at the time of the 2014 trial, the district court was not even aware the original version of that will was missing. Simply put, the validity of the 2010 will was never at issue during the first proceeding or appeal. But while law-of-the-case doctrine, collateral estoppel, and Minnesota Statutes sections 524.3-412 are inapplicable for this reason, this does not resolve the broader doctrine of res judicata.

Res judicata does not require the issue or claim to have been previously raised. Res judicata, or claim preclusion, precludes parties from raising subsequent claims in a later action when "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter." *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 220 (Minn. 2007) (quoting *Hauschildt*, 686 N.W.2d at 840) (internal quotations omitted). Res judicata applies to both claims that were actually litigated and claims that could have been litigated. *Id.*

[10] Even if the post-trial order for the first trial was ambiguous as to whether the validity of the 2010 will was determined, this court defers to the district court's interpretation of its own order when interpreted by the same judge who authored the order. *LaChapelle v. Mitten*, 607 N.W.2d 151, 162 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). Here, the same judge wrote both orders, and the district court stated, "I did not find that the 2010 will was valid." Therefore, we afford the district court's determination that the 2010 will's validity was not decided at the first trial a large amount of deference.

But res judicata is not to be applied rigidly. Instead the focus is whether applying the doctrine would create an injustice for the party it is being used against. *Hauschildt*, 686 N.W.2d at 837. Res judicata should not be applied when it would contravene public policy. *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984) (stating res judicata should not override public policy). Thus, whether to apply the theory of res judicata is a matter of judicial discretion for the district court. *Dixon*, 619 N.W.2d at 755. And appellate courts should decline to interfere with the district court's discretionary decision to not apply the doctrine, if applying the doctrine would result in a denial of a party's right to a fair hearing and an opportunity for judicial review on the issue. *See D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co.*, 535 N.W.2d 671, 674 (Minn. App. 1995) (holding res judicata was properly denied when the parties would be denied a fair hearing and the opportunity to be heard), *review denied* (Minn. Oct. 18, 1995).

Here, the district court declined to apply the theory of res judicata, and we decline to interfere with that discretionary decision. The first proceeding looked at the validity of the 2012 will. In their initial objection to respondents' petition for probate of the 2012 will, appellants urged the district court to instead determine the 2010 will was valid and should be probated instead. But just as respondents did not argue the 2010 will was invalid at the first proceeding, appellants never argued it was valid and did not address why the original was missing. The district court noted it did not make any determinations on the validity of the 2010 will during the first proceeding, and thus applying res judicata would prevent the parties from having a fair hearing on the issue. Additionally, appellants were not unfairly prejudiced by allowing the validity issue to be litigated. They were afforded a full

opportunity to argue the 2010 will was valid during the second proceeding. Because res judicata is a discretionary doctrine, and the district court declined to apply it, this court will not disturb the district court's decision.

II. The district court did not err in determining the 2010 will was revoked and invalid.

Appellants argue the district court, if it properly reached the issue, erred in determining the 2010 will was revoked and invalid. Appellants contend the district court erred because (1) it improperly placed the burden of proof on appellants; (2) its findings of fact were not supported by the record; and (3) its finding that appellants did not overcome the presumption that the will was revoked was clearly erroneous. We disagree.

Whether the burden of proof was erroneously placed on appellants involves the interpretation of a statute, which we review de novo. *See In re Estate of Sullivan*, 868 N.W.2d 750, 752 (Minn. App. 2015). A will is revoked by "performing a revocatory act" on the will. Minn. Stat. § 524.2-507(a)(2) (2016). This includes "burning, tearing, canceling, obliterating, or destroying the will or any part of it." *Id.* The party asserting the testator intentionally revoked a valid will must prove that there was a valid and effective revocation. Minn. Stat. § 524.3-407 (2016). And parties maintain the ultimate burden of persuasion as to matters for which they have the initial burden of proof. *Id.* This means that here, respondents had the initial burden of proof and the ultimate burden of persuasion that the will was revoked. However, if the original will is not produced, it *permits* a rebuttable presumption that the will was revoked. *In re Estate of Botko*, 541 N.W.2d 616,

619 (Minn. App. 1996), *review denied* (Minn. Feb. 27, 1996).[11] Here, the original 2010 will was not produced, and the district court acted within its proper scope of discretion in determining there was a presumption that the original will was revoked.[12] As a result, the district court did not err in concluding that appellants had the burden of overcoming this presumption with evidence of nonrevocation, while respondents maintained the ultimate burden of persuasion.

Nor are we persuaded by appellants' argument that the district court's findings of fact are not supported by the record. A district court's findings of fact are set aside only if clearly erroneous. *M & G Servs., Inc. v. Buffalo Lake Advanced Biofuels, LLC*, 895 N.W.2d 277, 281 (Minn. App. 2017), *review denied* (Minn. June 28, 2017). The district court determined that Loretta was the last to have possession of the original will; no one else ever saw the will after Loretta took possession of it; the will was not given to attorney Norman when Loretta brought him her boxed important documents; Loretta was informed about how to revoke a will; Loretta and Randal had a large falling out; and Loretta would rather die intestate than under the 2010 will, where Randal would inherit a large amount of

[11] Appellant Randal argues this presumption can be imposed only if respondents meet their burden in establishing there was no evidence that the will was kept by someone other than Loretta. But caselaw does not establish that such a burden exists. In *In re Estate of Botko*, the court determined there was a presumption the will was revoked when (1) the original was not produced and (2) the record showed no evidence that the original will was kept by someone else. 541 N.W.2d at 619. But this case is silent on the burden on the second requirement. And we do not need to reach the issue of whether respondents had a burden because here there is no evidence in the record that anyone other than Loretta had possession of the original 2010 will.

[12] Appellant Kevin argues that the failure to introduce the original version does not prove revocation. However, neither the district court nor respondents have asserted the failure to introduce the original version is dispositive. It merely creates a presumption.

farmland. A close review of the record shows that each one of these facts was supported by the record. The district court did not commit clear error.

Finally, appellants contend the district court erred by determining that they did not overcome the presumption that the lost will was revoked. Whether a will is executed in a manner prescribed by statute is a question of fact that we review under the clearly erroneous standard. *See In re Estate of Sullivan*, 868 N.W.2d at 752; *see also Matter of Estate of Langlie*, 355 N.W.2d 732, 735 (Minn. App. 1984) (reviewing whether the district court erred in determining a lost will was not revoked under the clearly erroneous standard). Appellants argue they rebutted the presumption because they established that respondents had access to Loretta's documents and they had unduly influenced her previously. While both of these facts are supported by the record, the district court determined that no one—including respondents—possessed the will at any time, and the court stated that there was "no evidence to support any theory that the [respondents] destroyed" the original will. Appellants also emphasize the fact that Kevin testified that he saw a blue folder, similar to the one containing the original 2010 will Loretta received, in the box Loretta gave to Norman. But the district court found Kevin's testimony deserving of little evidentiary weight, and we defer to the court's credibility determinations. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).[13] Because of the numerous pieces of evidence suggesting the will was revoked, the district court's finding that appellants were unable to overcome the presumption that the will was revoked was not clearly erroneous.

[13] Furthermore, the district court acknowledged this fact about the blue folder, but still made the determination that Loretta did not include the 2010 will in the box of documents.

III. The district court did not err in determining the dependent relative revocation doctrine did not apply.

Appellants argue that if the 2010 will was invalid, the district court erred by not applying the dependent relative revocation doctrine. This is a mixed question of law and fact, and this court corrects erroneous applications of law, but "accord[s] the district court discretion in its ultimate conclusions and review[s] such conclusions under an abuse of discretion standard." *In re Estate of Sullivan*, 868 N.W.2d at 754.

The dependent relative revocation doctrine allows courts to give the intended effect to the terms of a revoked will in certain situations, if doing so would be consistent with the testator's intent.[14] *See id.*; *In re Anthony's Estate*, 265 Minn. 382, 390, 121 N.W.2d 772, 778-79 (1963). The doctrine applies when the circumstances connected with the revocation "are such as to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted."[15] *In re Nelson's*

[14] The dependent relative revocation doctrine is different from reviving a revoked will pursuant to Minnesota Statutes section 524.2-509. This statute allows a previously revoked will to be revived, if it is consistent with the testator's intent, in circumstances where the subsequent will is revoked by a revocatory act. Minn. Stat. § 524.2-509(a). Here the subsequent will was not revoked by a revocatory act, but was instead invalidated. That statutory provision is inapplicable to these facts.

[15] No published case has reduced this doctrine to elements, but in the unpublished case, *In re Estate of Perrault*, this court listed three prerequisites: "(1) the decedent must have had a valid will; (2) the decedent must have revoked or destroyed that will with the intention of making a new will; and (3) the new will, if made, must fail for any reason or be inoperative through lack of formality." No. A09-1103, 2010 WL 2035714, at *4 (Minn. App. May 25, 2010), *review denied* (Minn. Aug. 10, 2010). The district court cited these elements and found element two was lacking. But it is not necessary for this court to adopt a bright line test as the doctrine is inapplicable here because applying the doctrine would be inconsistent with Loretta's intent and because the record does not support that the revocation was contingent on the creation of the 2012 will.

Estate, 183 Minn. 295, 298, 236 N.W. 459, 461 (1931). This follows the common law principle that when the revocation of a will is unconditional, then the will is revoked regardless of whether the subsequent will is invalid, and courts do not look to the testator's intent. *In re Scott's Will*, 88 Minn. 386, 388, 93 N.W. 109, 110 (1903). But if the revocation is conditional on the creation of a *valid* subsequent will, and that later will is invalidated, then courts may look to the testator's intent to determine if the revoked will should be given its intended effect. *See id.*

At its essence, this doctrine is used to effectuate the testator's intent in circumstances where the revocation was conditional. *See In re Anthony's Estate*, 265 Minn. at 390, 121 N.W.2d at 779. Importantly, this doctrine only creates a presumption that the revocation is ineffective. Its application is not ironclad against contrary evidence suggesting the testator would not want the revoked terms to be given effect. *See* Restatement (Third) of Property § 4.3 & cmt. a (1999). Because the revocation of the 2010 will was not dependent on the creation of a new will, and applying the doctrine would be inconsistent with Loretta's intent as determined by the district court, we determine that the district court correctly held the doctrine is inapplicable.[16]

[16] Applying the doctrine here, where the two wills drastically differ in their terms and purpose, would also go against the grain of how the doctrine is traditionally applied. The doctrine is generally used in circumstances where a mistake has been made or where there are minor changes made in the subsequent will, as opposed to where there are wholesale changes. *See, e.g.*, *Watson v. Landvatter*, 517 S.W.2d 117, 121–22 (Mo. 1974) (stating the doctrine is "particularly applicable" to where the second will does "not change the testamentary purpose but only minor details"); *La Croix v. Senecal*, 99 A.2d 115, 118 (Conn. 1953) (applying the doctrine when the testator made only a "very minor change").

Here it is not a reasonable interpretation that Loretta's revocation of the 2010 will was dependent on the creation of the 2012 will. The district court's determination that the 2010 will was destroyed, at the latest, on August 21, 2012, means that the will was revoked at least one month prior to the execution of the 2012 will. The circumstances do not suggest Loretta revoked the 2010 will on the condition that she would create the 2012 will. Instead, the district court's findings suggest that she wished to remove Randal from her will, and destroyed the 2010 will that was favorable to him. Loretta's revocation of the 2010 will does not lead to the determination that the revocation was dependent on the execution of the 2012 will.

And this leads to the critical point that applying the doctrine would not be consistent with Loretta's intent. The district court explicitly found that Loretta did not intend to proceed with the terms of the 2010 will. It found that submitting the 2010 will to probate would go against Loretta's intent as she "would have actually preferred to risk having her estate distributed via the laws of intestacy rather than having her estate distributed in accordance with" the 2010 will. While appellants argue that it is undisputed that Loretta did not intend to die intestate, this does not equate to determining Loretta intended to have her estate distributed in accordance with the 2010 will, which the doctrine requires.

Because the revocation of the 2010 will was not conditional, and applying the dependent relative revocation doctrine would not further Loretta's intent, the district court acted within its scope of discretion and did not erroneously apply the law.

Affirmed.