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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0641**

In re the Estate of: Richard W. Koberoski, Deceased.

**Filed January 18, 2022
Reversed and remanded
Reyes, Judge**

Watonwan County District Court
File No. 83-PR-20-416

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Considered and decided by Reyes, Presiding Judge; Frisch, Judge; and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant, the son of decedent, challenges summary judgment in favor of respondents, decedent's other children, arguing that the district court erred in determining decedent revoked his 1993 will. Appellant also argues that he is entitled to summary

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

judgment to admit decedent's 1993 will to probate because decedent did not revoke the will. We reverse and remand to the district court for further proceedings.

FACTS

Decedent Richard Koberoski and his wife Sheila had seven children: respondents Robert, Karen, Joseph, William, Kimberly, Becky, and appellant Peter.¹ Decedent owned a nursery business and multiple tracts of real estate. Decedent and Sheila executed reciprocal wills in 1993. Decedent's 1993 will created a trust which gave any child engaged in the nursery business on a full-time basis an option to purchase decedent's land and the nursery stock, tools, machinery, and equipment at a discount. Peter remained active in decedent's business and regularly worked with decedent. Peter's brothers Joseph and Robert are also in the nursery business generally, although both brothers stopped working at decedent's nursery business more than a decade ago. Peter testified² that, after decedent executed his 1993 will, he went with decedent to purchase life insurance on decedent so that, if decedent died, he would have funds to purchase decedent's business. Peter also testified that decedent regularly told him that if he stayed in the business, he would have a chance to buy it.

Sheila died in 2008. Decedent declared to the district court that Sheila's original 1993 will was lost. The district court probated a copy of Sheila's 1993 will provided by

¹ For clarity, we refer to decedent Richard Koberoski as "decedent," to appellant, his son Peter, as "Peter," and to his other six children, the respondents, as "respondents," collectively, or by their individual full first names.

² "Testimony" in this opinion refers to statements made during depositions of decedent's children taken during discovery.

Sheila's and decedent's attorney, Richard Kakeldey.³ Peter testified that decedent referred to his and Sheila's 1993 wills as "lost" multiple times during this period.

In February 2009, decedent consulted Kakeldey about his estate plans. Kakeldey summarized these discussions in a letter to decedent noting:

We had a very good discussion regarding the changes that are important in your will. In light of the fact that the document generally refers to children who are engaged in the nursery business, I think you felt that we should move forward to change your will at this time.

The letter described the proposed changes, which included giving Peter and Robert the right to acquire certain parts of decedent's business, changes to the option prices in the 1993 will, and a different distribution of decedent's personal real estate to his children.

Decedent met with Kakeldey again in June 2009. In a letter summarizing their discussion, Kakeldey noted, "We also discussed changes in your current estate plan. You indicated to me that you wanted to redraft your documents to accommodate some of these changes." The changes summarized in Kakeldey's June letter included a distribution of decedent's real estate to his children that differed from the distribution in decedent's 1993 will.

In May 2010, Kakeldey sent decedent a letter stating:

I have provided you a number of options in terms of how you might want to proceed with [distributing your estate]. It is my understanding that you have not decided how the estate would be divided up among your children, and at this time, it would be substantially distributed equally to them. Please advise if there is anything that should be changed.

³ Neither party deposed Kakeldey before they moved for summary judgment, and he died shortly after the parties filed their summary-judgment motions.

Decedent never executed a new will.

Decedent died in April 2020. The family searched decedent's house and could not find a will. The family did find a safe in decedent's home office which contained some of decedent's important paperwork as well as a large, empty brown envelope from Kakeldey's office. Decedent's original 1993 will was not in the safe. Decedent's children obtained a copy of decedent's 1993 will from Kakeldey's files.

Robert and Karen petitioned for a formal adjudication of intestacy. Their petition stated that all of decedent's children except Peter believed decedent destroyed his original 1993 will before his death based on statements decedent made to them. Peter filed a counter-petition to probate the copy of decedent's 1993 will. After a period of discovery, Peter moved for summary judgment that decedent did not revoke his 1993 will, and respondents moved for summary judgment that decedent died intestate. The evidence supporting the parties' motions consisted of affidavits; depositions of Peter, respondents, and Peter's wife; a list of documents found in decedent's safe; and copies of the letters sent by Kakeldey regarding decedent's estate plans.

The district court denied Peter's motion for summary judgment. It determined instead that the common-law presumption of revocation applied to the copy of decedent's will and that Peter failed to rebut that presumption. The district court accordingly granted summary judgment to respondents that decedent died intestate. This appeal follows.

DECISION

I. The summary-judgment de novo standard of review applies.

The parties disagree about which standard of review applies in this appeal. Peter argues that the standard of review of a summary-judgment decision is de novo while respondents argue that we must review a district court's decision to apply the presumption of revocation and its determination that the presumption was not rebutted for clear error. We agree with Peter that the standard of review is de novo.

In arguing for clear-error review, respondents rely on *In re Estate of Botko*, 541 N.W.2d 616, 618 (Minn. App. 1996), *rev. denied* (Minn. Feb. 27, 1996). But we did not review a district court's summary judgment in *Botko*: instead, the district court in *Botko* appears to have held a hearing, heard testimony, and issued findings of fact supporting its order. *Id.* at 617-18. We then reviewed those findings for clear error. *Id.* at 618. This case comes before us after the district court's grant of summary judgment, at which stage the district court does not make factual findings but only determines whether material issues of fact exist, and, if not, applies the applicable law to the relevant facts. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). Because this appeal challenges the district court's summary-judgment decisions, the summary-judgment standard of review applies.

On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *See STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). We view the evidence in the light most favorable to the nonmoving party. *Id.* Summary judgment should not be granted when reasonable persons could draw different conclusions

from the evidence presented, *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017), or when there are differing reasonable inferences from undisputed facts, *Warren v. Dinter*, 926 N.W.2d 370, 380 (Minn. 2019).

II. The district court erred by granting summary judgment to respondents by determining that decedent died intestate.

Peter first argues that the district court erred by granting respondents' motion for summary judgment by determining that decedent died intestate. Peter argues that the district court misapplied the common-law presumption of revocation to decedent's will and erred by determining that Peter failed to rebut the presumption of revocation. We agree.

In contested cases, the proponent of a will has the burden of establishing prima facie proof that the testator duly executed the contested will. Minn. Stat. § 524.3-407 (2020). The parties agree that decedent duly executed his 1993 will and that the will would be entitled to probate unless he revoked it. Contestants of a will then have the burden of proof to establish revocation. *Id.* Parties have the ultimate burden of persuasion on matters for which they have the initial burden of proof. *Id.* Under Minnesota law, there are two ways for a testator to revoke a will: (1) by executing a subsequent will that revokes the previous will expressly or by inconsistency or (2) by the testator performing a revocatory act on the will with the intent and for the purpose of revoking the will, or by another individual performing the act in the testator's conscious presence and at the testator's direction. Minn. Stat. § 524.2-507(a) (2020); *see also In re Estate of Schroeder*, 441 N.W.2d 527, 531 (Minn. App. 1989), *rev. denied* (Minn. Aug. 15, 1989). However, when the original version of the will is not produced, there is a common-law rebuttable presumption that the

will was revoked. *Botko*, 541 N.W.2d at 618-19. This presumption applies when a testator last possessed the will but it cannot be found after the testator's death. *In re Estate of Langlie*, 355 N.W.2d 732, 735 (Minn. App. 1984); *In re Estate of Pundt*, 157 N.W.2d 839, 841 (Minn. 1968).

A. The district court erred by applying the presumption of revocation without determining whether decedent possessed his 1993 will before his death.

In granting summary judgment to respondents, the district court determined that the presumption of revocation applied to decedent's will without addressing whether decedent last possessed his 1993 will. The district court only stated that no one could locate the 1993 will and repeatedly stated that decedent knew the will was lost. Determining that a decedent believed a will was "lost" does not, by itself, compel the presumption that the will was revoked; the district court must also determine that the testator possessed the will before the testator's death for the presumption to apply. The district court therefore erred in applying the presumption of revocation without first determining that decedent possessed the will before his death.

Respondents argue that they did not need to show that decedent possessed the will before his death so long as there is no evidence that someone other than decedent kept the original will. Respondents rely on *Botko*, in which this court stated that "the law permits an inference of revocability when an original will is not produced and the record shows no evidence that the original will was kept by someone other than decedent." 541 N.W.2d at 619. But read in context, this court in *Botko* simply rejected the appellants' argument that a copy of a will found in the decedent's personal belongings *precluded* a presumption of

revocation. *Id.* at 618-19. *Botko* affirmed that the absence of an original will is entitled to *some* evidentiary weight in determining revocation, but *Botko* did not dispense with the traditional showing of possession required to presume revocation. *Id.* Requiring a determination that the testator possessed the will before presuming that a lost will was revoked is consistent with both Minnesota caselaw and with the assumption underlying the presumption, which is that the original will could not be found *because the testator destroyed it*. See *Pundt*, 157 N.W.2d at 841 (describing the presumption “that if a will is left in the possession of the testator and it cannot be found after his death, it is presumed to have been revoked by him” (emphasis added)); *Langlie*, 355 N.W.2d at 735 (noting that the proponent of a lost will must “go forward in the face of a common law presumption that a lost will *possessed by a testator has been destroyed*” (emphasis added)). Possession of the will is therefore a material element which the district court should have addressed before presuming that decedent revoked his 1993 will.

We further conclude that the district court inappropriately applied the presumption of revocation in granting summary judgment because whether decedent actually possessed the will remains a genuine issue of material fact. The relevant facts, taken in the light most favorable to Peter, include the following:

- Decedent and his wife, Sheila, executed reciprocal wills on March 19, 1993.
- Peter never saw decedent’s or Sheila’s original 1993 will. Peter testified that, although his parents brought a large brown envelope when they went with him to purchase a life-insurance policy shortly after they executed their wills, Peter never saw the documents that were in the envelope.

- Sheila Koberoski generally took care of household matters.
- When Sheila died in 2008, no one could find her original 1993 will and decedent petitioned the district court to probate a copy of her will.
- Nobody could find decedent's original 1993 will after his death.
- Decedent was secretive about his estate plans, and none of his children ever saw his original 1993 will.

Viewing the evidence in the light most favorable to Peter and drawing all factual inferences against respondents, we conclude that a genuine issue of material fact exists as to whether decedent possessed his will before his death or whether Sheila possessed, and then lost, the original 1993 wills. We therefore remand to the district court for factfinding on that issue.

B. The district court erred by granting summary judgment to respondents after concluding that Peter failed to rebut the presumption of revocation.

Even assuming decedent possessed the will and that the presumption of revocation applies, we further conclude that the district court erred in granting summary judgment to respondents by determining that Peter failed to rebut that presumption. Once the district court determines that the presumption of revocation applies, the burden shifts to the proponent of the lost will to make a prima facie showing of nonrevocation. *Langlie*, 355 N.W.2d at 736. A prima facie showing of nonrevocation compels admission of the will to probate “unless it does not preponderate over evidence offered by [respondents], who [have] the ultimate burden of persuasion on revocation.” *Id.*

The district court granted respondents summary judgment after determining that Peter had not produced evidence sufficient to make a prima facie showing of

nonrevocation. The district court noted that Peter provided evidence that decedent spoke of the business going to him after decedent's death and that decedent had indicated that he was happy with his current estate plan. But the district court explained that this was not sufficient evidence of nonrevocation because Peter had not presented evidence that the estate plan decedent was happy with was his 1993 will. The district court reasoned instead that the evidence showed that decedent consulted with Kakeldey; that Kakeldey informed decedent that if he did nothing, his assets would be "substantially distributed equally" to all his children; and that decedent chose not to complete any will. The district court concluded that Peter provided insufficient evidence to overcome the presumption of revocation.

In so concluding, the district court failed to view the evidence in the light most favorable to Peter as the nonmoving party. The evidence includes the following:

- When Sheila died in 2008, no one could find her original will, so decedent petitioned to probate of a copy of her will obtained from Kakeldey. The district court probated the copy of Sheila's 1993 will.
- Around that time, decedent discussed possible changes to his estate plans with Kakeldey. Kakeldey wrote to decedent in February 2009 that "We had a very good discussion regarding the changes that are important in your will. . . . I think you felt that we should move forward to change your will at this time." In June 2009, Kakeldey wrote to decedent that they had "discussed changes in your current estate plan. You indicated to me that you wanted to redraft your documents to accommodate some of these changes."
- Decedent did not move forward with the changes described by Kakeldey, and in 2010 Kakeldey wrote to decedent: "It is my understanding that you have not decided how the estate would be divided up among your children, and at this time, it would be substantially

distributed equally to them. Please advise if there is anything that should be changed.”

- Decedent did not execute a new will.
- While Sheila’s will was being probated, decedent described his and Sheila’s 1993 wills as “lost” multiple times. Decedent made comments to his children around 2018 regarding his will and told them “I don’t have a will.” In response to one of his children’s questions about whether he had a will, decedent answered “No, you kids will decide.”
- Decedent regularly told Peter that if Peter stayed in the business, he would have a chance to buy it.
- Decedent indicated that he was happy with his current estate plan.

Viewing the evidence in the light most favorable to Peter, one could reasonably conclude that decedent’s statements only reflected decedent’s knowledge that his 1993 original will had been lost. That decedent knew the will was lost does not necessarily compel a conclusion that he destroyed the original will with the intent to revoke it, especially because decedent knew, based on the probate of Sheila’s lost reciprocal 1993 will, that a copy of a lost will could be probated. Kakeldey’s statements about decedent’s “current estate plan” and Kakeldey’s notes to decedent about redrafting his documents and making changes to his will could be interpreted as referring to decedent’s 1993 will, and one could accordingly interpret decedent’s failure to move forward with Kakeldey’s proposed changes as a decision *not* to revoke the terms of the 1993 will. Finally, although respondents argue that Kakeldey’s statement that “at this time, [your estate] would be distributed substantially equally [to your children]” referred to decedent’s plan to die intestate, the 1993 will also included provisions distributing tangible personal property and the proceeds of the “Koberoski Family Trust” to decedent’s children in equal shares.

We therefore conclude that Peter provided sufficient evidence showing nonrevocation and that the district court erred by granting summary judgment to respondents on that issue. We also conclude that material issues of fact remain to preclude summary judgment on the issue of whether, even assuming the presumption of revocation applies, Peter rebutted that presumption with a prima facie showing of nonrevocation. We therefore reverse the district court's grant of summary judgment to respondents and remand for further factfinding on these issues.

III. Peter is not entitled to summary judgment that decedent did not revoke his 1993 will.

Peter argues that he is entitled to summary judgment because respondents failed to show decedent revoked his 1993 will and that the district court must therefore probate the will. We are not persuaded. Just as we conclude that material issues of fact remain precluding summary judgment for respondents, we similarly conclude that the same genuine issues of material fact would make summary judgment for Peter inappropriate. Viewing the evidence in the light most favorable to respondents, a reasonable person could conclude that decedent disposed of his original 1993 will with the intent of revoking it, which would be an effective revocation under Minn. Stat. § 524.2-507(a)(2). Peter is therefore not entitled to summary judgment on the issue of revocation of decedent's will.

IV. The district court may, in its discretion, reconsider its decision to appoint Robert and Karen special administrators of decedent's estate.

Peter asks this court to order that the special administrators remain in place for 30 days to give Peter time to bring a motion challenging the district court's appointment of personal representatives not named in the 1993 will.⁴ We decline to issue such an order.

After granting summary judgment to respondents that decedent died intestate, the district court issued an order of formal adjudication of intestacy and formally appointed Robert and Karen as the personal representatives of decedent's estate. The district court stated in its order that if an heir appealed the district court's determination that decedent died intestate, the appointment of Robert and Karen would automatically convert to a special administration without the need for a further court proceeding. When Peter appealed the district court's intestacy decision, Robert and Karen then became special administrators.

We note that the district court initially appointed Robert and Karen as personal representatives, and then as special administrators, based on its determination that decedent died intestate. Because we reverse the district court's grant of summary judgment on that issue, the district court may, in its discretion, reconsider its appointment of Robert and

⁴ Peter originally appealed the district court's appointment of Robert and Karen as special administrators. By order of a special term panel, this court determined that an order appointing a special administrator is not an appealable order under Minn. Stat. § 525.71(c) (2020) and dismissed that part of Peter's appeal.

Karen as special administrators. We express no opinion on the district court's prior appointment of Robert and Karen.

Reversed and remanded.