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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF CARVER **FIRST JUDICIAL DISTRICT**

PROBATE DIVISION

In re:

Estate of Prince Rogers Nelson,
Decedent

Case Type: Special Administration
Court File No. 10-PR-16-46
Honorable Kevin W. Eide

REPLY MEMORANDUM IN SUPPORT OF MOTION TO APPROVE PAYMENT OF ATTORNEYS' FEES AND COSTS TO WHITE WIGGINS & BARNES, LLP AND J. SELMER LAW, P.A.

White Wiggins & Barnes, LLP ("WWB") and J. Selmer Law, P.A. ("JSL") (collectively "Movants"), submit this Reply Memorandum in Support of their Motion to Approve Payment of Attorneys' fees and costs from the Estate of Prince Rogers Nelson (the "Estate") for services that benefitted the Estate.

On March 8, 2019, at the request of the Personal Representative Comerica Bank & Trust, NA, this Court Ordered that any attorney of record for the Heirs submit a request for payment of fees or expenses incurred from February 1, 2017 through December 31, 2018 and directed that such motion be filed by March 31, 2019. On March 28, 2019, WWB and JSL submitted a motion that set forth their attorneys' fees and costs. Comerica filed a response opposing Movant's fees on April 15, 2019.

Comerica's response confirms that the Court must make specific findings regarding the Movants' claim for fees and expense, and that the requested fees must be "just and reasonable" and "commensurate with the benefit derived by the Estate from such services." However, it appears that Comerica's sole objection to Movants' fee application relates only to the issue of

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whether the work performed for which reimbursement is sought benefitted the Estate as a whole, rather than Alfred Jackson individually for which we submit the Reply Memorandum.

As a preliminary matter, on pages 1 and 9 and in footnote 6 of Comerica's Response, Comerica concedes that certain actions and documents filed by the Movants in February 2019 conferred a benefit for which reimbursement by the Estate is warranted. Comerica clearly does not view any of the work identified in Movants' fee application as relevant, benefitting the entire Estate, or connected to the reimbursable 2019 filings –and has essentially requested the Movants to seek fees related to that work later. However, some of the work reflected in the billing statements is indeed related to or directly relevant to the issues that were brought to light in recent filings. Majority of the time submitted for payment relates to issues concerning the extent to which Comerica and the prior special administrator, Bremer Trust, NA, could be absolved in advance for any liability associated with its administration of the Estate.

Since appearing as counsel of record on behalf of Alfred Jackson, until the time of their replacement in February 2019, WWB spent considerable time researching and analyzing statutes and case law, submitted briefings, and orders of the Court as it relates to the Estate. These efforts provided the framework from which Movants were able to identify and provide evidence of substantial breaches of confidential information on the part of third-parties which could potentially expose the Estate, clearly adding value to—the Estate as a whole. Minnesota's Statute provides that where the services of attorney for any interested person contribute to the benefit of the estate, as distinguished from the personal benefit of such person, the "attorney shall be paid such commission from the estate as the court shall deem just and reasonable and commensurate with the benefit to the estate from the recovery so made or from such services." Minn. Stat. § 524.3-720. Moreover, Minnesota courts have rejected the argument that in order to contribute to the

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benefit of the estate, interested persons must not themselves benefit from the proceedings. *In re Estate of Kane*, No. A15-1033, 2016 WL 1619248, at *7 (Minn. Ct. App. Apr. 25, 2016).[1]

While the court has the full discretion on the determination of attorney fees that are awarded, the court must consider the following factors:

(1) The time and labor required;

(2) The experience and knowledge of the attorney;

(3) The complexity and novelty of problems involved;

(4) The extent of the responsibilities assumed and the result obtained; and

(5) The sufficiency of assets available to pay for the services.

Minn. Stat. § 525.515 (b) (2016).

Movants met their burden of establishing entitlement to the requested fees, and Comerica challenged neither the necessity nor the reasonableness of the fees submitted. The only the question before the Court is whether the work performed benefitted the estate. While the court has not specifically outlined what is meant by a "benefit" to an estate, the court has held that an estate is benefitted when efforts are expended *to keep the estate intact*. *In re Estate of Van Den Boom*, 590 N.W.2d 350, 354 (Minn. Ct. App. 1999) (emphasis added).

Comerica implied that Movants' fee statements reflecting "services—such as routine correspondence, court appearances, and review of court filings and proposed transactions—were for the benefit of the Heirs individually rather than the Estate as a whole." Each of the following time entries were necessary and related to either (1) the Special Representative and the Personal Representative's efforts to be fully and permanently discharged of liability as to the Estate and the Heirs; or (2) the review of the client files received from Messers. Michael Lythcott and Greg

[1]Pursuant to Minn. Stat. § 480A.08, a copy of this case is attached hereto.

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Walker, who brought to light potential breaches of the confidentiality of the Estate's documents and information:

October 31, 2018	Confer with potential local counsel regarding matter and qualifications; Strategy conference.
November 1, 2018	Review public documents and applicable authorities presently at issue in Probate, including documents relating to Bremer's discharge of liability.
November 3, 2018	Review authority and caselaw regarding the obligations of personal representative as it pertains to discharge of liability as to heirs; pursue strategy regarding same.
November 4, 2018	Review applicable authorities and conference with Messers, Barnes, Anozie and White regarding the scope and appropriateness of the discharge of Bremer Trust. Continue case research analysis regarding duties and release of liability of Personal Representative; Confer with prior counsel re: the issues.
November 6, 2018	Conference with Messers, Barnes, Anozie and White re: appeal. Review Applicable authorities re: availability of appeal of discharge and fees and procedure. Draft notice of appeal. Review letter filed by Comerica re: attorneys liens. Review letter filed by Maslon and attached proposed order re: scope of discharge. Draft motion for relied from judgement; confer with local counsel and file the same. Communication with J. Cassioppi regarding payments to Bremer in light of objections to discharge; Confer with team regarding strategy; review client and court files regarding same. Conference with Messer, Barnes, White and Anozie re: appeal.
November 7, 2018	Review order denying motion to rescue Hon. Eide. Review Lommen Abdo's motion for approval of fees.

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Review applicable authorities re: appellate Pro Hac Vice and draft documents relating to the same.

Review and revise motion for clarification; continue review of file for status and strategy; reviewal of client files from prior counsel and M. Lythcott; Conference with White regarding the same.

November 8, 2018 Draft Motion for Clarification.

Review correspondence from Ms. Shirk (Minn Probate Clerk). Reviewal of Alfred Jackson's objection to and motion for clarification of courts Oct. 17, 2018 order; review file history regarding same.

November 10, 2018 Final revisions to objections; continue review of client files; confer with local counsel re: appeal of prior order from the Court regarding discharge of personal representative.

November 13, 2018 Review Comerica's amended petition to approve interim accounting, and other pleadings related to issue discharge, including O. Baker and client's objection. Conference with Anozie regarding next steps; review case law on discharge issue; review file with full access.

November 15, 2018 Review case filings.

Begin drafting Appellate documents.

November 16, 2018 Draft Appellate Pro Hac Vice motion, affidavit and statement of case.

Confer with local counsel re: appellate filings.

November 19, 2018 Confer with local counsel re: Nov 29, 2018 hearing.

Correspond with local counsel re: accepted appellate case filings. Review issues related to Comerica's request for approval of final accounting, which includes a discharge as to heirs of matters covered or contained therein; conference with Barnes, White, and Anozie regarding case authority and strategy to oppose such discharge.

November 20, 2018 Review order granting Pro Hac Admissions in appellate court.

Pursue strategy and research regarding tax issues; confer with former colleague regarding general issues and IRS considerations

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	with regard to estate tax resolutions; review material in Comerica database related to the estate tax issues.
November 21, 2018	Review Barnes Thornburg application for attorney's lien against Tyka Nelson.
November 22, 2018	Prepare for hearing on motion to approve accounting with discharge; continue review of client files.
November 26, 2018	Confer with local counsel and re-submit objection to Comerica's petition to approve accounting.
	Reviewal of Alfred Jackson's brief in support of his objection to Comerica Bank & Trust, N.A.'s Amended Petition to Approve Interim Accounting.
November 27, 2018	Confer with Ms. Collins re: upcoming hearing and corresponding documents and information.
	Review transcript ordered by opposing counsel in appellate court.
	Continue preparation for hearing; review legal authority and details of activities sought to be approved by the court.
	Confer the Barnes and hearing preparations; confer with Barnes re: hearing preparations and issues anticipated.
November 28, 2018	Travel to Minneapolis for hearing; final preparation for hearing.
	Review of 11.29.18 hearing pleadings.
November 29, 2018	Appearance and argument at hearing on motion to approve accounting; confer with Comerica counsel; confer with O. Baker regarding issues of administration of the estate.
	Attend hearing-Comerica Interim Accounting.
December 3, 2018	Review filing of proposed order.
December 4, 2018	Review Hon. Eide's letter to Gleekel and response to Motion for clarification.
	Review letter from J. Eide regarding ruling related to discharge of former special representative; confer with local counsel regarding same; confer with client.

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December 5, 2018	Travel to Kansas City to meet with client to provide update and discuss strategy regarding estate issues.
December 6, 2018	Confer local counsel re: withdraw of appeal in accordance with Hon. Eide's letter.
December 7, 2018	Review letter from Malson re: Rule 54.02 certification and confer with local counsel regarding the same.
	Review affidavit and stipulation and order for dismissal.
	Confer with local counsel regarding service issues; continue review of client files; pursue strategy related to client expenses; review the court filings for the week.

The fees reflected and the outcomes achieved by Movants' service conferred a benefit not only for the individual heirs, such as Mr. Jackson, but for the Estate as a whole because Movants revealed/ objected to the Personal Representative's and Special Administrator's attempt to be fully and permanently discharged of all liability as to the Estate and the Heirs (which would be detrimental to the Estate). By successfully defeating the prior and current administrators' motions for pre-emptive relief from liability arising out of mismanagement, oversight and safeguarding the assets of the Estate, Movants have protected the Estate, and ensured that all decisions by the current administrator will seek to preserve the Estate for its beneficiaries and creditors. The fees and expenses in this regard for which Movants seek reasonable reimbursement and payment are evidenced by the favorable rulings Movants received from this Court, as well as actions taken by the Minnesota Appellate Court.

Additionally, the filing fees and travel expenses were incurred in connection with the motions, appeals, and the November 2018 hearing in which Movants prevailed and preserved the Estate's assets, and/or the depletion of Estate assets, that would have resulted from full and permanent discharge of the Special Representative and Personal Representative.

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Alfred Jackson did not uniquely or individually benefit from the services provided by WWB and JSL for their review of file materials, including the Court filings, prior transactions, litigation related to the entertainment deals entered by the Estate, and the Michael Lythcott documents because it was through the above-stated due diligence that the potential Estate asset depletion was discovered. As noted by the Court, the Prince Estate is complex, and consequently demanded considerable effort from Movants to review documents and provide detailed analysis and determine not only the best course of action for the benefit of Mr. Jackson and his interests in the estate, but also to understand the interplay between the various service providers, disparate personal interests of the Heirs, and those hangers-on who seek to gain benefits via affiliation or business dealings with the Estate and/or the Heirs, which inevitably benefited the Estate as a whole. Only by understanding the "big picture" could any attorney provide reasonable counsel in this matter. The work reflected in the Movants' fee statements related to such review and due diligence was reasonable and necessary, and it benefitted the Estate as a whole.

For all the foregoing reasons, White Wiggins & Barnes, LLP and J. Selmer Law, P.A. respectfully request the Court authorize and direct the attorneys' fees and costs be paid from the Estate, and for a finding that the work performed significantly benefitted the Estate as a whole.

Date: April 22, 2019

Respectfully submitted,

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2016 WL 1619248
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

In re the ESTATE OF Edward D. KANE a/k/a Edward Donald Kane, Decedent.

No. A15–1033.
|
April 25, 2016.

Synopsis

Background: Probate proceedings were initiated, in which decedent's daughter filed petition for descent, alleging will was valid, to which sons objected and filed cross-petition, alleging portion of will devising real property to daughter failed. Following a bench trial, the District Court, Rice County, entered judgment in favor of sons and awarded them attorney fees and costs from estate. Daughter appealed.

Holdings: The Court of Appeals, Hooten, J., held that:

evidence was sufficient to demonstrate decedent's intent to devise entirety of real property to daughter, so as to remove ambiguity from will, and

trial court acted within its discretion in awarding sons attorney fees and costs.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal.

Rice County District Court, File No. 66–PR–13–2646.

Attorneys and Law Firms

John R. Neve, Evan H. Weiner, Neve Webb, PLLC, Edina, MN, for appellant.

Mary L. Hahn, Barbara K. Lundergan, Hvistendahl, Moersch, Dorsey & Hahn, P.A., Northfield, MN, for respondents.

Considered and decided by RODENBERG, Presiding Judge; HOOTEN, Judge; and KLAPHAKE, Judge. *

UNPUBLISHED OPINION

HOOTEN, Judge.

***1** In this probate appeal, appellant argues that the district court abused its discretion by determining that the extrinsic evidence offered at trial was insufficient to cure an ambiguity in decedent's will and by awarding respondents attorney fees and costs from decedent's estate. We conclude that the district court properly awarded attorney fees and costs to respondents. But, we also conclude that the district erred by determining that the credible and undisputed extrinsic evidence offered at trial was insufficient to determine decedent's intent and to cure the ambiguity in his will. Accordingly, we affirm in part, reverse in part, and remand.

FACTS

Edward D. Kane (decedent) died on May 24, 2010. He lived in Minnesota at the time he executed his will on June 22, 1989, and up until the time of his death. Decedent's wife, Gene Kane, died on October 22, 2011. The couple had three surviving children: appellant Jeane Kane, who is decedent's successor personal representative, and respondents Raymond Kane and James Kane. Throughout her parents' lives and up until the present, appellant has resided in Minnesota. Raymond left Minnesota in 1967, James left Minnesota in 1971, and they both presently live in Tennessee.

On October 22, 2013, appellant filed a petition for determination of descent, seeking a declaration that decedent died testate and that his June 22, 1989 will was valid and unrevoked. On November 15, 2013, respondents filed an objection and cross-petition for determination of descent. On April 8, 2014, respondents filed an objection and amended cross-petition.

Attached to her petition, appellant submitted a document that purported to be decedent's original will, which was dated June 22, 1989. Paragraph 2.2 of decedent's will stated: "I give and devise to my wife, Gene C. Kane a life estate in *my real property which is described in the attached [e]xhibit 'A',* with the remainder over to my daughter, [appellant], or her survivors per stirpes." (Emphasis added.) However, exhibit A was not attached to the will that was filed for probate. Decedent's will also provided that the residue of his estate would pass to Gene Kane. Gene Kane's will, which was prepared at the same time and by the same attorney who prepared decedent's will, provided that any property she owned at the time of her death would be divided equally among her three children.

In 1977, decedent inherited from his parents a 120–acre farm in Rice County. Decedent's family had owned the farm since 1892. At the time decedent's will was drafted in 1989, this was the only real property that he owned, and he owned it as one parcel. In 1998, he sold a 4.1–acre parcel of the farm on which the house, barn, and outbuildings were situated. The remaining 115.9 acres of farmland were rented out. At the time of his death on May 24, 2010, decedent owned 115.9 acres of farmland. The farmland was titled in decedent's name alone. This was the only real property that decedent owned at the time of his death, and he owned it as one parcel.

***2** In her petition, appellant argued that, pursuant to paragraph 2.2 of decedent's will, she "now possesses the remainder interest in the [farmland]." In their objection and amended cross-petition, respondents countered that paragraph 2.2 of the will failed because the will lacked exhibit A, the farmland passed to Gene Kane through the residuary clause of decedent's will, and the farmland now passes to all three children equally under Gene Kane's will. Based on these grounds, respondents moved for summary judgment. Appellant filed a memorandum in opposition, arguing that because there was no exhibit A, paragraph 2.2 of the will was ambiguous and extrinsic evidence should be allowed to determine decedent's intent. Appellant also argued that decedent intended through paragraph 2.2 to devise all of his real property to her, while respondents argued that decedent intended to devise less than all of his real property to her.

On June 17, 2014, the district court denied respondents' motion for summary judgment, concluding that the phrase, "my real property," in paragraph 2.2 of the will was ambiguous as to whether decedent intended to devise all of his real property, or only a portion of it, to Gene Kane in a life estate and subsequently to appellant in fee. The district court determined that there was a genuine issue of material fact as to "whether [e]xhibit A was ever prepared and what it might have stated if it was."

A two-day bench trial was held in October 2014. The main issue at trial was the interpretation of paragraph 2.2 of the will based on extrinsic evidence. The district court heard testimony from appellant, respondents, the parties' first cousin, [1] and James Keating, the attorney who prepared the wills for decedent and Gene Kane. The only witness who had firsthand knowledge of the circumstances surrounding the drafting of decedent's will was Keating. Keating had originally retained a copy of decedent's will, but destroyed all of his files when he retired.

Keating testified that he believed he had two meetings with decedent and Gene Kane regarding their wills. He testified that, at the first meeting, decedent stated that his plan for distribution was a life estate in "all of his real property" to Gene Kane, with the remainder to be left to appellant, "to

the exclusion of [respondents]." The district court found that Keating's testimony regarding the first meeting was credible. The district court also found "Keating's testimony regarding [decedent's] wishes to be credible."

Keating also testified that if decedent had told him that he wanted to bequeath only a portion of his real property to appellant, Keating would have used different language in paragraph 2.2, to wit: "in *that portion of* my real property." (Emphasis added.) Keating testified that rather than including a legal description of real property in the body of a will, he would typically attach it to the will as an exhibit. He believed that exhibit A was originally attached to the will. But, Keating did not specifically remember if decedent had provided a photocopy of a legal description of the real property that was attached as exhibit A or if his office had actually prepared an exhibit A. Moreover, Keating did not specifically remember reviewing a legal abstract for the real property. The district court found that Keating's testimony was credible as to his typical practice, "but was not specific to [decedent's will]."

***3** The district court concluded that the extrinsic evidence admitted at trial did not cure the ambiguity in paragraph 2.2 of the will because the lack of exhibit A was a "material omission," and the district court therefore concluded that paragraph 2.2 failed. Because the specific devise in paragraph 2.2 failed, the district court determined that decedent's real property passed by way of the residue clause of his will to Gene Kane and thereafter equally to their three children, as tenants in common, through Gene Kane's will. In addition, the district court awarded to respondents farm rents from 2011 to 2014, which amounted to a $60,463.33 judgment against appellant personally.

Respondents moved for attorney fees and costs from decedent's estate pursuant to Minn.Stat. § 524.3–720 (2014). The district court granted the motion and awarded attorney fees and costs to respondents in the amount of $50,869.67. This appeal followed.

DECISION

I.

Appellant argues that the district court abused its discretion by concluding that the extrinsic evidence offered at trial was insufficient to cure the ambiguity in decedent's will. "The primary purpose of construing a will is to discern the testator's intent." *In re Estate & Trust of Anderson,* 654 N.W.2d 682, 687 (Minn.App.2002), *review denied* (Minn. Feb. 26, 2003); *see also* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."). "[W]e determine the testator's intent from a full and complete consideration of the entire will." *In re Estate of Lund,* 633 N.W.2d 571, 574 (Minn.App.2001); *see In re Trust of Shields,* 552 N.W.2d 581, 582 (Minn.App.1996) ("In construing a will, the cardinal rule is that the testator's intention is to be gathered from the language of the will itself." (quotation omitted)), *review denied* (Minn. Oct. 29, 1996).

"Whether a will is ambiguous is a question of law that this court reviews de novo." *Shields,* 552 N.W.2d at 582. A will is ambiguous if the language of the will on its face suggests more than one interpretation or if the surrounding circumstances reveal more than one interpretation even though the language is clear on its face. *In re Estate of Arend,* 373 N.W.2d 338, 342 (Minn.App.1985); *see also* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 11.1 ("An ambiguity in a donative document is an uncertainty in meaning that is revealed by the text or by extrinsic evidence other than direct evidence of intention contradicting the plain meaning of the text."). If there is no ambiguity, extrinsic evidence is not admissible. *In re Trusts of Hartman,* 347 N.W.2d 480, 483 (Minn.1984). However, if ambiguity

"exist[s] in the will[,] extrinsic evidence may be admitted to resolve the ambiguity." *Arend,* 373 N.W.2d at 342; *see also* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 11.2 cmt. b ("Because the primary objective of construction is to give effect to the donor's intention, extrinsic evidence relevant to the donor's intention may be considered along with the text of the document in seeking to determine the donor's intention.").

***4** The district court correctly concluded that paragraph 2.2 of the will is ambiguous on its face because it refers to real property as described in exhibit A, but exhibit A is not attached. There is no ambiguity as to whom decedent intended his real property to pass, because the devise refers only to Gene Kane and appellant. But, it is unclear from the language of the will what real property decedent intended to devise to appellant because a description of the real property was not attached to the will as exhibit A at the time that the will was filed for probate.

Whether the district court erred by concluding that the extrinsic evidence offered at trial was insufficient to determine decedent's intent and to cure the ambiguity in decedent's will presents a mixed question of law and fact.

> In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous. However, we are not bound by and need not give deference to the district court's decision on a purely legal issue. When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Porch v. Gen. Motors Acceptance Corp., 642 N.W.2d 473, 477 (Minn.App.2002) (quotation and citations omitted), *review denied* (Minn. June 26, 2002). "A district court abuses its discretion by resolving the matter in a manner that is against logic and the facts on record." *Beardsley v. Garcia,* 731 N.W.2d 843, 848 (Minn.App.2007) (quotation omitted), *aff'd,* 753 N.W.2d 735 (Minn.2008). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press,* 589 N.W.2d 96, 101 (Minn.1999) (quotation omitted). We defer to the district court's credibility determinations. *Vangsness v. Vangsness,* 607 N.W.2d 468, 472 (Minn.App.2000).

The district court determined that Keating's testimony regarding decedent's donative intent was credible. Keating unequivocally testified that decedent intended through paragraph 2.2 of the will to devise the entirety of his farmland to appellant, subject to the life estate of Gene Kane, and to the exclusion of respondents. Respondents presented no evidence to dispute this testimony. Keating also testified that, consistent with his standard practice in drafting wills, if decedent had intended to devise only a portion of his farmland to appellant, Keating would have drafted paragraph 2 .2 to read: "I give and devise to my wife, Gene Kane, a life estate in *that portion of* my property described [in][e]xhibit A." (Emphasis added.) Keating added that the term "my real property" in paragraph 2.2 "means all of [decedent's] property, all of his real property."

***5** The district court determined that Keating's testimony "was credible and detailed as to his regular practice" of preparing wills. Keating testified that it was his practice to have two meetings with his clients. At the first meeting, he would

discuss with the client what the client wanted the will to say. If Keating was preparing a will that required a legal description of real property to be attached, his practice was to have the client bring the legal description into his office after the first meeting. Keating explained that the legal description would be an abstract or some other document that described the real property. Rather than retyping the legal description into the body of the will, he would attach it to the will as an exhibit so that no mistakes would be made in retyping the description. After the first meeting, Keating would prepare the will in conformity with the client's intent and would then mail it to the client for review. At the second meeting, Keating would discuss the will with the client, verify that the will was correctly drafted, and correct any errors. Then the client and witnesses would sign the will.

The district court also determined that Keating's testimony about his first meeting with decedent and Gene Kane was credible. Regarding this first meeting, Keating testified that (1) decedent's "plan was to transfer a life estate to his wife in his farmland, and the remainder of that property was to go to [appellant] to the exclusion of [respondents]," and (2) decedent did not tell Keating that he wanted to devise only "part" of his farmland to appellant. It is undisputed that decedent owned only one parcel of real property at the time he executed his will in 1989 and at the time he died in 2010: the farmland.

Based upon this direct extrinsic evidence of decedent's intent, which the district court explicitly found was credible, along with the absence of any contrary evidence, we conclude as a matter of law that, on this record, appellant proved by a preponderance of the evidence that decedent intended through paragraph 2.2 of his will to devise the entirety of his real property to appellant. *See* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 11.2 cmt. o ("Once the donor's intention is established by a preponderance of the evidence, the [will] is construed in accordance with that intention."); *see also Rixmann v. City of Prior Lake,* 723 N.W.2d 493, 495 (Minn.App.2006) ("In civil actions, the standard of proof required is generally a fair preponderance of the evidence."), *review denied* (Minn. Jan. 24, 2007); *cf.* Minn.Stat. § 524.3–407 (2014) (providing that in contested cases, "[p]roponents of a will have the burden of establishing prima facie proof of due execution"). This conclusion is consistent not only with the credible extrinsic evidence produced at trial, but also with the language of the will itself. *See In re Estate of Cole,* 621 N.W.2d 816, 819 (Minn.App.2001) ("Extrinsic evidence is to be used to determine what the testator meant by the words used, not to determine an intent that cannot be found in the words employed in the instrument.").

***6** Notwithstanding this clear, credible, and undisputed evidence of decedent's intent and of Keating's standard practices in drafting wills, the district court concluded that the extrinsic evidence admitted at trial did not clarify whether decedent intended to devise all of his real property, or only a portion of it, to Gene Kane in a life estate and subsequently to appellant. The district court based this conclusion on the fact that Keating did not specifically remember (1) preparing exhibit A to decedent's will; (2) what *type* of description (a legal abstract or some other description) of decedent's property exhibit A would have contained; or (3) indeed, whether exhibit A was ever actually attached to the will. The district court concluded that the missing exhibit A was a "material omission" in the will and therefore that paragraph 2.2 failed.

But, in light of the clear, credible, and undisputed evidence of decedent's intent, Keating's usual practices in preparing wills, and the fact that decedent owned only one parcel of land, we conclude that the district court erred by determining that the missing exhibit A was a "material omission." *See* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 11.2 cmt. o. Although Keating did not specifically remember the contents of the legal description in exhibit A, or whether he actually attached exhibit A to the will, he was adamant that he "prepared the will consistent[ly] with [decedent's] wishes." There is no evidence in the record to raise any

reasonable inference that Keating's preparation of decedent's will, including his preparation of exhibit A, departed from his usual practices. *See* Minn. R. Evid. 406 ("Evidence of the habit of a person ... is relevant to prove that the conduct of the person ... on a particular occasion was in conformity with the habit...."). And, Keating unequivocally testified that at the first meeting, decedent stated that his intent was to devise *all* of his farmland to appellant, who lived in Minnesota, and to exclude respondents, who lived in Tennessee. By dropping paragraph 2.2 from the will, the district court abused its discretion because its conclusion that the extrinsic evidence offered at trial was insufficient to determine decedent's intent and to cure the ambiguity in his will "is against logic and the facts on record." *Beardsley,* 731 N.W.2d at 848. Moreover, by not effectuating decedent's intent, the district court undermined "[t]he primary purpose of construing a will." *Anderson,* 654 N.W.2d at 687.

Respondents argue that the district court did not abuse its discretion, relying on *In re Trust of Cosgrave,* in which the Minnesota Supreme Court stated: "In construing a will, the cardinal rule is that the testator's intention is to be gathered from the language of the will itself. Conversely, intention which the testator may have had, but did not express in his will, cannot be considered." 225 Minn. 443, 448—49, 31 N.W.2d 20, 25 (1948) (citations omitted). *Cosgrave* is inapposite, however, because that case did not involve ambiguous language in a will. *See id.* at 449—51, 31 N.W.2d at 25—26. Rather, in *Cosgrave,* the Minnesota Supreme Court interpreted language in a will that was "plain" and "clear beyond doubt." *See id.* Here, unlike in *Cosgrave,* there was an exhibit missing from the will, which created an ambiguity as to the real property that decedent devised, and this ambiguity was resolved by the credible and undisputed extrinsic evidence of decedent's intent that was produced at trial.

***7** We reverse the district court's decision as to the distribution of decedent's real property and remand for the district court to award appellant the real property in its entirety. Because respondents are not entitled to farm rents from 2011 to 2014, we also reverse the district court's award of farm rents to respondents.

II.

Appellant next argues that the district court abused its discretion by awarding respondents attorney fees and costs from decedent's estate. We review a district court's order regarding attorney fees for an abuse of discretion. *In re Estate of Torgersen,* 711 N.W.2d 545, 550 (Minn.App.2006), *review denied* (Minn. June 20, 2006). We will not set aside the district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01.

Under Minnesota law, attorney fees and expenses may be paid from the estate under certain circumstances. Minn.Stat. § 524.3–720. In pertinent part, the statute reads:

> [W]hen, and to the extent that, the services of an attorney for any interested person contribute to the benefit of the estate, as such, as distinguished from the personal benefit of such person, such attorney shall be paid such compensation from the estate as the court shall deem just and reasonable and commensurate with the benefit to the estate from the recovery so made or from such services.

Id.

Appellant argues that "[r]espondents have done nothing to benefit the estate. Instead, their work

at the [d]istrict [c]ourt benefited solely themselves." Respondents counter that they benefitted the estate because they "facilitated the district court's construction of an ambiguous instrument."

In *Torgersen,* we stated that the public policy underlying section 524.3–720 "recognize[s] that an estate as an entity is benefited when genuine controversies as to the validity or construction of a will are litigated and finally determined." 711 N.W.2d at 555 (quotation omitted). And, in *Gellert v. Eginton,* we stated that " 'a fiduciary acting on behalf of the estate, in good faith, [should be able to] pursue appropriate legal proceedings without having to risk personal financial loss by underwriting the proceeding's expenses.' " 770 N.W.2d 190, 197 (Minn.App.2009) (quoting *Torgersen,* 711 N.W.2d at 555), *review denied* (Minn. Oct. 20, 2009). We rejected the argument that, in order to contribute to the benefit of the estate, interested persons must not themselves benefit from the proceedings. *Id.* at 197–98.

The district court implicitly found that respondents pursued their claim for the benefit of the estate and that the amount awarded was "just and reasonable and commensurate with the benefit to the estate." *See* Minn.Stat. § 524.3–720. These findings are not clearly erroneous because a trial was necessary to determine decedent's intent in paragraph 2.2 of the will. We conclude that the district court did not abuse its discretion by awarding respondents attorney fees and costs from the estate because a "genuine controvers[y] as to the validity or construction of [the] will [was] litigated and finally determined." *Torgersen,* 711 N.W.2d at 555.

***8 Affirmed in part, reversed in part, and remanded.**

All Citations

Not Reported in N.W.2d, 2016 WL 1619248

Footnotes

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

1 The parties' first cousin testified in support of respondents' contention that decedent revoked the devise in paragraph 2.2 of his will near the end of his life. But, the district court concluded that respondents did not prove by a preponderance of the evidence that decedent revoked the devise. Respondents do not challenge this conclusion.