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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0500**

In re: Estate of John G. Sauers,
also known as John Gustav Sauers,
Deceased.

**Filed March 3, 2009
Affirmed
Connolly, Judge**

Hennepin County District Court
File No. 27-PA-PR-07-913

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National Association in its capacity as Personal Representative of the Estate of John G.
Sauers)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this appeal from an order probating a will, appellants assert that because there
were modifications to the type-written will that may have been made after the will was
executed, the district court erred in finding the will valid and not revoked. The district

court's finding that the modifications were present at the time that the will was executed is not clearly erroneous, and, accordingly, we affirm.

FACTS

John G. Sauers died on October 18, 2006. On October 19, Sauers's grandson located a will and trust documents in Sauers's briefcase at his Pebblebrook home. The seven-page pour-over will was signed by Sauers on each page, but the signature on pages three, six, and seven appears to be photocopied, although a notary signature on page seven may be original. Sometime later, a second version of the will was located by the son of Mary Jane Bursell, Sauers's longtime companion with whom he shared his home. The signature on each page except page seven and possibly page five appears to be photocopied.

Combining the two versions of the will, there is an original signature on each page except for pages three and six. Page three contains substantive terms providing for the estate to pour over into the trust. Page six contains the signatures of the witnesses to the will. The witnesses' signatures appear again on page seven following the statutory acknowledgement for a self-proved will. Sauers's original signature appears at the conclusion of substantive terms on page five and following the statutory acknowledgement on page seven. No other wills were located by Bursell or Sauers's family.

The two versions of the will are textually identical, and in both there are portions of the text that appear to have been whited-out and typed over. There are also gaps in the text, presumably where lengthier terms were replaced by briefer terms. No witness was

able to testify whether these modifications to the text were made before or after the will was signed and witnessed.

Citing the absence of original signatures and the modification to the will's text, U.S. Bank, as personal representative for Sauers's estate, brought a motion before the district court to determine the validity of the will. At a hearing on that motion, Bursell testified that Sauers had asked to see a copy of her attorney-prepared will and trust documents, and that she believed he had copied her documents for his own use. However, Bursell did not actually witness Sauers copying the will and trust documents and could not be certain that he had done so. Sauers's grandson testified that he did not know whether the will and trust represented Sauers's intent, but that he was troubled by the fact that the trust corpus was ultimately to be distributed to Sauers's great-grandchildren, rather than his grandchildren, of whom Sauers was very fond.

The district court concluded that the will was valid and ordered it probated. Sauers's granddaughters appeal, arguing that the district court erred by (1) finding that textual modifications to the will were made before the will was executed and (2) failing to find that the manner in which the will was found evidenced Sauers's intent to revoke the will.

DECISION

On appeal from a trial court order probating a will, "findings of fact will be disturbed only if clearly erroneous." *In re Estate of Torgerson*, 711 N.W.2d 545, 550 (Minn. App. 2006). *See* Minn. R. Civ. P. 52.01. "A finding is clearly erroneous if this

court is left with the definite and firm conviction that a mistake has been committed.”

Estate of Torgerson, 711 N.W.2d at 550 (quotation omitted).

The burdens of proof relevant to this case are provided by statute:

Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.

Minn. Stat. § 524.3-407 (2008).

The statutes also address the requirements for proper execution. *See* Minn. Stat. § 524.2-502 (2008). To be properly executed, a will must be in writing and signed by the testator and signed by two witnesses. *Id.* “Pursuant to Minn. Stat. § 524.2-504, a will becomes a self-proved will by the inclusion in the will of paragraphs signed by the testator and witnesses and properly notarized.” *In re Estate of Zeno*, 672 N.W.2d 574, 576-77 (Minn. App. 2003). “If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal . . . unless there is proof of fraud or forgery affecting the acknowledgement or affidavit.” *Id.* at 577 (citations omitted).

Appellants do not dispute that Sauers’s will was properly executed and self-proved, but argue that it is nevertheless unenforceable because it cannot be proven whether what they characterize as erasures and interlineations were included in the executed version of the will. Appellants assert that modifications to a will must be

witnessed in the same manner required for execution in the first instance, citing *In re Estate of Penniman*, 20 Minn. 245 (1874).¹ But appellants also concede that, if the changes to the will were made before the will was signed and witnessed, then it was properly executed.

The district court found that the erasures and interlineations were present at the time that the will was signed, finding that the will was “the product of cutting and pasting, copying and typing” and although it was “certainly poorly done” . . . “the evidence supports the conclusion that the decedent did it himself in an effort to save money.” The court acknowledged that Bursell did not actually see Sauers working on the will, but found that “she did see him typing away at his desk on various matters and there is no reason to believe that the document submitted as the will was the product of anyone else.” The court also acknowledged the photocopied signatures and modifications to the text, and found that

[I]t appears that the decedent made these changes to a copy of the will of Ms. Bursell. The result was inelegant and raised questions but appears in fact to be the product of the decedent’s amateur effort. What petitioner refers to as missing pages are pages where the decedent changed some of the wording. Similarly his cutting, copying, and pasting, and the consequent spacing issues are the product of his own efforts.

. . . the will may contain pages that are copies but those pages are part of the will that the decedent and witnesses signed.

¹ Appellants also assert that they are entitled to a presumption that any changes were made after execution, but they cite no Minnesota caselaw for this proposition and the annotation that they do cite evidences various positions of other jurisdictions on this point. See W.W. Allen, *Interlineations and Changes Appearing on Face of Will*, 34 A.L.R.2d 619, § 7 (1954).

There is no reason to believe, and no evidence to show, that the decedent made changes after he executed the will.

The district court also relied on the fact that the will poured over into a trust that was found with the will.

We agree that the manner in which Sauers drafted his will is not to be recommended. The cut-and-paste approach that he employed opened the door to confusion and costly probate proceedings. Certainly there may be circumstances in which such a will would not pass the test for validity. But the primary objective of the district courts in probate proceedings must be to effectuate the intent of the testator, if possible. *See, e.g., In re Estate of Kerr*, 520 N.W.2d 512, 514 (Minn. App. 1994) (“[t]he principle purpose of construing a will is to ascertain the testator’s intent at the time of execution.”). Moreover, “[i]f the language of [a] will [is] reasonably susceptible to two constructions, one of which would invalidate the will and the other sustain it, the latter construction must be adopted.” *Rong v. Haller*, 109 Minn. 191, 198, 123 N.W. 471, 472 (1909)(citations omitted).

Here, the district court found that the modifications to the will existed at the time that Sauers executed the will, and that finding is not clearly erroneous. As the district court noted, the modifications to the will in this case are not erasures or interlineations in the typical sense. Rather, they are consistent with Bursell’s belief (and the district court’s finding) that Sauers modified a copy of Bursell’s will. For instance, it is apparent in certain places that the pronoun “her” has been changed to “his.” The will also references a “testatrix” rather than a “testator,” which is consistent with the will being

copied from one written for a woman. In fact, the bulk of the modifications appear to insert Sauers's name or an appropriate pronoun. Thus, the nature of the modifications is consistent with the district court's finding that Sauers made the changes before he signed the will. Furthermore, no other version of the will has been discovered.

We also agree that the contemporaneously located trust, which was drafted in the same fashion as the will, supports the conclusion that the will reflected Sauers's testamentary intent. Notably in this regard, Sauers's only living son testified by affidavit that Sauers's only "comments to [his son] about his estate plan were that he had established a trust and that [his son] would be taken care of."

We do not find persuasive appellants' assertion that the evidence not only supports but actually compels a finding contrary to that made by the district court. First, appellants assert that the manner in which the will was found—in two separate locations with mixed originals—"shows that at some point [d]ecedent must have removed the original document he signed in order to do something with it because he put it back in two different places and apparently got the pages mixed up." Second, they rely on Bursell's testimony that Sauers often sat at his typewriter and typed. These facts reveal no more than Sauers's opportunity to change his will after the date of execution. They do not compel a finding that such changes were actually made.

Appellants also assert that the district court erred by probating the will when no originals of pages three and six were found. However, as the district court noted, a will need not be signed in a particular place in order to be valid. *See In re Estate of Cravens*, 177 Minn. 437, 440, 225 N.W. 398, 399 (1929) (holding that signature of testator may

appear anywhere on will). Since Sauers was not required to sign his will on each page, it follows that there need not be *original* signatures on each page in order for the will to be valid.

In the alternative to their execution arguments, appellants assert that the evidence compels a finding that the will was revoked. Revocation occurs when a testator performs a “revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will.” Minn. Stat. § 524.2-507(a)(2) (2008). Revocatory acts include “burning, tearing, cancelling, obliterating, or destroying the will or any part of it.” *Id.*

Appellants assert that separation and loss of so-called original pages in this case compels a finding that the will was revoked, citing *In re Estate of Botko*, 541 N.W.2d 616, 618 (Minn. App. 1996) (holding that “the absence of [an] original [will] is entitled to some evidentiary weight in determining revocation”). Appellants assert that *Botko* creates a presumption of revocation when an original will could not be located and there was no evidence that the original was maintained by someone other than the testator. We disagree. *Botko* recognizes the common-law presumption that a lost will has been revoked. 541 N.W.2d at 618. And it holds that in the absence of an original will, “the law *permits an inference*” of revocation. *Id.* at 619 (emphasis added). But it does not create a presumption of revocation. Moreover, this case is distinguishable from *Botko* because here, unlike in *Botko*, the district court found that the photocopied pages were included in the will that Sauers and his witnesses signed. In other words, the court determined that the photocopies were part of the original document. Accordingly, we

conclude that this evidence did not compel a finding of revocation and that the district court did not clearly err in failing to make such a finding.

Affirmed.