**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-76**

In re the Estate of:
Mildred Ordine Harwick, Deceased,
by Sandra K. Harwick, Personal Representative,
Respondent,

vs.

Kenneth Harwick,
Appellant,

vs.

Rita Harwick, et al.,
Respondents.

**Filed August 31, 2010**
**Affirmed**
**Johnson, Judge**

Lac Qui Parle County District Court
File Nos. 37-PR-06-243, 37-CV-06-366

Gregory R. Anderson, Anderson, Larson, Hanson & Saunders, P.L.L.P., Willmar, Minnesota (for respondents)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

**JOHNSON**, Judge

Kenneth Harwick appeals from a district court judgment probating the will of his stepmother, Mildred Harwick, and resolving his action against Mildred's estate and his two siblings, Rita Harwick and Sandra Harwick. Kenneth argues that the district court erred by (1) rejecting his claim that he is entitled to an interest in real property owned by Mildred, or damages in lieu of an interest, based on an oral agreement or promise; (2) failing to make a proper accounting and distribution of personal property of the estate; and (3) failing to credit him in the final accounting for certain personal property that was not awarded to him. We affirm.

## FACTS

Mildred Harwick died on August 22, 2005, at the age of 83. She was preceded in death by her husband, Harlien Harwick. Mildred and Harlien were married in 1966, at which time Harlien had three children -- Kenneth, Rita, and Sandra -- from his prior marriage to Hilda Harwick, who died in 1959. The primary issue in this appeal concerns six parcels of farm land that were owned by Harlien prior to his death.

Harlien died intestate on May 9, 1998. During the settlement of Harlien's estate, Mildred anticipated receiving an interest in Harlien's farm land. In July 2000, Mildred, Kenneth, Sandra, and Rita stipulated to a division of Harlien's property, and the stipulation was adopted by the district court in that probate action. Pursuant to the stipulation, Mildred received, among other things, parcels 1, 2, 3, and 6, which total 280 acres; Kenneth, Rita, and Sandra received roughly equal divided portions of parcels 4 and

5, which total 272 acres. The stipulation also settled issues regarding the distribution of Harlien's personal property, including livestock, grain, motor vehicles, tools, and machinery.

After Mildred's death, Kenneth sought to establish that he owns one-third of the farm land that Mildred received by the stipulation that settled Harlien's estate. But it was revealed to him that, in November 1999, Mildred had executed a quit-claim deed conveying her interest in parcels 1, 2, 3, and 6 to Sandra and Rita, subject to a life estate in herself. Although the deed was executed before Harlien's estate was settled, it was not recorded until January 2001, after Harlien's estate was settled.

In the action probating Mildred's will, Kenneth asserted claims against the estate for a one-third interest in parcels 1, 2, 3, and 6, and he also commenced a separate action against Rita and Sandra. Kenneth alleged that he, Mildred, Rita, and Sandra had orally agreed that he would own one-third of Mildred's interest in real property. The district court consolidated the actions and conducted a two-day bench trial in November 2007. The district court conducted additional hearings in August 2008, November 2008, and December 2009. The district court issued an order in August 2008 and an amended order in December 2009. The district court rejected Kenneth's claims, finding, among other things, that there was no oral agreement or promise that Mildred's interest in farm land would be conveyed to Kenneth after Mildred's death. Kenneth appeals.

## D E C I S I O N

### I.

Kenneth's primary argument on appeal is that the district court erred by rejecting his claims concerning his alleged interest in the farm land Mildred received from Harlien's estate. Kenneth contends that Mildred, Rita, and Sandra orally agreed that he would receive one-third of Mildred's interest in the farm land after Mildred's death. An agreement to convey an interest in land, however, must be in writing to satisfy the statute of frauds. Minn. Stat. § 513.04 (2008); *In re Guardianship of Huesman*, 354 N.W.2d 860, 862-63 (Minn. App. 1984). It is undisputed that the alleged agreement was not in writing. Thus, any agreement to convey an interest in land in this case would be void under the statute of frauds. For that reason, Kenneth asserts three other theories of relief.

First, Kenneth contends that he is entitled to relief based on the theory of part performance. Kenneth relies on the principle that "[a]n agreement may be taken out of the statute of frauds . . . by part performance." *See Berg v. Carlstrom*, 347 N.W.2d 809, 812 (Minn. 1984). If a party relies on part performance of an oral contract to convey land to avoid the statute of frauds, "he must enter into possession of the land under and in reliance upon the contract, and make valuable improvements thereon." *Snow v. Snow*, 98 Minn. 348, 351, 108 N.W. 295, 296 (1906). The district court found, however, that "Kenneth did not enter into possession of the land other than as a tenant, and he made no valuable improvements thereon." Kenneth has not made any specific arguments that the district court's findings are clearly erroneous. Thus, the district court did not err by rejecting Kenneth's claim based on the theory of part performance.

Second, Kenneth contends that he is entitled to an award of damages on the theory of promissory estoppel. The law is unsettled as to whether a claim of promissory estoppel is viable if a defendant relies on the statute of frauds as a defense. Under one possible interpretation of the law in Minnesota, "promissory estoppel will defeat the statute of frauds only when the promise relied upon is a promise to reduce the contract to writing." *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 283, 230 N.W.2d 588, 593-94 (1975); *see also Lunning v. Land O'Lakes*, 303 N.W.2d 452, 459 (Minn. 1980). Under another possible interpretation, promissory estoppel will defeat the statute of frauds only if "the detrimental reliance is of such a character and magnitude that refusal to enforce the contract would permit one party to perpetuate a fraud." *Del Hayes & Sons*, 304 Minn. at 284, 230 N.W.2d at 594. In his brief, Kenneth urges us to apply the latter approach. At oral argument, he conceded that his promissory estoppel claim would fail under the former approach.

It is unnecessary for us to determine which of the two possible interpretations of the law is correct because Kenneth's promissory estoppel claim fails under either approach. To establish a promissory estoppel claim, a plaintiff must prove "1) a clear and definite promise was made, 2) the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and 3) the promise must be enforced to prevent injustice." *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000). The district court found that there was no clear and definite promise to convey land to Kenneth upon Mildred's death. The district court noted that Sandra and Rita denied such an agreement, that the only evidence supporting Kenneth's claim was

his own testimony, and that "the relative credibility of all parties" supported its conclusion that no such promise was made. This court must defer to the district court's credibility determinations. *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)).

Kenneth further contends that the district court erred by disregarding the testimony of a paralegal involved in settling Harlien's estate, who indicated that Mildred intended to convey land to Kenneth. But the witness did not testify that Mildred actually made a promise to, or an agreement with, Kenneth concerning the land. *See In re Estate of Trobaugh*, 380 N.W.2d 152, 155 (Minn. App. 1986) (affirming district court findings concerning document that "merely stated that decedent intended to leave her house to appellants" but "made no reference . . . to any contract or agreement concerning the house"). In addition, the attorney involved in settling Harlien's estate testified that he was not aware of any oral agreement concerning a transfer of land to Kenneth. Thus, the district court did not err by rejecting Kenneth's claim of promissory estoppel.

Third, Kenneth argues that the district court erred by not ordering an equitable remedy. He cites *Brecht v. Schramm*, 266 N.W.2d 514 (Minn. 1978), in support of his argument that, if there is a "manifest injustice . . . where a testator cuts out a beneficiary by accident or oversight," a district court should "make it up to that party by other means." Kenneth never presented this argument to the district court. Thus, the argument has been forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

## II.

Kenneth also argues that the district court erred by failing to perform a proper accounting and distribution of personal property in the estate.

In construing a will, a district court may "make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it." Minn. Stat. § 524.1-302(b) (2008). The assets of an estate "shall be distributed in kind to the extent possible," and in cases where there is an objection to the proposed distribution or it would be impracticable to distribute in kind, "residuary property may be converted into cash for distribution." Minn. Stat. § 524.3-906(a), (a)(4) (2008).

In this case, the district court directed the parties to compile a list of all disputed items of tangible personal property, with their estimated values. The parties were allowed to claim some items at the established values. Other items were sold at an auction overseen by the sheriff, and the district court accounted for the proceeds of that auction. The district court found that some items were not part of the estate because Harlien or Mildred had transferred ownership of them during their lifetimes. The parties were unable to resolve their competing claims over many items, which required the district court to make a series of rulings in which it awarded those items to one party or another.

Kenneth contends that the district court failed to include certain items of personal property in the estate, most notably some toy tractors. Kenneth acknowledges Sandra's testimony that she purchased the toy tractors from Harlien for $6,000 in 1997, but he

contends that the $6,000 payment was for another purpose. The district court resolved the conflicting evidence by finding that Sandra's payment to Harlien was for the purchase of the toy tractors and other personal property. This finding is not clearly erroneous.

Otherwise, Kenneth contends only in general terms that the district court's distribution of personal property was unfair and inequitable and that the district court failed to account for all items of personal property. Our review of the district court record indicates that the district court patiently and thoroughly considered and ruled on numerous arguments and counterarguments concerning many disputed items of personal property. Kenneth's challenge to the district court's order is lacking in specifics. He does not describe with precision how the district court erred, and he does not identify a particular remedy that would correct the asserted error. Thus, Kenneth has failed to convince us that the district court erred in its distribution of personal property.

**III.**

Kenneth also argues that the district court erred in its December 2009 amended order when it amended its August 2008 order by deleting several items from the list of personal property to be awarded to Kenneth without giving him credit for their total value of $17,735. The record, however, shows that the district court adjusted the final accounting by giving Kenneth the credit he claims not to have received. The district court's August 2008 order stated that Kenneth owed the estate $68,652, but the district court's December 2009 amended order states that Kenneth owes the estate $50,917, which is $17,735 less than the earlier debt. Thus, the district court did not err in its

December 2009 amended order when it removed items from the list of personal property to be awarded to Kenneth.

**Affirmed.**