COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2637-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF GEORGE MILAS, DECEASED,
VANESSA HENNINGFELD,

APPELLANT,

V.

JUDITH FISCHER AND RAYMOND MILAS,

RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Reversed and cause remanded for further proceedings.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Vanessa Henningfeld appeals from a judgment granting the objection of Judith Fischer and Raymond Milas (objectors) to the probate of the 1993 Will of George Milas (decedent). The issue is whether the

decedent died intestate because in the 1993 Will he revoked his 1988 Will. Because the trial court correctly concluded that the 1993 Will was procured by undue influence and was thus invalid, we conclude that it also was invalid to revoke the 1988 Will. Therefore, we reverse the trial court's judgment, in which it concluded that decedent's estate should be distributed as if he had died intestate, and we remand for further proceedings.[1]

Decedent disinherited his children (the objectors) and bequeathed his estate to Henningfeld in his 1988 and 1993 Wills. Decedent also purported to revoke his 1988 Will: (1) in his 1993 Will; and (2) by marking an "X" through a copy of his 1988 Will. The trial court concluded that: (1) the 1993 Will was the product of Henningfeld's undue influence; and (2) the decedent intended to revoke his 1988 Will. Although decedent intended to revoke his 1988 Will, the trial court recognized that he did not validly do so because: (1) the 1993 Will was the product of Henningfeld's undue influence; and (2) he defaced a copy of his 1988 Will, rather than the original. *See* ***Wehr v. Wehr***, 247 Wis. 98, 110-11, 18 N.W.2d 709, 715 (1945) (there is no authority that destruction of a conformed copy of a will is effective to accomplish a revocation). However, the trial court reasoned that because decedent clearly intended to revoke his 1988 Will, his estate should be distributed as if he had died intestate.

Henningfeld does not challenge the trial court's conclusion that the 1993 Will was procured by undue influence, but instead challenges the conclusion that decedent died intestate. She contends that the 1993 Will cannot be invalid for its disposition, yet valid to revoke the 1988 Will. We agree because a will which

[1] This is an expedited appeal under RULE 809.17, STATS.

has been held invalid for one purpose must be held invalid for all purposes. *See* ***Yahn v. Barant***, 258 Wis. 280, 283, 45 N.W.2d 702, 704 (1951) (the undue influence which invalidates a will pervades the entire will including its revocatory clause).

Objectors contend that Henningfeld was estopped from offering the 1988 Will for admission to probate because: (1) it was procured by the same undue influence as the 1993 Will; (2) it could have been litigated in the prior proceeding;[2] and (3) it was not filed within thirty days of decedent's death as required by § 856.05, STATS. We disagree because: (1) the objectors must prove, by clear, satisfactory and convincing evidence, that decedent was unduly influenced at the time the contested will was executed; (2) none of the parties sought adjudication of the 1988 Will; and (3) § 856.05 does not require the filing of a prior will within thirty days when the later will, which has been offered for probate, purportedly revokes that prior will.[3]

Although the trial court's findings that decedent intended to revoke the 1988 Will are not clearly erroneous, equity cannot supersede ***Yahn*** and ***Wehr*** which preclude the trial court's ultimate conclusion. Our holding does not decide the validity of the 1988 Will; it merely authorizes the adjudication of the validity

[2] *See* ***Schmalz v. McKenna***, 58 Wis.2d 220, 226, 206 N.W.2d 141, 144 (1973) (concluding that a prior probate proceeding which was held to determine the validity of the will which had been filed in probate did not estop later litigation of whether equity should impose a constructive trust over certain property of the decedent).

[3] The supreme court rejected respondents' contention that estoppel by record precluded appellants' claim in ***Schmalz***, 58 Wis.2d at 226-27, 206 N.W.2d at 144, as we do in this appeal. *See also* 80 AM. JUR. 2D *Wills* § 888 (1975) (the chief beneficiary named in successive wills is not estopped to present the earlier will for probate by having propounded the later will, or by failure to produce the earlier will during the contest of the later will) (citation omitted).

of that will, rather than proceeding at this juncture as if decedent had died intestate.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.