NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 02/07/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

In the Matter of the Estate of: DONALD J. WOLF, Deceased.	1 CA-CV 10-0773 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
FRANCES SHELDON READER, as Personal Representative of the Estate of Donald J. Wolf, Appellee, v. JOHN WILLIAM TOPA, IV, Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. PB 2010-001133

The Honorable Richard L. Nothwehr, Commissioner

REVERSED AND REMANDED

Michael J. Fuller Attorney for Appellee	Phoenix
John R. Coll Attorney for Appellant	Phoenix
John W. Topa Appellant	Tempe

W I N T H R O P, Chief Judge

¶1 Objector/Appellant John William Topa, IV ("Topa") appeals the probate court's order finding Donald J. Wolf's attempt to modify his Last Will and Testament ("Will") invalid. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 1995, Decedent Donald J. Wolf ("Decedent") executed a valid Will. In the Fourth Article of his Will, Decedent left fifty percent of his estate to his long-time friends, Petitioner Frances Reader and her husband, Mark Reader (collectively, the "Readers"); twenty-five percent to another individual; and twenty-five percent to assist AIDS patients. Frances Reader was also named as executor. Decedent gave an unsigned copy of his Will to the Readers.

¶3 In June 2005, Decedent attempted to revise the Will ("Will revision"). In the Will revision, Decedent removed the bequest to AIDS patients and directed that this twenty-five percent of his estate instead be divided equally between Topa and Charles Van Dorn.

¶4 Decedent made the revisions in his own handwriting on the face of the original Will and on the Readers' unsigned copy. Decedent dated and initialed the change on both. Frances Reader is not certain whether she and her husband witnessed the change to the original Will; however, she

testified that they did witness Decedent revise their copy of the Will. In any event, neither the original witnesses nor the Readers ever signed Decedent's revised original Will or the Readers' copy of the revised original Will.

¶5 After an evidentiary hearing, the probate court admitted the original Will to probate, appointed Frances Reader personal representative and held:

> On June 12, 2005, Decedent attempted to revise [the Fourth Article] of his Last Will to provide that twenty five percent (25%) of Decedent's Estate be divided equally between Charles Van Dorn and John Topa ("Will revision"). The Will revision was prepared and initialed by Decedent and was witnessed by Mark Reader and Frances Sheldon Reader. However, Mark Reader and Frances Sheldon Reader did not execute the Will revision as required by A.R.S. Section 14-2502.A.3., and a reasonable time has passed to prevent them from executing the Will revision.
>
> The revision to the Last Will and Testament dated February 15, 1995 naming Charles Van Dorn and John Topa as 12.5% beneficiaries of the Estate is invalid.

¶6 Topa timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(9) (West 2012).[1]

DISCUSSION

¶7 The sole issue on appeal is whether the trial court

[1] We cite the current version of the applicable statutes where no revisions material to this decision have since occurred.

clearly erred when it found that the Will revision is invalid for failure to comply with A.R.S. § 14-2502(A)(3).

¶8 "We will not set aside the probate court's findings of fact unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses." *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5, 12 P.3d 1203, 1205 (App. 2000). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). We are, however, not bound by the trial court's conclusions of law, *In re Estate of Jung*, 210 Ariz. 202, 204, ¶ 11, 109 P.3d 97, 99 (App. 2005); and statutory interpretation is a question of law, which we review de novo. *Id.*

¶9 "The right to create a will is statutory and the Legislature determines the requirements necessary to make a valid testamentary document." *Id.* at 204, ¶ 13, 109 P.3d at 99. To be valid, A.R.S. § 14-2502 requires that a will be in writing, signed by the testator and signed by two witnesses within a reasonable time after they witnessed the signing of

the will.[2] A will that does not comply with statutory requirements is invalid, even if it accurately reflects the testator's wishes. *Jung*, 210 Ariz. at 205, ¶ 13, 109 P.3d at 100.

¶10 Here, the Readers testified that they witnessed Decedent revise their copy of the Will and may have witnessed him revise the original. The Readers admit, however, that they did not sign either revised document. Indeed, neither the original nor the copy of the revised Will bears the Readers' signatures. The evidence is undisputed that the Will revision was not signed by two witnesses as arguably required by A.R.S. § 14-2502.

¶11 Section 14-2502 explicitly notes, however, certain statutory exceptions to the formalities required for a will. Pursuant to § 14-2503, a holographic will prepared by the decedent is allowed, whether or not witnessed, so long as "the signature and the material provisions are in the handwriting of

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[2] The court in *Jung* held that so long as the amount of time that had passed was reasonable, a witness could sign a will even after the decedent's death. 210 Ariz. at 206, ¶ 22, 109 P.3d at 101. The probate court here held that a reasonable time had expired, so the Readers could not sign the Will at the time it was offered for probate. In fact, five years had passed between the Will revision and the probate of the Will. Topa does not dispute the court's finding that a "reasonable time" had passed, nor does he argue that the Readers could now sign as witnesses to the codicil to render it valid and enforceable.

the testator." Here, it is uncontested that Decedent made and initialed the Will revision.

¶12 In *In re Estate of Morris*, 15 Ariz. App. 378, 379, 488 P.2d 1015, 1016 (1971), this court considered whether an un-witnessed holographic codicil can effectively modify a witnessed will. In that case, two witnesses attested to a typed will. *Id.* at 378, 488 P.2d at 1015. The testator later made a holographic codicil, which was not witnessed. *Id.* The trial court ruled the holographic codicil was effective in modifying the original will. *Id.* In considering the issue on appeal, this court reviewed Arizona's statutory history and case law and concluded that "under the Arizona statutes a holograph and a witnessed will are of equal formality, and that the holographic codicil here effectively modified the witnessed will." *Id.* at 381, 488 P.2d at 1018.

¶13 In a supplemental brief, Frances Reader concedes she is "unable to find any distinction between the facts mentioned in *Estate of Morris* and those of the present case." She does, however, note that if Topa is entitled to 12.5 percent of the estate, "his share will be subject to offset for the judgment entered against him in favor of the Estate dated October 13, 2011, in the original sum of $57,706.80."

¶14 We hold that, based upon the analysis in *Morris*, Decedent's handwritten revisions to the original Will

constituted an effective holographic codicil. For that reason, we reverse the probate court's order rejecting the revised Will. On remand, the probate court can address the issue of offset raised by the October 2011 judgment in favor of the Estate.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶15 Frances Reader has requested an award of attorneys' fees on appeal pursuant to A.R.S. § 12-349(A)(3). Because she did not prevail on appeal, we deny her request. As the prevailing party, we award Topa his costs on appeal, conditioned upon compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure.

CONCLUSION

¶16 For the foregoing reasons, we reverse the probate court's order and remand for further proceedings consistent with this decision.

/S/
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/S/
DIANE M. JOHNSEN, Presiding Judge

/S/
DONN KESSLER, Judge