

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1262**

Estate of: Stephen D. King, Decedent.

**Filed May 22, 2023
Affirmed; motion granted in part
Reyes, Judge**

Hennepin County District Court
File No. 27-PA-PR-21-1331

Michael C. Mahoney, Mahoney Law Firm, L.L.C., Wayzata, Minnesota (for appellant Steven M. Cohan)

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Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Larson, Judge.

SYLLABUS

In a probate proceeding involving a nondomiciled decedent, a district court does not abuse its discretion by sua sponte raising the issue of improper venue and dismissing the case without prejudice under Minn. Stat. § 524.3-201 (2022) if the petitioner fails to establish a prima facie case that decedent owned property located in the State of Minnesota at the time of death.

OPINION

REYES, Judge

Appellant asks this court to reverse the district court's order dismissing a petition for formal probate on venue grounds, arguing that the district court (1) failed to provide

sufficient notice of the venue hearing; (2) abused its discretion by dismissing the case for improper venue; and (3) abused its discretion by denying the motion for a new trial and, in part, for amended findings of fact. We affirm.

FACTS

Decedent Stephen D. King (decedent) passed away on September 21, 2020, in the state of Georgia. On October 19, 2021, appellant Steven M. Cohan, one of decedent's alleged creditors, filed a petition for formal adjudication of intestacy, determination of heirs, and appointment of a personal representative in Hennepin County District Court. The petition alleged that, at the time of death, decedent (1) did not have a valid will; (2) was domiciled in Georgia;¹ and (3) owned property in Hennepin and Anoka counties consisting of an approximately \$4 million debt. On December 16, 2021, decedent's surviving spouse, respondent Deborah King (King), filed an objection to the petition, claiming, in part, that (1) decedent had a valid will that she was still looking for and (2) the district court lacked jurisdiction over this proceeding because decedent did not reside or own property in Minnesota upon his death.

The district court sua sponte raised the issue of improper venue and scheduled a hearing for February 17, 2022, to determine whether venue was proper in Hennepin County under Minn. Stat. § 524.3-201. To support proper venue based on property located in Minnesota, Cohan submitted an affidavit asserting that decedent was a beneficiary of five trusts, including a spendthrift trust the trustee of which could be sued in Minnesota and

¹ On December 5, 2021, Cohan filed a Georgia death certificate with decedent's residence listed in Georgia.

alleged that decedent fraudulently concealed his income between 2012 and 2015 by assigning his wages from Wits Basin Precious Metals Inc. (Wits Basin), totaling \$405,000, to King's Minnesota corporation, Corporate Resource Management Inc. (CRM). King countered that decedent's beneficiary interests in the trust had terminated upon his death and that Cohan failed to establish a prima facie case for the alleged lawsuit or debt. Following the hearing, the district court determined that (1) Cohan provided no evidence of decedent's beneficiary interests in a Minnesota trust and (2) "mere speculative debt [d]ecedent owed toward creditors in an ongoing litigation" did not support venue in Hennepin County. By an order dated February 23, 2022 (February 2022 order), the district court dismissed the petition for formal probate without prejudice for lack of proper venue.

On March 24, 2022, Cohan filed a motion for amended findings of fact and for a new trial. Cohan argued, among other issues, that the district court (1) gave insufficient notice on the "motion to dismiss" for lack of proper venue; (2) improperly dismissed the case by conflating venue with jurisdiction; and (3) decided the matter on the merits prematurely. In a July 11, 2022 order (July 2022 order), the district court struck one factual finding and amended the language in the conclusions of law and order, but denied the new-trial motion and confirmed its February 2022 order dismissing the petition for lack of proper venue. This appeal follows.

ISSUES

- I. Should this court grant Cohan's motion to strike portions of King's brief and request for attorney fees?
- II. Did the district court err by failing to provide sufficient notice of the hearing on venue requiring reversal?

- III. Did the district court abuse its discretion by dismissing the case for improper venue?
- IV. Did the district court abuse its discretion by denying the motion for a new trial and denying in part the motion for amended findings?

ANALYSIS

I. We grant in part and deny in part Cohan’s motion to strike portions of King’s brief and deny the request for attorney fees.

As an initial matter, we address a motion by Cohan to this court to strike portions of King’s brief for referencing facts outside the record. Cohan also seeks attorney fees in conjunction with this motion. We grant the motion, in part, to strike the statements regarding the locations of decedent’s assets.

Parties on appeal must provide a reference to the record for each statement of a material fact in their briefs. Minn. R. Civ. App. P. 128.02, subd. 1(c); *see Hecker v. Hecker*, 543 N.W.2d 678, 681-82 n.2 (Minn. App. 1996) (noting “material assertions of fact in a brief properly are to be supported by a cite to the record” and stating such cites are “particularly important” where “the record is extensive”), *aff’d* 568 N.W.2d 705 (Minn. 1997). The record on appeal comprises documents filed in the district court, exhibits, and the transcript of the proceedings. Minn. R. Civ. App. P. 110.01. “An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). We “will strike documents included in a party’s brief that are not part of the appellate record.” *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff’d* 504 N.W.2d 758 (Minn. 1993).

Cohan first challenges factual assertions in King's brief that are based on King's February 15, 2022 affidavit submitted to the district court. Because the district court struck the findings of fact based on King's affidavit in its July 2022 order, Cohan argues that any factual assertions in King's brief to this court based on that affidavit are outside the scope of the record. We disagree. Contrary to Cohan's argument, the record shows that the district court never *excluded* King's affidavit or determined that it was inadmissible. In its February 2022 order, the district court stated in the findings of fact:

14. On February 15, 2022, counsel for [King] filed an affidavit. Judicial notice was taken of the affidavit during the motion hearing. The court found this affidavit to be persuasive.

In its July 2022 order, the district court stated in its conclusions of law:

10. [Cohan] has failed to allege a sufficient defect in the court's findings. However, the court will amend its findings to strike references in #14 . . . since #14 referred to an attorney's affidavit rather than actual testimony received during the hearing.

That the district court removed a single reference to the affidavit in its findings does not equate to an exclusion of the entire affidavit from the record. Because King's February 15, 2022 affidavit was submitted to the district court, it remains part of the record on appeal. Minn. R. Civ. App. P. 110.01.

Cohan next argues that King failed to accompany some statements of fact in her brief with citations to the record. *See* Minn. R. Civ. App. P. 128.03; *Hecker*, 543 N.W.2d at 681-82 n.2. We agree. In the argument section, King listed assets from a Schedule A/B form that decedent filed with a bankruptcy court. Cohan does not dispute that the Schedule

A/B form is a part of the record but asserts that King's description that some of these assets are located in Georgia is not based on the record. The relevant assets include decedent's personal and household items, crypto currency, and five non-vested shares in a company. Although King provided citations to the specific pages of the addendum, the Schedule A/B form cited by King did not indicate the location of these assets. We therefore grant Cohan's motion to strike King's description in her brief that items 6, 7, 9, 10, 11, 12, 18, and 19 are located in Georgia.

Lastly, Cohan seeks an award of attorney fees on the motion to strike. *See* Minn. R. Civ. App. P. 139.05 (identifying procedure for seeking attorney fees on appeal); *Geske v. Marcolina*, 624 N.W.2d 813, 819 (Minn. App. 2001) (stating that former Minn. R. Civ. App. P. 139.06 (2001)² provided procedure for seeking attorney fees on appeal but rejecting idea that rule was substantive basis for seeking those fees). Minnesota applies the American rule under which each party is responsible for paying its own attorney fees absent specific authorization to shift the fees to an adversary. *See Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363 (Minn. 1998). Cohan identifies no authority to support his request. We therefore deny Cohan's request for attorney fees.

II. Cohan received sufficient notice of the hearing on venue.

Cohan argues that he received insufficient notice of the venue hearing. We are not persuaded.

² When the Minnesota Supreme Court amended the Minnesota Rules of Civil Appellate Procedure, effective September 1, 2019, the former rule 139.06 became the current rule 139.05. *See Order Promulgating Amendments to the Rules of Civil Appellate Procedure*, No. ADM09-8006 (Minn. May 30, 2019).

“Unless inconsistent with the provisions of [chapter 524] or chapter 525, pleadings, practice, procedure and forms in all probate proceedings shall be governed insofar as practicable by Rules of Civil Procedure[.]” Minn. Stat. § 524.1-304(a) (2022). Under the civil rules, appellate courts review “[f]actual disputes regarding the adequacy of notice” for clear error and “the legal adequacy of any notice that may have been given” de novo. *Cook v. Arimitsu*, 907 N.W.2d 233, 240 (Minn. App. 2018), *rev. denied* (Minn. Apr. 17, 2018). When a party moves to dismiss a claim under rule 12 of the Minnesota Rules of Civil Procedure, a district court must accept facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). If the district court considers matters outside the pleadings, it shall treat the motion as one for summary judgment as provided in Minn. R. Civ. P. 56. Minn. R. Civ. P. 12.02. Moreover, rule 115.03 of the Minnesota General Rules of Practice provides that a district court shall not hear a civil motion unless the moving party serves all opposing parties and files documents with the court, including the motion and notice of the motion, a proposed order, affidavits and exhibits accompanying the motion, and a memorandum of law, at least 28 days before the hearing. In no event shall a party serve a motion for summary judgment “less than 14 days before the time fixed for the hearing.”³ Minn. R. Civ. P. 56.02. Finally, the probate code requires a 14-day notice before the time set for the hearing. Minn. Stat. § 524-401(a) (2022).

³ Cohan erroneously states in his brief that rule 56.03 requires that “motion shall be served at least 10 days before the time fixed for the hearing.”

Here, Cohan argues that the district court's dismissal of the case should have been governed by rule 12 and that the district court erred by considering matters outside the pleading, thereby converting the "motion to dismiss" under rule 12 to a "motion for summary judgment" under rule 56. Cohan further contends that the district court failed to provide sufficient notice of the hearing on venue as required by rule 56 and rule 115.03. Cohan's arguments are misguided.

First, because the district court raised the venue issue sua sponte, there was no motion to dismiss. And neither rule 12 nor rule 56 applies to an analysis of venue. Under rule 12, a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) insufficient process; (4) insufficient service of process; (5) failure to state a claim upon which relief can be granted; or (6) failure to join a necessary party. Minn. R. Civ. P. 12.02. Here, however, the district court raised the issue of venue sua sponte and dismissed the case after determining that venue was improper under the probate code. Minn. Stat. § 524.3-201. Rule 12 therefore is inapposite. Similarly, rule 56 does not apply either because the district court did not dismiss the case based on a lack of genuine issue of material fact or because the moving party was entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01.

Second, the probate code requires a 14-day notice before the scheduled date for a hearing, and the record shows that Cohan received a 35-day notice of the hearing on venue. Minn. Stat. § 524.1-401(a). Cohan asserts that he only received a seven-day notice by relying on the February 10, 2022 date when King filed her memorandum requesting dismissal for lack of *jurisdiction*. However, the district court raised the issue of venue sua

sponte and, on January 6, 2022, expressly set the date for a hearing on *venue* for February 17, 2022. The fact that King filed a memorandum arguing *jurisdiction* seven days before the *venue* hearing was irrelevant for deciding the sufficiency of the hearing notice. We conclude that Cohan received sufficient 35-day notice of the venue hearing under the probate code.

III. The district court did not abuse its discretion by dismissing the case for improper venue.

Cohan argues that the district court abused its discretion by its application of law related to venue and jurisdiction and by dismissing the case for improper venue. We disagree.

We review a district court’s findings of fact for clear error and its legal determinations de novo. *In re Est. of Short*, 933 N.W.2d 533, 537 (Minn. App. 2019). “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.” *Id.* (quotation omitted).

Venue for the first and subsequent estate proceedings is proper (1) “in the county of the decedent’s domicile at the time of death” or (2) “if the decedent was not domiciled in this state, in any county where property of the decedent was located at the time of death.” Minn. Stat. § 524.3-201(a). A district court in a probate proceeding has subject-matter jurisdiction “[t]o the full extent permitted by the Constitution.” Minn. Stat. § 524.1-302(a) (2022).

Here, the district court focused on venue instead of jurisdiction. Although King initially objected to the proceeding on jurisdictional grounds, the district court sua sponte

raised the issue of venue. In its February 2022 order, the district court determined that *venue* was improper in Hennepin County because Cohan failed to show that decedent owned any property in Minnesota at the time of his death.

On the issue of the location of assets for venue purposes, the probate code provides that

a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, *at the place where it has its principal office*. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

Minn. Stat. § 524.3-201(d) (emphasis added). A petitioner who seeks to establish intestacy bears the burden of establishing a *prima facie* case of venue. Minn. Stat. § 524.3-407 (2022).⁴

During the district court proceedings, Cohan alleged that there were four types of property located in Hennepin County: (1) a beneficiary interest from a trust; (2) debt arising out of a potential claim of fraudulent transfer; (3) business records located in his daughter's residence in Minnesota; and (4) stock options. Because Cohan only briefed the first two arguments on appeal, he has forfeited the remaining two arguments. *Meriwether Minn. Land & Timber, LLC v. State*, 818 N.W.2d 557, 570 (Minn. App. 2012) (“An

⁴ Cohan argues that, because this case arises from the district court's order granting a motion to dismiss under Minn. R. Civ. P. 12.02, the district court had to accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party. We disagree. As discussed in Section II, rule 12 does not apply in this case.

argument not briefed is waived.”); *State, Dep’t of Lab. & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to consider issue that is inadequately briefed); *In re Est. of Hadaway*, 668 N.W.2d 920, 924 (Minn. App. 2003) (applying this concept in probate appeal).

It is undisputed that decedent and King were beneficiaries of the Gift of Gold Trust,⁵ and their beneficiary interest was located in Minnesota where the trust’s trustee, who was King’s trial attorney, could be sued. See Minn. Stat. § 524.3-201(d) (“An interest in property held in trust is located where the trustee may be sued.”). However, a provision in the Gift of Gold Trust states that “[u]pon the death of any beneficiary any assets remaining in his or her share shall be distributed *per stirpes* to his or her then living descendants.” In other words, upon decedent’s death, his interest in the assets in the Gift of Gold Trust were divided equally among his living children. See Minn. Stat. Ann. § 524.2-709 (b) (2022). The record therefore supports the district court’s finding that Cohan provided no evidence that decedent had any beneficiary interest upon his death in the Gift of Gold Trust or in any other trusts.

As for decedent’s alleged debt located in Hennepin County, Cohan and several creditors filed a civil lawsuit against CRM and King in 2019. The parties appear to have reached a confidential settlement before trial. The complaint for that civil suit alleged in part that plaintiffs loaned money to Wits Basin based on decedent’s “false representation,”

⁵ Cohan claims that decedent was a beneficiary of five trusts. However, he only made substantive arguments for one spendthrift trust, the Gift of Gold. Any potential argument based on beneficiary interest from the other trusts has been forfeited. See *Meriwether Minn. Land & Timber, LLC*, 818 N.W.2d at 570; *Hadaway*, 668 N.W.2d at 924.

that (1) Wits Basin transferred \$929,435.94 between 2013 and 2015 to CRM; (2) Wits Basin did not receive anything in return for its payments; and (3) CRM used these payments to pay for ordinary household expenses for King and decedent between 2013 and 2015.

Although decedent was not a named party in the prior civil suit, Cohan provided admissible evidence by affidavit and argued that CRM owed decedent \$405,000 based on the fraudulent transfer of decedent's salary from Wits Basin to CRM. However, the record shows that CRM dissolved on March 15, 2019. As a result, *at the time of decedent's death*, the alleged debtor CRM no longer existed, let alone had a place of business, principal or otherwise, in Hennepin County to establish the existence of debt in the county. Accordingly, the record supports the district court's ruling that Cohan failed to make a prima facie case that decedent owned property in Hennepin County or anywhere else in Minnesota at the time of his death.

We acknowledge that, unlike jurisdictional defects that mandate dismissal, improper venue is often resolved through a motion for change of venue instead of dismissal for lack of jurisdiction. *Nat'l City Bank v. Ceresota Mill Ltd. P'ship*, 476 N.W.2d 787, 792 (Minn. App. 1991), *aff'd*, 488 N.W.2d 248 (Minn. 1992). In the instant case, because decedent was not domiciled in Minnesota at the time of his death, once the district court found that decedent had no property anywhere in Minnesota, there would be no proper venue within the state to transfer the case, leaving the district court no option but to dismiss the case.

Finally, while it is not common for a district court to raise sua sponte the issue of venue, our caselaw has recognized that a district court may sua sponte raise a dispositive issue to determine the appropriate process of the case. For instance, in *Hebrink v. Farm Bureau Life Ins. Co.*, we held that a district court has the authority to grant summary judgment sua sponte when (1) “no genuine issues of material fact remain,” (2) “one of the parties deserves judgment as a matter of law,” and (3) “the absence of a formal motion creates no prejudice to the party against whom summary judgment is granted.” 664 N.W.2d 414, 419 (Minn. App. 2003). But in order to raise an issue sua sponte, the district court “must afford the adverse party a meaningful opportunity to oppose such an action.” *Id.* In *Hebrink*, we concluded that the adverse party had a meaningful opportunity to oppose summary judgment when the district court gave notice at the motion hearing and allowed parties 18 days to submit briefs on the issue. *Id.* Similarly here, because Cohan had a 35-day notice of the venue hearing, we are satisfied that he had a meaningful opportunity to oppose the dismissal for a lack of proper venue.

We therefore hold that, in a probate proceeding involving a nondomiciled decedent, a district court does not abuse its discretion by sua sponte raising the issue of improper venue and dismissing the case without prejudice under Minn. Stat. § 524.3-201 if the petitioner fails to establish a prima facie case that decedent owned property located in the state of Minnesota at the time of death.

IV. The district court did not abuse its discretion by denying the motion for a new trial and denying in part the motion for amended findings.

Cohan argues that the district court abused its discretion by denying his motion for a new trial and denying in part the motion for amended findings of fact. We are not persuaded.

A. Because no trial occurred, the district court’s order denying the new-trial motion is not appealable.

“We review a district court’s decision to grant or deny a new trial for an abuse of discretion.” *Christie v. Est. of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). But if the district court never held a trial because, for example, it dismissed the case pretrial, “a motion for a new trial is an anomaly and an order denying such a motion is not appealable.” *Parson v. Argue*, 344 N.W.2d 431, 431 (Minn. App. 1984) (quotation omitted). Because this case never proceeded to trial, the district court’s order denying a new-trial motion is not appealable.

B. The district court did not abuse its discretion by denying in part the motion to amend findings.

“Upon the timely motion of a party, the district court may amend its findings or make additional findings.” *In re Guardianship of Guaman*, 879 N.W.2d 668, 672 (Minn. App. 2016) (citing Minn. R. Civ. P. 52.02). “We review the district court’s denial of a motion for amended or additional findings for an abuse of discretion.” *Id.*

During the district court proceedings, Cohan moved to amend the findings of fact, arguing that (1) no motion to dismiss was served or filed by any party and the district court moved sua sponte to dismiss the case for lack of venue without an evidentiary hearing;

(2) both personal and subject-matter jurisdiction are presumed unless a lack of jurisdiction is apparent on the face of the record or shown by extrinsic evidence; and (3) venue in civil actions is not jurisdictional such that dismissal is required.

Having concluded that Cohan received proper notice of the hearing on venue, and that the district court did not abuse its discretion by dismissing a probate petition when (1) the decedent was not domiciled in Minnesota and (2) petitioner failed to establish a prima facie case that decedent owned property in Minnesota at the time of death, we further conclude that the district court did not abuse its discretion by denying the motion for amended findings in part.

DECISION

We hold that, in a probate proceeding involving a nondomiciled decedent, a district court does not abuse its discretion by sua sponte raising the issue of improper venue and dismissing the case without prejudice under Minn. Stat. § 524.3-201 if the petitioner fails to establish a prima facie case that decedent owned property located in the state of Minnesota at the time of death. We also conclude that the district court provided sufficient notice to Cohan for the hearing on venue and did not abuse its discretion by denying, in part, the motion for amended findings. Because this case never proceeded to trial, the district court's order denying a new-trial motion is not appealable. We grant Cohan's motion, in part, to strike portions of King's brief referencing the locations of decedent's property but deny his request for attorney fees.

Affirmed; motion granted in part.