2014 IL App (1st) 131209-U

No. 1-13-1209

SIXTH DIVISION
March 7, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ESTATE OF FLORENCE MARTIN, Deceased (Michael Martin, Plaintiff and Counterdefendant-Appellant,	)	Appeal from the Circuit Court of Cook County
v.	)	No. 06 P 8421
Daniel D. Martin, Jr., Individually, Defendant and Counterplaintiff-Appellee).	)	Honorable Mary Ellen Coghlan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court properly granted partial summary judgment in favor of defendant, finding that the will at issue was not a joint and mutual will.

¶ 2 Plaintiff Michael Martin appeals the trial court's ruling that granted partial summary judgement in favor of defendant Daniel Martin. On appeal, Michael argues that his parents' will was a joint and mutual will and his mother's devise of property contrary to the terms of that will was a breach of contract.

¶ 3 For the reasons that follow, we affirm the judgment of the trial court.

¶ 4 I. BACKGROUND

¶ 5 On March 12, 1990, Florence and Daniel Martin, Sr. met with their attorney James Carlson to discuss their testamentary wishes. They were married and had two living children, Michael and Daniel. Mr. and Mrs. Martin wanted to devise their property to Michael and Daniel. At the time, Mr. and Mrs. Martin owned real estate located at 8503 W. Berwyn, Chicago, Illinois (the property), as joint tenants with rights of survivorship. They did not mention to Carlson any agreement between themselves to leave their property equally to both sons. Furthermore, Mr. and Mrs. Martin did not express any desire that the survivor of the two of them could not change the will. That same day, Mr. and Mrs. Martin executed their will, which was entitled "Joint Last Will and Testament of Daniel D. Martin Sr. and Florence M. Martin."

¶ 6 Daniel Senior died in November 1998. Upon his death, Florence, as surviving joint tenant, became the owner of the property.

¶ 7 In July 2005, Florence met with Carlson and discussed placing the property into a land trust. She told Carlson that she had attended a seminar that had discussed the avoidance of probate and provided literature about land trusts. She told Carlson that she wanted a land trust for the property, wanted to avoid probate, and wanted the property to go to Daniel. Based on Florence's directions, Carlson prepared a quit claim deed in trust and a land trust agreement naming only Daniel as the contingent beneficiary upon Florence's death. Later in July 2005, Florence met again with Carlson and, after Carlson went over the documents and explained them to her, Florence signed the quit claim deed in trust and land trust agreement.

¶ 8 Florence died in June 2006. The March 1990 will was admitted to probate in March 2007.

¶ 9 In September 2009, Michael filed a four-count verified complaint for breach of contract, declaratory and other relief. First, Michael alleged breach of contract, contending his parents promised each other that they would "carry out a common dispositive scheme" and that they agreed to pass their assets in accordance with a specific plan, referred to as the " 'joint plan of distribution.' " Michael alleged that the joint plan of distribution became irrevocable upon his father's death. Michael also alleged that, after March 2005, his mother "lacked the mental ability to know and remember who the natural objects of her bounty were." Michael further alleged that he was an intended third party beneficiary of the "contract" between his parents, and that the "purported transfer" of the property in July 2005 by his mother was in breach of that contract.

¶ 10 Second, Michael alleged that Daniel exerted undue influence on Florence and caused the preparation of the July 2005 transfer of the property to the land trust. Third, Michael alleged that Daniel intentionally interfered with Michael's testamentary expectancy in the property. Fourth, Michael alleged that Florence lacked testamentary capacity because she lacked the mental ability to either comprehend the kind and character of her property or make a disposition of the property according to "a plan formed in her mind." Michael sought a finding of lack of testamentary capacity and the issuance of an injunction against Daniel taking further acts as executor of the will or using any of the estate funds for fiduciary fees for himself.

¶ 11 Daniel subsequently moved to strike the second count of the complaint alleging undue influence and dismiss the third count alleging interference with testamentary expectation. He

answered the complaint and counterclaimed for unjust enrichment, alleging that he had moved into the property in 1998 and resided with Florence until her death, and had expended more than $350,000 of his own funds to care for Florence and for expenses related to the property.

¶ 12 The trial court denied Daniel's motion to strike the undue influence claim and reserved ruling on the claim for interference with testamentary expectation.

¶ 13 In November 2012, Michael moved for partial summary judgment, pursuant to section 5/2-1005(d) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005(d) (West 2012)), concerning the claim for breach of contract. Michael sought a determination as a matter of law that his parent's 1990 will was a joint and mutual will under Illinois law, and that his mother's July 2005 transfer of the property to a land trust constituted a breach of her contractual obligations under the will. He supported his motion with testimony from attorney James Carlson's evidence deposition, which was taken in April 2012.

¶ 14 Daniel filed a response and cross-motion for partial summary judgment. His motion referred to an order of November 20, 2012, in which the parties stipulated that the issue of whether the will was joint and mutual would be determined on undisputed facts and that no additional facts relating to that issue would be asserted except for those facts set forth in Michael's motion for partial summary judgment and the Carlson evidence deposition.

¶ 15 In February 2013, the trial court granted Daniel's cross-motion for partial summary judgment, and denied Michael's motion for partial summary judgment. Specifically, the trial court found that the Martins' will was not a joint and mutual will.

¶ 16 Thereafter, Michael filed a motion to dismiss the remaining counts of his complaint. On April 3, 2013, the trial court entered an agreed order that dismissed with prejudice the remaining counts of Michael's complaint, dismissed Daniel's counterclaim without prejudice, made the February 2013 order final and appealable, and found no just reason to delay either enforcement or appeal of the order. On April 8, 2013, Michael filed an appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, Michael contends that his parents' will was a joint and mutual will under Illinois law; the trial court improperly found as a matter of law that the will was not a joint and mutual will; and his mother's conveyance of the property to a land trust constituted a breach of her contractual obligations under the will.

¶ 19 Section 2-1005(d) of the Code provides that:

> "if a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue *** the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just." 735 ILCS 5/2-1005(d) (West 2012); see Mohn v. Posegate, 184 Ill. 2d 540, 546-47 (1998).

By filing cross-motions for summary judgment, the parties agree that no material issue of fact exists and that only a question of law is involved. Robson v. Electrical Contractors Assoc., 312

Ill. App. 3d 374, 380 (2000). Accordingly, our review of this matter is de novo. See Id.

¶ 20 Michael, in support of his contention that his parents' will was a joint and mutual will under Illinois law, initially asserts that his parents' testamentary intent was established by the clear and unambiguous terms of the will. This contention, however, consists of one three-sentence paragraph and merely states general principles of law concerning will construction, i.e., that testator intent is to be construed from the language of the will itself and that where terms are unambiguous, the intent is gathered from the four corners of the document itself without extrinsic evidence. However, Michael's motion for partial summary judgment was supported with attorney Carlson's evidence deposition, which Michael relies upon in his appellate brief and which is before us as part of the pleadings. Moreover, Michael acknowledges in his brief that, "[i]f what is contained in the pleadings and affidavits would constitute all the evidence before the court and upon such evidence the court would be required to direct a verdict, then summary judgment should be entered." Hollmann v. Putman, 260 Ill. App. 3d 737, 740 (1994). Accordingly, we are not limited to the four corners of the will itself but consider also evidence presented in Carlson's deposition. See Hollmann, 260 Ill. App. 3d at 740; see also In re Estate of Briick, 24 Ill. App. 2d 77, 92 (1959) (noting trend of considering other proof outside the will).

¶ 21 Contrary to Michael's assertion that his parents' testamentary intent was established, as a matter of law, by the "clear and unambiguous terms of the will" showing an intent to create a joint and mutual will, neither the language of the document nor the evidence support this conclusion. Furthermore, Michael's contention that the will satisfies the majority of factors to be considered joint and mutual also fails.

¶ 22 Under Illinois law, "[a] 'joint and mutual will' is a single testamentary instrument which contains the wills of two or more persons." Rauch v. Rauch, 112 Ill. App. 3d 198, 200 (1983). Such will is "executed jointly and disposes of property owned *** jointly by the testators." Id.; see also Kinkin v. Marchesi, 237 Ill. App. 3d 539, 543 (1992). "A joint and mutual will must be executed pursuant to a contract between the testators, requiring the survivor of them to dispose of the property as the will's provisions instruct." Rauch, 112 Ill. App. 3d at 200; see also In re Estate of Signore, 149 Ill. App. 3d 904, 907 (1986).

¶ 23 Although the joint and mutual will may itself comprise the contract between the testators, "[a]s in any contract, some consideration between the parties is necessary." Rauch, 112 Ill. App. 3d at 200; see Jacoby v. Jacoby, 342 Ill. App. 277, 283 (1950) (stating that a "joint will is not of itself, without reference to the terms of the instrument, sufficient evidence of an enforceable contract to devise between the testators"). The contract becomes irrevocable after the death of one of the testators, and the survivor is estopped from disposing of the property other than as contemplated by the will. Rauch, 112 Ill. App. 3d at 200; see also In re Estate of Edwards, 3 Ill. 2d 116 (1954). Earlier decisions determined that, where the joint and mutual will was executed by a husband and wife, their "mutual love and respect" was sufficient consideration (Rauch, 112 Ill. App. 3d at 200 (citing Frazier v. Patterson, 243 Ill. 80 (1909))), but more recently Illinois "courts have expressed their reluctance to permit the fact of joint execution alone to be conclusive and have looked to the provisions of the will itself and to other proof for a contract" (In re Briick, 24 Ill. App. 2d at 92). See also Perino v. Eldert, 229 Ill. App. 3d 602, 604 (1992); In re Estate of Schwebel, 133 Ill. App. 3d 777, 786 (1985).

¶ 24 The party arguing that the will is joint and mutual has the burden of establishing this point, and the burden must be established by clear and convincing evidence. Kinkin, 237 Ill. App. 3d at 543; Jacoby, 342 Ill. App. at 283 (requiring proof by "clear and satisfactory evidence" that a joint and mutual will was "executed in pursuance to a contract between the parties, and that each will is the consideration for the other"). Further, the party asserting the existence of the contract bears the burden of proof and must establish that the will is contractual as well as testamentary. Jacoby, 342 Ill. App. at 283; In re Signore, 149 Ill. App. 3d at 907. Michael fails to meet his burden because neither the language of the will nor the other evidence support his contention that the will is joint and mutual.

¶ 25 In determining whether a will is joint and mutual, courts view each case individually and, in so doing, consider the following five factors: (1) the label used by the testators; (2) reciprocal provisions in which the testators disposed of their entire estate in favor of the other; (3) a pooling of the testators' interests into one joint fund; (4) a common dispositive scheme disposing of the common fund to their heirs in approximately equal shares; and (5) use by the testators of common plural terms such as "we" and "our" as further evidence of their intent to make a joint and mutual will. Rauch, 112 Ill. App. 3d at 200-01; In re Signore, 149 Ill. App. 3d at 907. Not all five factors support a conclusion here that Mr. and Mrs. Martins' will was joint and mutual. Moreover, Michael fails in his burden of proof because evidence of the testators' intent here is not limited to the document itself (see, *e.g.*, *In re Briick*, 24 Ill. App. 2d at 92); attorney Carlson's testimony in his evidence deposition provides clear and convincing evidence that there was no contractual element and the document at issue was not a joint and mutual will.

¶ 26 Carlson explicitly testified that Florence and Daniel Senior's joint will was not prepared with the intent of having a formal contract or agreement between the two testators. Instead, neither Florence nor Daniel Senior ever mentioned any agreement or contract between them to leave their property to their two sons equally. They never stated that one or the other were prohibited from changing the will upon the death of the first testator, or ever insisted that the other one leave property to both of the children when they died. Rather, Carlson's deposition testimony establishes that their will was prepared as a single document instead of two separate documents because preparing a joint will for a couple was Carlson's typical procedure; the document was not prepared "specifically for them" but was saved in Carlson's computer from a form book. Carlson explicitly testified that preparing a joint will in a single document for the couple was "just [his] standard operating procedure."

¶ 27 Given this evidence that there was no intent between Florence and Daniel Senior to make the will contractual or bind the survivor to the terms of the joint document, Michael's claim that the will was joint and mutual cannot be sustained. Although their will satisfies one of the factors by using plural pronouns, it fails another factor because it is not labeled "joint and mutual." Michael points to the fifth article of the will as proof of the reciprocity, pooling of interests, and common dispositive scheme as other requisite factors of a joint and mutual will. However, this claim is undermined by Carlson's testimony that the will was prepared from a form book, and the Martins did not have the will prepared with an intent that it be a formal contract. Thus, the will's boilerplate language does not establish any agreement whatsoever that the terms were to be irrevocable by the surviving one of the two testators. Rather, this testimony was evidence before

the trial court establishing that, contrary to Michael's claim, there was no intent on the part of the Martins to make a contract or bind each other to the terms of the joint will they made in 1990.

¶ 28 Carlson's entire deposition also refutes Michael's contention that there was intent to establish a joint and mutual will. In support of this claim, Michael offers only two statements by Carlson, who said that Florence and Daniel Senior wanted their property to go to their children in equal shares. That testamentary wish was expressed in the sixth article of the joint will giving the entire estate to Daniel and Michael upon the death of the surviving testator. But again, there was no evidence that such testamentary intent was irrevocable. Rather, Florence, as the surviving testator, was not bound by any contract or agreement to keep the same testamentary scheme. Because she was under no such obligation, Florence was fully within her right to change her mind and to leave the property to the son who, according to the evidence, was the one who lived with her and took care of her. See *In re Briick*, 24 Ill. App. 2d at 100-01 (evidence outside the document, including testimony of drafting attorneys, established joint will was matter of convenience and did not prohibit surviving testator from making changes); *accord*. *Jacoby*, 342 Ill. App. at 287.

¶ 29 Finally, Michael's claim that Florence's conveyance of the property to a land trust violated "the contractual terms of the will," fails because, as previously discussed, there were no such contractual terms. The 1990 will prepared by Carlson for Florence and Daniel Senior followed a form book, reflected the attorney's "standard operating procedure," and did not bind either of the testators to any contract or agreement whatsoever. Therefore, there was nothing improper in Florence's conveyance of the property to a land trust which benefitted Daniel.

¶ 30 Accordingly, the order appealed from, ruling on the cross-motions for summary judgment and finding that the will was not joint and mutual, is affirmed.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 33 Affirmed.