2012 IL App (1st) 113320-U

FIFTH DIVISION
November 09, 2012

No. 1-11-3320

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF JOSEF OPIELA, DECEASED,	)	Appeal from the
----------	)	Circuit Court of
	)	Cook County.
RICHARD OPIELA,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 07 P 2398
v.	)	
	)	
DONALD OPIELA, DENNIS OPIELA, and	)	
CYNTHIA MICHNA (f/k/a CYNTHIA OPIELA),	)	Honorable
	)	Susan M. Coleman,
Respondents-Appellees.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Circuit court properly denied admission of will and codicil to probate where the attestation clause was incomplete and petitioner failed to authenticate the signatures of the two deceased attesting witnesses.

¶ 2 Petitioner-appellant Richard Opiela appeals from an order of the circuit court of Cook County denying admission to probate of the purported will and codicil of petitioner's grandfather, Jozef Opiela. The circuit court denied admission to probate because the attestation clause on

both documents did not include a statement that the attesting witnesses believed Jozef to be of sound mind and memory at the time he signed both documents. Petitioner contends that it was sufficient that the will bore an attestation clause and that he also produced another witness to the signing who testified to his belief that Jozef was of sound mind and memory at the time he signed the purported will. Respondents Dennis Opiela, Donald Opiela, and Cynthia Michna contend that petitioner failed to prove that Jozef was of sound mind and memory at the time he signed either document. As part of this contention they assert that petitioner never proved that the purported signatures of the attesting witnesses were in fact their signatures.

¶ 3 Jozef Opiela died on January 24, 1975. He left a purported will dated March 31, 1972, and a purported codicil dated August 2, 1972.[1] By the terms of the will, Jozef left all of his property to his son, Edward Opiela. The terms of the codicil made clear that Jozef's other heirs were disinherited by the will. Edward died on June 21, 2003, and is survived by his son, petitioner. This petition to admit the will and codicil to probate was filed by petitioner on April 4, 2007.[2]

¶ 4 At the evidentiary hearing on the petition, the sole witness to testify was Richard McQueen, whose mother was a friend of petitioner's mother. McQueen also knew Jozef. McQueen testified that on the day the will was executed he offered to give Jozef a ride to an attorney's office where Jozef told him he had "some papers" to take care of. At this time, McQueen was 20 and he believed that Jozef was about 70. McQueen drove Jozef to the office and entered with him. Inside were Eugenie Wnorowski, who was a neighborhood attorney, and her colleague, Romuald Weaver. Wnorowski presented Jozef with a document and, in Polish,

[1] Our reference to these documents as a will and codicil for the sake of simplicity does not imply a determination concerning their validity.

[2] In their briefs the parties do not explain the time lag between Jozef's death and the filing of the petition to admit the will and codicil to probate.

which McQueen also spoke, she translated it for Jozef. McQueen knew from this conversation that the document was a will. When shown a certified copy of the will at issue in this cause, McQueen testified that it looked like "a similar paper that was presented to [Jozef]." Jozef signed the document with his mark, an "X". Wnorowski stated that she and Weaver would act as witnesses to the will and they then signed the document below where Jozef had signed it, in Jozef's presence.

¶ 5 The will contains what purport to be the signatures of Wnorowski and Weaver below the statement "Witnesses to Mark." Those signatures are followed by an attestation clause which provides:

> "The foregoing instrument, consisting of one (1) page was on this 31st day of March, 1972, subscribed at the end thereof by JOZEF OPIELA, affixing his mark "X" thereto, and signed, by Mark, by the Testator and sealed, published and declared to be His Last Will and Testament, in the presence of Us and each of Us, who thereupon, at his request, in His presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses thereto."

Underneath this clause are the purported signatures of Wnorowski and Weaver. The codicil to the will bears substantially the same attestation clause, also purportedly signed by Wnorowski and Weaver, but it is dated August 2, 1972.

¶ 6 McQueen was not asked to identify the signatures of Wnorowski and Weaver on the will at the hearing. He did not testify concerning the signing of the codicil and there is no indication that he was present when that document was signed. He was asked to describe Jozef's mental competency and stated that Jozef appeared to understand what was being done at the meeting

concerning the will. McQueen also testified that he believed Jozef knew who his children were that day, knew what his property was, and was able to form a plan as to who he wanted to receive his money and property. Finally, McQueen testified that after the document had been signed, Jozef was given a copy of it, and McQueen and Jozef left the office.

¶ 7 At the conclusion of the evidentiary hearing, the court ruled that the will and codicil would not be admitted to probate because the attestation clause did not contain a provision stating that the attesting witnesses believed the testator to be of sound mind and memory.

¶ 8 We will reverse a circuit court's decision on the admission of a will to probate only where that decision is contrary to the manifest weight of the evidence. *In re Estate of Smith*, 282 Ill. App. 3d 389, 393 (1996); *In re Estate of Koziol*, 236 Ill. App. 3d 478, 485 (1992). A will may be admitted to probate where two attesting witnesses to the will state that (1) they were present and saw the testator sign the will; (2) they attested to the will in the presence of the testator; and (3) at the time of the signing of the will, they believed that the testator was of sound mind and memory. 755 ILCS 5/6-4(a) (West 2010). These statements by the witnesses may be in the form of testimony before the court; an attestation clause signed by the witnesses as part of the will; or an affidavit signed by the witnesses as part of the will. 755 ILCS 5/6-4(b) (West 2010). Here the parties at the hearing below agreed that the attesting witnesses were deceased, although no proof of that fact was submitted to the court. In any event, proof of the will was in the form of an attestation clause. But that clause omitted any statement concerning the witnesses' belief that Jozef, the testator, was of sound mind and memory. It was on this ground that the circuit court denied admission of the will to probate.

¶ 9 Petitioner correctly notes that the absence from the attestation clause of a statement as to the testator's sound mind and memory need not be fatal to admission of the will to probate. Section 6-4(a) of the Probate Act provides that "[t]he proponent may also introduce any other

evidence competent to establish a will." 755 ILCS 5/6-4(a) (West 2010). But that provision does not mean that such other evidence can substitute for the statutorily created formalities necessary to establish a valid will. *In re Estate of Lum*, 298 Ill. App. 3d 791, 795-97 (1998) (where purported will was never signed by witnesses, subsequent affidavits of parties claiming to have been witnesses could not substitute as proof of the will). Here, the circumstances permitting admission of the will to probate in the absence of the attestation clause are not present. Petitioner relies primarily upon *More v. More*, 211 Ill. 268 (1904). In *More*, both attesting witnesses were deceased and the will had no attestation clause. *More*, 211 Ill. at 269. But the court noted that there was proof that the will bore the genuine signatures of the attesting witnesses. The court held that where the attesting witnesses were deceased and there was no attestation clause, proof of the genuineness of the witnesses' signatures was sufficient to raise the presumption that the statutory requirements had been met. *More*, 211 Ill. at 271-72. In particular, as to the requirement that the attesting witnesses believed the testator was competent, the court found that the act of attestation drew the attention of the witnesses to the testator's mental competency and therefore raised the presumption that by signing in attestation, the witnesses indicated their belief that the testator was competent. *More*, 211 Ill. at 272.

¶ 10 In the case at bar, the witnesses were deceased and the attestation clause did not contain language establishing the witnesses' belief that Jozef was competent. But unlike in *More*, there was no proof that the signatures of the attesting witnesses were genuine. Richard McQueen, who was present when the will was signed by Jozef and the attesting witnesses, was never asked to identify the signatures of those two witnesses. Indeed, he was only able to testify that the will he was shown was "similar" to the document he saw in 1972. Nor did petitioner introduce the testimony of any other witness who was familiar with the signatures of the attesting witnesses. 755 ILCS 5/6-6 (West 2010)) (in a probate case the court may admit proof of the handwriting of

a deceased witness); see *In re Jaeger's Estate*, 16 Ill. App. 3d 872, 875 (1974) (testimony of son of attesting witness that signature was not genuine was believed over testimony of employee of attesting witness that signature was genuine where both witnesses also testified that they had seen the signature many times). McQueen's testimony concerning his own belief that Jozef was mentally competent did not prove that the attesting witnesses also believed Jozef to be competent. In any event, because there was no proof that the attesting witnesses' signatures were genuine, the presumption set out in *More* is not applicable, and the circuit court properly denied admission of the will to probate. We also find that the circuit court properly denied admission of the codicil to probate, where that document incorporated the will by reference.

¶ 11 The judgment of the circuit court of Cook County is affirmed.

¶ 12 Affirmed.