2014 IL App (1st) 130499-U

No. 1-13-0499

SIXTH DIVISION
February 7, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ESTATE OF THERESA DENLINGER, Deceased (Ruth Denlinger and Helen Denlinger, Individually and as Co-Executors of the Estate of Theresa Denlinger, Petitioners-Appellants, v. Rita Kemetick, Estate of John Kenneth Denlinger, John Kenneth Denlinger Trust, James Orrico, Paul Hoffman, Joseph Hoffman, and Margaret Hoffman, Respondents-Appellees).	))))))))))))	Appeal from the Circuit Court of Cook County No. 08 P 803 Honorable Susan M. Coleman, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Where the appellants, who found the decedent's will after her estate had been probated as intestate and distributed to her heirs, failed to give the heirs the statutory notice of the admittance of the will to probate and of the heirs' rights to require formal proof of the will and to

contest the admission of the will to probate, the circuit court did not err in denying appellants' petition to order the heirs who were not legatees under the will to refund their distributive shares to the estate.

¶ 2 Decedent's will was found about three years after her estate had been probated as intestate, distributed to her eight heirs, and closed. Upon petition by decedent's two sisters who were the only legatees under the will, the circuit court reopened the estate, admitted the will to probate, and appointed the two sisters as co-executors. When the sisters subsequently petitioned the court to order the distributees under the intestate succession to refund their distributive shares, the court denied that petition and ruled, pursuant to Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006), that the denial was final and appealable.

¶ 3 The sisters appealed, contending the denial was error because a newly discovered will can be admitted to probate and cause prior court orders to be vacated. The sisters also argue that section 24-4(b) of the Probate Act of 1975 (Act) (755 ILCS 5/24-4(b) (West 2010)), which empowers a court to order distributees to refund money to an estate, can be invoked here to require the heirs who received shares of the estate under the intestacy succession but are not legatees under the will to refund their shares to the estate.

¶ 4 For the reasons that follow, we affirm the circuit court's denial of the refund petition.

¶ 5 I. BACKGROUND

¶ 6 In February 2008, Ruth Denlinger filed a petition for letters of administration, which stated that her sister Theresa Denlinger died in October 2007, left no will, and the approximate value of her personal estate was $300,000. In March 2008, letters of office as independent

administrator were issued to Ruth, and a $450,000 surety bond was approved. Theresa never married and had no children. According to the laws of intestacy, Theresa's heirs were her surviving four siblings (John, Ruth and Helen Denlinger, and Rita Kemetick), three nephews (James Orrico, and Paul and Joseph Hoffman), and one niece (Margaret Hoffman). These eight heirs were listed in the affidavit of heirship, and the court issued an order declaring them to be Theresa's heirs. The eight heirs signed a notice consenting to Ruth's appointment as independent administrator and waiving notice of the hearing on the petition and of rights in independent administration. Ruth subsequently published the necessary claims notice for creditors and, in September 2008, filed with the court a final report, which stated that the assets of the estate were distributed to the heirs and receipts were obtained from all of them. On September 29, 2008, the court entered an order that discharged the independent representative and closed the estate.

¶ 7 However, in December 2011, Ruth and Helen filed a petition to vacate the order of discharge and reopen the estate. They stated that Theresa's last will and testament, dated February 26, 1964, was recently found, it appointed Ruth and Helen as co-executors, and it bequeathed all of Theresa's assets to Ruth and Helen in equal shares. They asked the court to vacate the September 29, 2008 discharge order, reopen the estate matter, and distribute the estate in accordance with the will. Citing *Oliver v. Oliver*, 313 Ill. 612 (1924), they argued that a newly discovered will provides adequate grounds for vacating a prior distribution and taking up anew the matter of the estate.

¶ 8 Thereafter, a copy of the six-page will was filed with the court. The will contained an attestation clause, wherein three witnesses stated that they were present and saw Theresa sign the

will, they attested to the will in Theresa's presence, and they believed she was of sound mind and memory at the time of the signing of the will.

¶ 9 On March 6, 2012, the court, stating that "the will having been proved as provided by law," admitted the will to probate, appointed Ruth and Helen as co-executors, and reopened the estate. However, there is no indication in the record that notice of the admittance of the will to probate or of the heirs' rights to require proof of the will or contest the validity of the will was given to the heirs in accordance with section 6-10 of the Act (755 ILCS 5/6-10 (West 2010)).

¶ 10 In May 2012, Ruth and Helen moved the court for a recovery citation against John Denlinger, his probate estate, and his trust estate to return the funds he had received from the intestacy distribution because he was not a legatee under the will. However, in September 2012, the court entered an order that withdrew the petition for citation to recover and continued the matter.

¶ 11 None of the heirs filed a petition with the court to require proof of the will or to contest the validity of the will.

¶ 12 On December 21, 2012, Ruth and Helen petitioned the court to require John Denlinger's estate and trust, Rita Kemetick, James Orrico, and Paul, Joseph and Margaret Hoffman (the heirs) to refund the distributive shares they had received under the intestate succession. Ruth and Helen argued that a newly discovered will was a special circumstance that required the heirs, who were distributees under the intestacy succession but were not legatees under the will, to refund their shares to the estate.

¶ 13 On January 17, 2013, the circuit court denied the refund petition and entered a finding that the order was final and appealable. There is no indication in the record of the reason for the court's denial of the refund petition. Ruth and Helen timely appealed.

¶ 14 II. ANALYSIS

¶ 15 Initially we note that the heirs have not filed briefs on appeal. However, we find that the issues and record are not complicated, and we will address the merits of the appeal in accordance with the standards of *First Capitol Mortgage Corp. v. Talandis Construction Corp.,* 63 Ill. 2d 128 (1976).

¶ 16 Further, we note that Ruth and Helen have the burden, as the appellants, to provide this court with a sufficiently complete record of the proceedings at trial. If any hearing was held on their refund petition, the record does not contain either a transcript of that proceeding or a bystander's report pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). Generally, in the absence of such a record on appeal, a reviewing court will presume that the order entered by the trial court was in conformity with the law and supported by a sufficient factual basis. See *Midstate Siding & Window Co. v. Rogers,* 204 Ill. 2d 314, 319 (2003), citing *Foutch v. O'Bryant,* 99 Ill. 2d 389, 391-92 (1984). However, we note that many matters in the probate court are *ex parte*, and many hearings are handled in an informal and routine manner. Moreover, the lack of any hearing transcript here does not bar our review of the issue on appeal.

¶ 17 On appeal, Ruth and Helen argue that the circuit court did not provide any reason or analysis for its denial of the refund petition even though none of the heirs appeared in court, no objections were filed or orally made, and the refund petition was uncontested at the January 17,

2013 court date. Ruth and Helen argue that a newly discovered will provides adequate grounds for vacating a prior distribution, taking up anew the matter of the estate, and recovering previous distributions made to heirs or legatees. See *Oliver v. Oliver*, 313 Ill. 612 (1924) (the court held that since a statute expressly provided that letters of administration should be revoked upon the subsequent production and probate of a will, and since the administration of an estate as intestate property had never been held to bar the probate of a subsequently discovered will, there was no reason why an adjudication of intestacy and a settlement of the rights of a decedent's heirs to her property should prevent the probate of the subsequently discovered will); 755 ILCS 5/24-4(b)(West 2010) (section 24-4(b) of the Act allows courts to order distributees to refund money to the estate, and if they refuse to refund within 60 days after being ordered, then a civil action can be maintained by the representative against the distributee for the amount due and the court's order is evidence of the amount due).

¶ 18 In Illinois, there is no statute that limits the period following a testator's death in which a will may be admitted to probate. Any valid will may be filed and admitted to probate, regardless of low long the period that has elapsed. See *In re Estate of Schafroth*, 233 Ill. App. 3d 185, 187 (1992) (a widow was not equitably estopped from filing a will eight years after the decedent's death where there was no proof she misrepresented that she was unaware of the will, nor was the widow guilty of laches, which requires an unreasonable delayed assertion of a known right); *In re Estate of Cornelius*, 125 Ill. App. 3d 312, 314 (1984) (even though the estate had been probated as intestate and closed, the circuit court properly re-opened the estate to probate the newly found will because "Illinois courts have long recognized that a newly discovered will

provides adequate grounds for vacating a prior distribution and taking up anew the matter of the estate"); *Crooker v. McArdle*, 332 Ill. 27 (1928) (normally, the later-discovered will, if otherwise valid, may be admitted to probate even though an earlier will has been probated); *Conzet v. Hibben*, 272 Ill. 508 (1916) (when the later-found will is duly proven, the order of the court provides for the revocation of the probate of the earlier will, and the admission of the later will to probate, all as part of the same proceeding). Delays in filing a will may result in problems because the estate may have been probated already, either intestate or under another will, and fully distributed. Such situations may require action to recover the estate from the distributees.

¶ 19 The Act provides that a will with an adequate attestation clause, like the one in this case, can be admitted to probate as self-proving. 755 ILCS 5/6-4 (West 2010). This procedure allows the administration of the estate to be commenced quickly because notice of probate of the will is given after the will is admitted to probate. 755 ILCS 5/6-10 (West 2010). Nevertheless, this procedure still provides an adequate opportunity for interested parties to file a will contest because the court's order admitting the self-proving will to probate is not final as to the will's execution or validity.

¶ 20 Specifically, section 6-10(a) of the Act provides, in pertinent part, that within 14 days after entry of an order admitting a will to probate, the representative must mail to each heir and legatee a copy of the petition to admit the will to probate and a copy of the court order showing the date of entry. 755 ILCS 5/6-10(a) (West 2010). The mailed information must include an explanation, in the form prescribed by Illinois Supreme Court Rule 108 (eff. May 30, 2008), of the rights of the heirs and legatees to require formal proof of the will under section 6-21 of the

Act (755 ILCS 5/6-21 (West 2010)), and to contest the admission of the will to probate under section 8-1 of the Act (755 ILCS 5/8-1 (West 2010)). 755 ILCS 5/6-10(a) (West 2010). The representative must file proof of mailing with the clerk of the court. *Id.*

¶ 21 Serious problems can arise when notice is not given to heirs and legatees as required by the Probate Act. In *In re Estate of Stanford*, 221 Ill. App. 3d 154, 157 (1991), no section 6-10(a) statutory notice was mailed to any of the 74 heirs and legatees listed on the petition to probate the will, although a notice to unknown heirs was published. The will was probated, and the estate administered and distributed. *Id*. at 157-58. After the circuit court approved the final report and discharged the executor, an heir who failed to receive section 6-10 notice moved the court to vacate its order. *Id*. at 158. The circuit court determined that it did not have *in personam* jurisdiction over the heir due to the lack of notice, declared void all the orders entered after the will was admitted to probate, and reopened the estate. *Id*. The appellate court affirmed, noting that the probate notice provisions, as a matter of law, were the equivalent of service of process in a law or chancery case, and that without compliance, the probate court lacks *in personam jurisdiction* of any heir or beneficiary who does not voluntarily appear generally. *Id*. at 160. Moreover, notice made other than as required under the Act was ineffective to confer *in personam* jurisdiction, irrespective of how many times it was made, the form in which it was made, or that it was, in fact, received. *Id*. The section 6-10(a) notice advises the heirs of their rights and also gives a time frame from which the 42-day time limit for requiring formal proof of the will (755 ILCS 5/6-21 (West 2010)), and the six-month time limit for contesting the will (755 ILCS 5/8-1 (West 2010)), can commence. *Id*. at 161.

¶ 22 Here, the record establishes that Ruth and Helen did not comply, within 14 days after entry of the court order admitting the will to probate, with the statutory requirement to give the heirs notice of the admittance of the will to probate and notice of their rights to demand formal proof of the will and to contest the validity of the will. Accordingly, the circuit court did not err in denying Ruth and Helen's subsequently filed refund petition.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.