2014 IL App (1st) 132809-U

FIRST DIVISION
May 12, 2014

No. 1-13-2809

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re	)	Appeal from the Circuit Court of
	)	Cook County.
ESTATE OF MARY DICKS,	)	
	)	
(Allison Ferconio,	)	
	)	
Respondent-Appellant,	)	
	)	
v.	)	No. 12 P 6420
	)	
Jennifer Barber,	)	
	)	Honorable Susan M. Coleman,
Petitioner-Appellee).	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court erred when it refused admission of a will to probate on the basis that one of two attesting witnesses testified that he did not actually see the testator's signature on the will.

¶ 2 This dispute between a niece and a granddaughter involves whether a relative's will should be admitted to probate. Because the evidence presented below was insufficient to

overcome the presumption of validity, we reverse the circuit court's decision to refuse confirmation of the will and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Mary Dicks died September 25, 2012. Her closest living relative and only heir at law was a granddaughter, Jennifer Barber. Barber filed a petition to be named as administrator of Dicks's estate, claiming that Dicks died intestate. Shortly thereafter, Dicks's niece, Allison Ferconio, filed a will with the circuit court. The will was dated May 23, 2012 and purported to be signed by Dicks. The will names Ferconio as executor and leaves Dicks's estate to six persons, including Ferconio but excluding Barber. The will contains a standard attestation clause signed by witnesses Richard Tebik and Robert Abraham. The page signed by Dicks ends with an attestation reading:

> "The foregoing instrument consisting of two, pages, and the Acknowledgment attached hereafter, was on the 23rd day of May, 2012 signed by MARY DICKS, the above named Testator, and by her signed, sealed, published and declared to be her Last Will, in the presence of us and each of us, who thereupon at her request, in her presence, and in the presence of each other, have hereunto subscribed our name [*sic*] as witnesses thereto, this 23rd day of May, 2012.
>
> /s/ Richard S. Tebik — 2832-164th Pl., Hammond, IN 46323 219-659-[****]
>
> /s/ Robert W. Abraham — 10729 Ave E, Chicago, IL 773-221-[****]."

[The underlined material is handwritten in the original document.]

¶ 5 The next page contains an additional attestation section signed by Dicks, Tebik, and Abraham, which begins:

> "Come now, MARY DICKS, the Testator and Richard S. Tebik and _____, [*sic*] the subscribing witnesses herein, who hereby declare under the penalties of perjury that we have signed and executed the foregoing instrument designated as Last Will and Testament of MARY DICKS."

This second attestation clause asserts that: Dicks signed the document as her will; she signed and acknowledged her signature in the presence of both witnesses; she signed the will freely and voluntarily; and she was an adult of sound mind. It is dated May 23, 2012 and signed by all three individuals.

¶ 6 The court admitted this will to probate and named Barber as independent executor. However, a month later, Ferconio filed a request for formal proof of will pursuant to section 6-21 of the Illinois Probate Act of 1975 (Probate Act) (755 ILCS 5/6-21 (West 2012)). The record of the hearing on the formal proof of will consists only of the testimony of Abraham and Tebik.

¶ 7 Tebik testified that he was the attorney[1] who prepared the will, including the attestation clauses. He visited Dicks at her home to obtain instructions on how to prepare the will. When he returned to the home at a later date for execution of the will, Dicks identified Abraham to him as a neighbor who could be a witness. He stated that after he reviewed the terms of the will with Dicks, Dicks "approved" the will and then signed it in his presence, but not in the presence of any other persons. He, in turn, signed as a witness in Dicks's presence. He identified signatures

[1] Tebik was never admitted to the Illinois bar. At the time the will was executed, Tebik had been suspended by the Supreme Court of Indiana, his home state, for failure to cooperate with a disciplinary investigation. *In re Tebik*, 930 N.E.2d 1134 (Ind. 2010). However, no party suggests here that the fact the will may have been prepared by a non-licensed attorney should affect our analysis of whether Dicks properly executed the will.

on the will as his own and stated that he handwrote certain information that was filled in blanks on the will. However, he stated that because he did not witness Abraham sign the will, the language in the attestation clause stating that all three signed in each other's mutual presence was incorrect.

¶ 8 Abraham, a retired accountant and a neighbor of Dicks for almost 50 years, testified through an evidence deposition admitted by stipulation. He testified that Dicks called to him from the back of her house, and, upon his moving closer to her, asked if he would "sign my will." Abraham responded in the affirmative and did so by signing the will twice, in Dicks's dining room with her, but not Tebik, present. Abraham identified his signatures on the will. At first, he testified that Dicks did not sign the will in front of him and that "her signature was blank." However, he later clarified, Dicks only saw the pages including his signature because Dicks "wouldn't really let me see anything, and I didn't want to see anything." He admitted that he signed "her papers, and [was] not really paying attention to anything else." On the last page, all he saw "was the place where she pointed out" for him to sign, "no other signatures, no other writing." During the deposition the following colloquy took place:

> "Q. Okay. So Mary Dicks asked you to sign her last will and testament, you did so by signing your name to pages two and three?
>
> A. Right, uh-huh. And the question you asked me before was – is – well, if I recall, is this the will that I signed? Certainly. It's the papers I signed."

He also stated that he knew Barber's father, who was Dicks's only son, and that he disagreed with the concept of disinheriting a grandchild.

¶ 9 At the conclusion of the formal proof of will hearing, the court explained that there was "no issue" regarding the fact that the two witnesses did not see each other. The court found, however, that Abraham's testimony that the "page was blank when he affixed his signature to it" was dispositive because the witness "must acknowledge the signature of the testator." The court denied confirmation of the will to probate, vacated the earlier order admitting the will to probate, and later denied reconsideration of those orders. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Ferconio claims we have jurisdiction over this appeal pursuant to Illinois Supreme Court Rules 301 and 303. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. June 4, 2008). This is incorrect because she seeks review of an interlocutory, not final, order. Illinois Supreme Court Rule 304(b)(1) grants us jurisdiction here. Ill. S. Ct. R. 304(b)(1) (eff. Jan. 1, 2006). That rule allows appeals as a matter of right from judgments or orders "entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." *Id.*; see also Ill. S. Ct. R. 304(b) Committee Comments (rev. Feb. 26, 2010) ("[s]ubparagraph (1) applies to orders that are final in character although entered in comprehensive proceedings that include other matters. Examples are an order admitting or refusing to admit a will to probate").

¶ 12 Our review of the circuit court's construction of the applicable statute is *de novo*. *In re Estate of Poole*, 207 Ill. 2d 393, 401 (2003). An order denying a will to probate will normally be reversed on appeal if it is against the manifest weight of the evidence. *In re Estate of Salzman*, 17 Ill. App. 3d 304, 309 (1974).

¶ 13 Section 6-21 of the Probate Act sets forth the requirements for a formal proof of will hearing. 755 ILCS 5/6-21 (West 2012). It provides, in pertinent part, that the "proponent must

establish the will by testimony of the witnesses" or through "other evidence as provided in this Act * * * as if the will had not originally been admitted to probate." *Id*. The statute further provides, "[i]f the proponent establishes the will by sufficient competent evidence, the original order admitting it to probate and the original order appointing the representative shall be confirmed * * * unless there is proof of fraud, forgery, compulsion or other improper conduct, which in the opinion of the court is sufficient to invalidate or destroy the will." *Id*.

¶ 14 Section 6-4 of the Probate Act, entitled "Admission of will to probate -- Testimony or affidavit of witnesses," states:

> "(a) When each of 2 attesting witnesses to a will states that (1) he was present and saw the testator or some person in his presence and by his direction sign the will in the presence of the witness *or the testator acknowledged it to the witness as his act*, (2) the will was attested by the witness in the presence of the testator and (3) he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will, the execution of the will is sufficiently proved to admit it to probate, unless there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will. The proponent may also introduce any other evidence competent to establish a will. If the proponent establishes the will by sufficient competent evidence, it shall be admitted to probate, unless there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will.

> (b) The statements of a witness to prove the will under subsection 6-4(a) may be made by (1) testimony before the court, (2) an attestation clause signed by the witness and forming a part of or attached to the will or (3) an affidavit which is signed by the witness at or after the time of attestation and which forms part of the will or is attached to the will or to an accurate facsimile of the will." (Emphasis added.) 755 ILCS 5/6-4 (West 2012).

The dispute here centers around the clause "or the testator acknowledged it to the witness as his act," words enacted as part of the 1940 codification of Illinois probate law, which remain unchanged for over 70 years. See Ill. Rev. Stat. 1939, ch. 3, ¶ 221. The frequency with which disputes arise over the authenticity of wills has created a firm interpretative framework regarding this clause.

¶ 15 The statutory requirements of due execution of a will are mandatory and they must be followed to make a valid will. *Brelie v. Wilkie*, 373 Ill. 409, 411 (1940); see also *In re Estate of Carroll*, 192 Ill. App. 3d at 206-07. The proponent has no duty to show that the will is valid in all respects, but only the duty to prove the essential elements included in the statute. *In re Estate of Salzman*, 17 Ill. App. 3d at 306-07. If the attestation clause is in due form and the will bears the genuine signatures of the testator and the subscribing witnesses, it is *prima facie* evidence of the due execution of the will, and is not overcome by the mere fact that the subscribing witnesses testify they failed to notice whether the will was signed or not, and cannot remember whether they saw the signature. *Brelie*, 373 Ill. at 412. This *prima facie* case can only be overcome by testimony of noncompliance with all the statutory requisites. *In re Estate of Koziol*, 236 Ill. App. 3d 478, 484 (1992). Even if the witnesses' recollection is faded, the attestation clause speaks

authoritatively for their actions. *In re Estate of Carroll*, 192 Ill. App. 3d 202, 207 (1989); *In re Estate of Salzman*, 17 Ill. App. 3d at 307-308.

¶ 16 Where a testator declares to the witnesses that the instrument is her will, or requests them to attest to her will, that declaration or request implies that the same has been signed by her. *Hobart v. Hobart*, 154 Ill. 610, 618-19 (1895). It is not indispensable to a proper attestation that the testator sign in the presence of the witnesses, that the witnesses see the signature of the testator upon the face of the will, or even that they know the instrument they are witnessing is a will. The statutory requirement is satisfied if the testator acknowledges the execution of the will. *Conway v. Conway*, 14 Ill. 2d 461, 468 (1958).

¶ 17 In *Conway*, the witnesses testified not that the will was unsigned at the time they attested to it, but merely that it was placed before them in such a manner that they could not see whether or not it was signed. Even so, the court found that the will was signed by the testator at the time the attesting witnesses signed it, and that the will was properly executed and attested. *Id.* at 469. It is not required that the attesting witnesses be in the presence of each other when they sign the will. *Jenkins v. White*, 298 Ill. 502, 508 (1921).

¶ 18 The *prima facie* evidence "will often prevail" over the testimony of the attesting witnesses which tends to show that some of the requisites were omitted. *Jenkins*, 298 Ill. at 508; see also *Conway*, 14 Ill. 2d at 466; *In re Estate of Carroll*, 192 Ill. App. 3d at 207. Where an attesting witness impeaches or denies the execution of a will or any fact essential to establish its validity, that testimony is entitled to little credence, and should be viewed with suspicion and caution. *In re Willavize's Estate*, 21 Ill.2d 40, 45 (1960); *In re Estate of Koziol*, 236 Ill. App. 3d at 483. The testimony of subscribing witnesses may be so inherently improbable, conflicting in

itself, and their conduct be of such a nature as to discredit their whole testimony, even in the absence of contradictory evidence. *Brelie*, 373 Ill. at 411-12.

¶ 19 Barber's argument hinges on Abraham's statement that he did not see Dicks's signature on the will. Abraham unequivocally stated, however, that Dicks identified the document as her will in his presence. Section 6-4 allows proof of the will in two distinct ways: (1) through testimony that the testator signed in the witness's presence; or (2) "the testator acknowledged it to the witness as his act." 755 ILCS 5/6-4 (West 2012). On this record, we are compelled to find that there is no evidence supporting Barber's contention of invalidity. Accordingly, Ferconio met her burden at the formal proof of will hearing.

¶ 20 CONCLUSION

¶ 21 For these reasons, we reverse the order of the circuit court, with directions to confirm the prior orders admitting the will to probate and appointing Ferconio as administrator, and for further proceedings consistent with this order.

¶ 22 Reversed and remanded with instructions.