2013 IL App (3d) 130074-U

Order filed November 14, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re ESTATE OF COLLEEN M. HUNCKLER,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Deceased,	)	
	)	
(James Hunckler,	)	
	)	Appeal No. 3-13-0074
Plaintiff-Appellee,	)	Circuit No. 11-P-786
	)	
v.	)	
	)	
Kelly Young,	)	Honorable
	)	James Jeffrey Allen,
Defendant-Appellant).	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err when it denied the petition to admit decedent's will to probate.

¶ 2 The trial court allowed admission of the will of the decedent, Colleen M. Hunckler, to probate. James Hunckler (James), decedent's surviving spouse, filed a motion to vacate the

order. The court granted the motion to vacate and, following a hearing on the admission of decedent's will to probate, denied admission of the will. Kelly Young (Kelly), named executor in decedent's will, appeals the trial court's decision denying admission. We affirm.

¶ 3 FACTS

¶ 4 Decedent died on October 15, 2011. On October 28, 2011, James filed decedent's purported will with the court. On November 8, 2011, Kelly, decedent's sister, filed a petition to admit decedent's purported will to probate and for the issuance of letters testamentary. Attached to the petition was a two-page document titled decedent's "Last Will and Testament," which named Kelly as executor of the estate. The will was dated February 20, 2009, with James and William Schubert (William), decedent's father, as attesting witnesses.

¶ 5 On July 2, 2012, the trial court admitted decedent's will to probate and appointed Kelly as executor. Although counsel for James did not object to this ruling, he advised the court that a will contest would be filed.

¶ 6 On July 18, 2012, James filed a motion to vacate the July 2, 2012, order admitting the will to probate. James alleged that the parties had been in discussion for several months prior to admitting the will to probate in an attempt to settle the differences of the parties regarding the admissibility of the will to probate. James intended to file objections to the will and mistakenly agreed to the admission of the will to probate. James explained that his objections were more properly made at a hearing for the admission of the will (755 ILCS 5/6-4, 6-21 (West 2010)), rather than in a proceeding to contest the will (755 ILCS 5/8-1 (West 2010)). James alleged that decedent's purported will did not satisfy the requirements under section 6-4(a) of the Probate Act of 1975 (Act) for admission to probate. 755 ILCS 5/6-4 (West 2010).

¶ 7 Kelly filed a response to the motion to vacate, which was supported by William's witness attestation affidavit dated November 28, 2011. William averred that he signed and attested decedent's will on February 20, 2009, when both decedent and James were present. William further averred that he, decedent, and James signed the will in the presence of a notary public on that date. On September 21, 2012, the trial court granted James' motion to vacate the July 2, 2012, order admitting decedent's will to probate.

¶ 8 A hearing on the petition to have the will admitted to probate was held on October 17, 2012. William's witness attestation affidavit was submitted into evidence.

¶ 9 James testified that he married decedent on June 13, 2009. James had previously seen decedent's purported will, but he did not recall seeing it on February 20, 2009. Decedent and James had discussed a will prior to their marriage, but James did not remember the date of this discussion. James testified that his alleged signature on both pages of the will looked like his, but he was unsure because the signature was illegible. James did not recall signing decedent's will. Decedent did not ask James to place his signature on her will, and decedent did not execute the will in his presence. James also did not see William sign the will. James did not remember an occasion when decedent, William, and he were together in the same room to sign a document. It was possible decedent signed James' name on the will. James also did not remember signing anything in front of the notary public named on the will. James testified that his printed name and date on the will near his alleged signature were not his handwriting.

¶ 10 A document identified as James' last will and testament dated February 20, 2009, was submitted into evidence. James admitted seeing this document before and that decedent had signed as a witness. With regard to his alleged signature, James stated it could possibly be his,

but could not confirm it because the signature was illegible. James only recalled signing a prenuptial agreement and last will and testament dated June 10, 2009. This document was located in decedent's safe deposit box along with the will dated February 20, 2009. The will executed on June 10, 2009, was not filed with the court because only James and decedent signed the will.

¶ 11 William testified that on February 20, 2009, he witnessed the execution of decedent's will. William reaffirmed the information contained in the affidavit. William was called over to decedent's house to sign wills for decedent and James. When William signed the will, William's wife, decedent, and James were present. William testified that James signed the will at this time, but later in his testimony stated that he did not see James sign. William further testified that everyone signed the will at the same time, but also that decedent may have signed the will at the bank in the presence of the notary. William admitted he was having memory problems.

¶ 12 The trial court stated that the reason for the instant dispute was because decedent's will did not contain an attestation clause. The will appeared to have the signatures of decedent, James, and William, which were notarized. The court determined that William, whom it found credible despite conflicting testimony, witnessed decedent and James sign the will in his presence. The court stated that if William, who was in the presence of decedent, saw James sign the will, the court could deduce that James was also in decedent's presence. However, the court would not find James' witness attestation based on the attestation of William. Therefore, the court found insufficient evidence to meet the requirements of section 6-4(a) of the Act, and the petition to admit the will to probate was denied.

¶ 13 Kelly filed a motion to reconsider, which the trial court denied. Kelly appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues that the trial court should not have vacated its July 2, 2012, order and that decedent's will should have been admitted to probate because the evidence sufficiently proved compliance with section 6-4(a) of the Act. 755 ILCS 5/6-4(a) (West 2010).

¶ 16 An order denying a will to probate will be reversed on appeal if it is against the manifest weight of the evidence. *In re Estate of Carroll*, 192 Ill. App. 3d 202 (1989). However, we review *de novo* the proper interpretation of the Act. *In re Estate of Koester*, 2012 IL App (4th) 110879.

¶ 17 In order to admit a will to probate, the party seeking to admit the will must prove compliance with the three elements of section 6-4(a). 755 ILCS 5/6-4(a) (West 2010). Thus, the party must present a statement by two attesting witnesses establishing that:

> "(1) he was present and saw the testator or some person in [her] presence and by [her] direction sign the will in the presence of the witness or the testator acknowledged it to the witness of [her] 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 proponent may also introduce any other evidence competent to establish a will." 755 ILCS 5/6-4(a) (West 2010).

¶ 18 These witness statements may be proved by: (1) testimony before the court; (2) an attestation clause signed by the witnesses 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. 755 ILCS 5/6-4(b) (West 2010). Although the law favors admission of a will to probate, the requirements of the statute are

mandatory and must be complied with. *In re Estate of Jacobson*, 75 Ill. App. 3d 102 (1979).

¶ 19 In the instant case, the parties agree that William was a proper attesting witness and that decedent was of sound mind and memory at the time of signing. Thus, the issue before this court is whether the evidence presented at the hearing concerning James' attestation satisfied the first two elements of section 6-4(a). These elements required Kelly to prove that: (1) James saw decedent sign the will or that decedent acknowledged her signature as her act; and (2) James signed the will in decedent's presence.

¶ 20 In support of her argument that James was a proper attesting witness, Kelly relies, in part, on *Carroll*, 192 Ill. App. 3d 202, to claim that strict adherence to the elements in section 6-4(a) is not required. In *Carroll*, the court admitted a will to probate despite an attesting witness' failure to recall the circumstances surrounding the attestation of the will. *Id.* We find *Carroll* distinguishable from the instant case.

¶ 21 In *Carroll*, the witness executed an attestation clause on the will, which provided *prima facie* evidence of the proper execution of the will. See *In re Estate of Alfaro*, 301 Ill. App. 3d 500 (1998) (stating that where a will contains an attestation clause asserting that all of the formalities required by law have been met and the signatures on the will are admittedly genuine, a *prima facie* case has been made in favor of the due execution of the will). By contrast, decedent's will here had no attestation clause, and the authenticity of James' signature was not confirmed; therefore, we can afford no such presumption to decedent's will.

¶ 22 Kelly asserts that although James testified he did not see decedent sign the will, decedent acknowledged it as her act when she talked to James about a will before they got married. We find this evidence insufficient, because James only testified that decedent discussed preparing a

will, not that decedent acknowledged executing the will in question.

¶ 23 Additionally, Kelly claims that we can infer the second element of section 6-4(a) from: (1) William's testimony that everyone signed at the same time; and (2) because James' signature was consistent with the signature on his own will. First, even if William's inconsistent testimony proved James signed the will in decedent's presence, the statute requires a statement from each attesting witness establishing this fact. See 755 ILCS 5/6-4(a) (West 2010). Thus, William's testimony would be insufficient to prove James' attestation. Second, James' alleged signature on decedent's will was not verified as consistent with the alleged signature on his own will. James testified that he could not confirm his signature on either document because the signature was illegible. No other evidence, other than the fact that the documents were executed on the same date, suggested that the signatures were consistent. Furthermore, the trial court did not make a finding that the signatures appeared consistent, and James' will does not appear in the record before us. See *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984) (stating that any doubts arising from an incomplete record will be resolved against appellant).

¶ 24 Based on the foregoing, we cannot say that the trial court's decision to deny admission of the will to probate was against the manifest weight of the evidence. See *Jacobson*, 75 Ill. App. 3d 102.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 27 Affirmed.