STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of CLARK T. SMOKE, Deceased.

ROBERT SMOKE,

Petitioner-Appellee,

v

TIMOTHY SMOKE,

Respondent-Appellant.

UNPUBLISHED
December 18, 2007

No. 273114
Wayne Probate Court
LC No. 2004-675901-DE

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order dismissing his objections and admitting into probate the last will and testament of Clark T. Smoke, the decedent, dated December 29, 1977. We affirm.

The decedent died on May 3, 2003, in Plymouth Township, and was survived by his sister Mary; his brother, petitioner; and his son, respondent. Shortly thereafter, petitioner submitted the decedent's will, created in 1977, for probate. The will left only $1,000 to respondent, who was a young child when the will was made, and it left the remainder of decedent's estate to his siblings. Respondent objected to the admission of the will to probate because he claimed to possess letters, written by the decedent, that purportedly expressed the decedent's testamentary intent that, after his death, respondent should receive all decedent's property. In a letter addressed to respondent and dated May 8, 2002, the decedent addressed the problems he was having with Mary and petitioner over a parcel of farm property that he held jointly with them as an inheritance from another brother. The decedent described his ownership interest in the 152 acres of property and his plans for its division. Decedent explained:

> I mention this to you, as you are my only offspring (next of kin), should I die, or become unable to conduct my own affairs. At least you will have some idea of what assets are involved in Court litigation, and can represent my legal interests, as my agent; if this should become necessary. You can present this letter to my lawyer(s) as proof of my intent that you should act as my agent in the above matters. Okay? So far, I am in good health, and able to conduct my own affairs.

Decedent concludes this letter by stating, "So, if the land passes to you upon my death be smart, and don't cave into pressure to unload the land for peanuts." This letter was signed only "Dad."

In a letter dated October 14, 2001, addressed to Mary and petitioner, the decedent again addressed his concerns over the property. The only copy in evidence did not contain a signature, and the evidence did not demonstrate that decedent signed the original document. In the letter, the decedent stated:

> I feel that the property should be partitioned in 3 equal parcels of approximately 50± acres to resolve the issue of "who owns what" and to resolve this legal impasse once and for all. I am getting older and I want to avoid any problems of being able to devise my share of the 152 acres to my son, Tim Smoke, if I should expire unexpectedly. Tim should not have to be concerned about getting involved in legal squabbles about who owns what part of the 152 acres when he is on active duty in the Army. I believe I would be remiss in my obligations as his father to leave him an expensive legal headache <u>that can be avoided</u>.

The trial court, after two days of testimony, issued an opinion rejecting respondent's arguments that the letters acted either as a holographic will or a codicil that revoked or modified the 1977 will.

On appeal, respondent argues that the trial court clearly erred by failing to effectuate the testamentary intent reflected in the letters. We disagree. For any issues involving the court's role as factfinder, we accord the probate court "due deference and apply a clear error standard of review . . . ." *In re Estate of Bem*, 247 Mich App 427, 433; 637 NW2d 506 (2001). To support his claim that the letters should preempt the will, respondent points to the fact that the decedent mailed out multiple copies of the letter containing the purportedly testamentary provisions. The decedent apparently sent an original to his siblings and a copy to his son and his attorney. Respondent also relies upon statements made by Mary, who openly recognized that the decedent wanted his property to go to respondent. Finally, the respondent relies upon those aspects of Mary's testimony that indicated recognition of the letter's testamentary nature.

According to MCL 700.2502(1), a will is valid if it is in writing, signed by the testator, and signed by at least two individuals, each of whom signed within a reasonable time after they witnessed the signing of the will. The next subsection, MCL 700.2502(2), provides that if the document does not comply with the formalities of subsection (1), it may be valid as a holographic will, whether witnessed or not, if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting. Finally, MCL 700.2502(3) allows for the use of extrinsic evidence to prove that a document constitutes a testator's will, including, for a holographic will, portions of the document that are not in the testator's handwriting.

In analyzing the letters, the lower court correctly recognized that the decedent's letters do not meet the requirements of a formal will under MCL 700.2502(1) because they were not witnessed. The letters do not meet the requirements of a holographic will under MCL 700.2502(2) because the letters do not bear decedent's signature. Because MCL 700.2502 did

not apply to the decedent's letters, the court turned to the will saving statute, MCL 700.2503, which provides:

> Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:
>
> (a) The decedent's will.
>
> (b) A partial or complete revocation of the decedent's will.
>
> (c) An addition to or an alteration of the decedent's will.
>
> (d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

The trial court correctly determined that the purpose of the statute is to permit a probate court to overlook technical deficiencies in what clearly stands as a clear, accurate, written statement of the decedent's testamentary intent. To invoke MCL 700.2503, the proponent of a document must demonstrate by clear and convincing evidence that the decedent intended the document to state the decedent's testamentary intent, whether through "a more recent will, or a partial or complete revocation, or an addition or alteration of the decedent's will, or a partial or complete revival of a formerly revoked will or a formerly revoked portion of a will." *In re Estate of Kilyon Lee Smith*, 252 Mich App 120, 128; 651 NW2d 153 (2002). It is important to note that the proponent of the document must demonstrate that the document itself represents a valid and more recent testamentary instrument. MCL 700.2503. In other words, it is not enough that a document reflects the decedent's intent to someday make changes to his will, or that it hints that the decedent has long abandoned the intent embodied and formalized in the will, or even that it expresses the decedent's regret about ever making the will in the first place. MCL 700.2503; see also MCL 700.2507.

Here, the trial court placed substantial emphasis on the fact that the two letters with purported testamentary effect did not contain decedent's signature, so it was highly unlikely that either of them were intended to carry out the decedent's testamentary wishes. Both formal and holographic wills require the testator's signature as a basic prerequisite for admission to probate. MCL 700.2502. Signatures generally authenticate documents, especially wills, demonstrating to everyone involved that the statements represent an expression of the author's genuine, considered, and memorialized intent. *Bem*, *supra* at 438. In this case, the trial court found that the lack of signature fatally undermined respondent's reliance on them as testamentary instruments, because MCL 700.2503 was not intended to remedy such a glaring void in a will's formation.

Although we are not in a position to speculate that every document must always bear a signature to be acceptable as a will, the probate court's analysis and ultimate conclusion was amply supported by an examination of the letters presented in this case. The letters cover a variety of subjects, including the decedent seeing a Kodiak bear in a cage, the finding of a

trespasser on the jointly held property, and the decedent's concerns about the quality of fill dirt and ground water on another piece of property. Both letters speak of the demise of the property to respondent from a future, sometimes conditional, perspective. For example, in the first letter, the one to the decedent's siblings, the decedent writes of wanting "to be able to devise" the land to respondent. This is not the type of express present intent associated with a will. Contrary to MCL 700.2503, the decedent does not actually purport to devise anything with the letter. Similarly, the later letter to respondent contains the phrase "if you get the land" and does not say anything to indicate his present intent that his rights in the land will pass to respondent at his death. In fact, the letters do not reflect any certainty at all about what interest, if any, decedent's estate would retain in the land at his death, and the land was always the focal point of decedent's discussion of testamentary matters. Considering the meandering nature of the letters and the minimal amount dedicated to their supposed testamentary intent, the probate court correctly found that respondent had not presented clear and convincing evidence that the decedent intended the letters to replace, amend, or revoke his earlier will. MCL 700.2507.

Next, respondent argues that it was improper for the court, in issuing its opinion, to reject respondent's cited authority and evidence and to rely instead upon cases from foreign jurisdictions and an ex parte communication with a legal scholar to interpret MCL 700.2503. However, the trial court ultimately adopted and applied a correct legal interpretation of the statute. Any technically improper reliance on questionable authority did not affect the validity and accuracy of the law actually applied, so any error is harmless to respondent's case.

Respondent also challenges the 1977 will as deficient. We disagree. Once a proponent has presented evidence of due execution of a will, the burden of proof then shifts to the contestants to prove, by a preponderance of the evidence, some reason why the will should not be admitted to probate. *In re Estate of McIntyre*, 355 Mich 238, 247-248; 94 NW2d 208 (1959). Here, the court noted that the original will was located in the probate court file and the death certificate listed Wayne as the county of death. The proponent of the will proffered the testimony of the attorney who drafted the 1977 will for the decedent, who testified that he was a witness to the execution of the will, along with the office secretaries. The attorney also testified that if the decedent signed the will, it would have been signed in his presence and the will was the exact document signed in his office on December 29, 1977. Respondent did nothing to challenge this evidence. Although respondent identified several circumstances that changed in the twenty-five years after the will was executed, changes in circumstances alone do not ordinarily support a finding of revocation. MCL 700.2508. Therefore, we find no error in the lower court's order submitting the 1977 will to probate.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood