

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001185-MR

LISA MARGARET LOCKARD

APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 09-CI-00605

LURA MICHELLE MCGRAW

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Lisa Margaret Lockard appeals from the June 6, 2011, order of the Grant Circuit Court which remanded this case to Grant District Court for probate of Howard Stephens' will following entry of the circuit court's April 5, 2011, judgment which held that Lisa's allegations of invalidity regarding her late father's will were without legal merit. After review, we affirm.

Lisa and Lura Michelle McGraw, Howard's two daughters, are both beneficiaries under the terms of his will. The issue in this case is whether Howard's will is valid despite the fact that Lura's spouse, Charles McGraw, witnessed the execution of the will. Howard's will was drafted by Hon. Edward J. Lorenz and was witnessed by one of Lorenz's employees, Julie Hunter, and by Charles.

Following Howard's death, Lura was appointed as executrix of his estate and his will was admitted to probate in Grant District Court. Lisa challenged the validity of the will in Grant Circuit Court, claiming that Charles was an improper witness to sign the will. After a hearing, the circuit court determined that the will was valid and remanded the case to the district court for admission to probate. Lisa now appeals.

On appellate review, a trial court's factual findings "shall not be set aside unless they are clearly erroneous; that is, not supported by substantial evidence." *Patmon v. Hobbs*, 280 S.W.3d 589, 593 (Ky.App. 2009) (citation omitted). CR¹ 52.01 explains that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Questions of law are reviewed on appeal *de novo*. *Patmon*, 280 S.W.3d at 593 (citation omitted).

¹ Kentucky Rules of Civil Procedure.

Lisa contends that the will is invalid pursuant to KRS² 394.210(2) because the marital relationship between Charles and Lura disqualifies Charles as a credible witness and thus, the requisites for a valid will are not met. We disagree.

KRS 394.040 provides that unless a will is wholly in the testator's handwriting, it must be witnessed by at least two credible witnesses, both of whom signed the will in the presence of the testator and in the presence of each other.

With respect to the credibility of witnesses, KRS 394.210(2) specifies:

If a will is attested by a person to whom, or to whose wife or husband, any beneficial interest in the estate is devised or bequeathed, *and the will cannot otherwise be proved*, such person shall be deemed a competent witness; but such devise or bequest shall be void, unless such witness would be entitled to a share of the estate of the testator if the will were not established, in which case he shall receive so much of his share as does not exceed the value of that devised or bequeathed.

(emphasis added). In other words, in order to trigger KRS 394.210(2), not only must a beneficiary or his/her spouse be a witness, but the will must not otherwise be capable of being proven. *Calvert v. Calvert*, 208 Ky. 760, 271 S.W. 1082 (1925) (holding that devise to attesting witness is not void if will is otherwise provable). *See also Stewart v. Noble*, 2007 WL 1196465 at 7-8 (April 6, 2007) (holding that will is valid even though wife of beneficiary acted as a witness because will could be proven by testimony of other witness).

Here, the first prong of KRS 394.210(2) is met since Charles is the spouse of a beneficiary. Thus, the issue is whether the will is otherwise capable of being proven. “A will may be proved by the testimony of one (1) of the subscribing

² Kentucky Revised Statutes.

witnesses without regard to the availability or competency of the other witnesses, provided said will was acknowledged or subscribed by the testator in the presence of two (2) witnesses at the same time.” KRS 394.210(3).

In this case, despite the fact that Charles’s credibility as a witness is undermined because his spouse is a beneficiary under the terms of the will, the will can otherwise be proven by the other subscribing witness, Julie Hunter, whose credibility is not challenged. Accordingly, the provisions of KRS 394.210(2) do not apply and the circuit court did not err by determining that Howard’s will was valid and remanding this matter to the district court for probate proceedings.

For the foregoing reasons, the order of the Grant Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Theodore Knoebber
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BRIEF FOR APPELLEE:

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