NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0093

IN THE MATTER OF THE SUCCESSION OF WILMA CHILDERS STARNS

J.E.K.
by J.T.P.
J.2.P.
MH

DATE OF JUDGMENT: JUN 10 2011

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 13,381, DIVISION D, PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE M. DOUGLAS HUGHES, JUDGE

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED.

Kuhn, J.

Appellants, Phillip Wayne Starns, Linda Ann Starns, and Shirley Louise Starns Gannarelli, the adult children of the decedent, Wilma Childers Starns, appeal the trial court's denial of their petition to annul a document, which the trial court had previously ordered to be filed and executed as Wilma's notarial testament. Appellants assert that the trial court erroneously required them to prove that Wilma "actually physically destroyed the original" document. Plaintiffs further contend that appellee, Jarred Walker, Wilma's grandson and Phillip's son, failed to carry his burden of proving by "clear and convincing evidence" that Wilma did not destroy her testament before her death. Finding no error in the trial court's judgment, we affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

On January 30, 2004, Wilma executed a notarial testament, which provided, in pertinent part:

> **To: [JARRED],** I give and bequeath all that I own at the time of my death ....
>
> I hereby nominate, constitute and appoint **Randal Childers**, as Executor ... of my estate ....

Wilma died on March 27, 2009. In July 2009, Jarred, filed a petition to probate her testament. Jarred attached a certified true copy of Wilma's "Last Will and Testament" to his petition rather than the original document.[1] By order dated July 27, 2009, the trial court ordered that the 2004 notarial testament be "registered, recorded, filed and executed." On August 24, 2009, appellants filed a

[1] A notarial testament does not need to be proved. Upon production of the testament, the court shall order it filed and executed, and this order shall have the effect of probate. La. C.C.P. art. 2891. The copy of the testament was certified as a "true copy" by Peggy Swetledge, the notary before whom Wilma executed the 2004 testament.

petition to annul the 2004 testament, asserting among other contentions that the testament had been revoked during 2006, when Wilma "declared that [Jarred] would receive none of her estate and ... destroyed the original of the testament." The trial court issued an order directing Jarred to show cause why "this court should not rule that the purported Last Will and Testament of the deceased previously ordered executed herein is null and void."

After the show cause hearing, the trial court issued written reasons for judgment that stated, in pertinent part, "The only person who allegedly saw [the decedent] tear up the will is [her son, Phillip] .... However, because of the extreme animosity between all parties, that testimony is not enough to annul the testament." By judgment dated April 21, 2010, the trial court denied the petition to annul the 2004 testament.

Appellants contend that the trial court erred in requiring them to prove that the deceased revoked the testament by destruction and by not requiring Jarred to prove that the deceased had not revoked it.[2] As such, appellants contend this court should consider this matter on a *de novo* basis.

II. ANALYSIS

The appellate court's review of factual findings is governed by the manifest error-clearly wrong standard. With regard to questions of law, the appellate review is simply a review of whether the trial court was legally correct or legally incorrect. ***Succession of Bell***, 06-1710, p. 5 (La. App. 1st Cir. 6/8/07), 964 So.2d 1067, 1071.

[2] In the proceedings below, appellants challenged the validity of the original will on the grounds that it was improperly executed. The trial court rejected this claim, and appellants have not reurged this claim on appeal.

In an action to annul a notarial testament, the plaintiff always has the burden of proving the invalidity of the testament. La. C.C.P. art. 2932B. However, when the original of a will cannot be found after the testator's death, the failure to find a will that was duly executed and in the possession of, or readily accessible to, the testator, gives rise to a legal presumption of revocation by destruction.[3] ***Succession of Talbot***, 530 So.2d 1132, 1134-35 (La. 1988). This presumption is a rebuttable one and so may be overcome by sufficient evidence. ***Id***, 530 So.2d at 1135.[4] The proponent of the will must produce evidence that persuades the trial court of contrary essential facts. ***Id***, 530 So.2d at 1136. The presumption may be weak or strong, and more or less easily rebuttable, depending on the clarity of the evidence as to whether the testator was the author of the will's destruction, whether he expressed an intention to revoke the will, whether he treated any extent copy of the will as not having been revoked, and as to any other issue bearing upon the testator's intention with respect to the destruction and revocation of the will. ***Id.***, 530 So.2d at 1135; see also ***Succession of Altazan***, 96-0409, p. 4 (La. App. 1st Cir. 11/8/96), 682 So.2d 1320, 1322, where this court stated, "It is clear that the [***Talbot*** court] recognized a sliding scale of proof sufficient to rebut the presumption depending on the weakness or strength of the evidence surrounding the lost original." The ***Talbot*** court further set forth that this presumption should not be rebuttable except upon clear proof of a contrary contention when the

[3] Louisiana Civil Code article 1606 provides that a testator may revoke his testament at any time. Methods of revocation include the physical destruction of the testament by the testator or at his direction. La. C.C. art. 1607(1).

[4] A presumption shifts the burden of producing evidence and serves to assign the burden of persuasion as well. ***Talbot***, 530 So.2d at 1135, citing McCormick, *Evidence* § 343 (3rd ed. 1984).

testator, in the presence of a credible witness, declares his intention to revoke his will and in fact destroys an original thereof. ***Talbot***, 530 So.2d at 1136.

At the hearing, Jarred testified that he had seen his grandmother's original will hanging in a manila folder on the wall in her bedroom. He did not recall the exact date on which he saw it, but he testified that it was "before" his grandmother's death and "around the time she passed away." Jarred also testified that his grandmother had shown him the will and had given him a copy of the will before he graduated from high school in 2006. At that time, he and his grandmother understood that he would possibly attend college, and she told him that she intended to pay his college tuition. He stated that when he decided not to go to college after graduation, his grandmother understood and accepted his decision. She also initially opposed his decision to marry soon after his graduation, and she did not attend his wedding or the wedding shower.

While acknowledging that he had been arrested on charges of spousal abuse and assault against his child, Jarred stated that his grandmother was aware of the criminal charges and that both charges were expunged before she died. Jarred also testified that he and his wife had lived next door to his grandmother's mobile home in an old travel trailer, both of which were located on the same piece of property.[5] When his grandmother passed away, Jarred still resided next door to his grandmother. He explained that his grandmother had never refused him anything that he had needed during her lifetime. He stated that she had never told him that

[5] Phillip testified that he owned the mobile home that Wilma resided in the last few years of her life, but he did not live with her.

she did not want him to inherit her property and that she never changed or destroyed her will. She also never told him that she had torn up her will.

Jarred testified that his grandmother also gave him her pickup truck shortly before she passed away and that she had previously given him money. He related that his grandmother had been suffering from cancer for about a year before she died. In anticipation of her death, she had wanted to give him the mobile home in which she lived, but he told her that he did not want it.

In the first few days following his grandmother's death, many family members were present and had access to her bedroom. Jarred searched her bedroom for the original will, but he stated that it was not where she had always kept it. He testified that the appellants never told him that Wilma had torn up her will.

The only testimony that referenced the alleged destruction of the will was offered by Phillip. He testified that Wilma had always stated she would send Jarred to college and that she was devastated when she found out he was not going to attend. He related that she and Jarred argued about it regularly. Phillip also testified that in July 2006, he was visiting his mother, who was at that time upset with Jarred. Phillip stated that Wilma went into her bedroom, where she kept her personal things, she brought out a piece of paper that he briefly read, and stated, "That little bastard's not going to get anything," and then she tore up the paper.[6] Phillip testified that he returned to the house a week later when Jarred was present and that Wilma told Jarred that she had torn the will and he was not "getting

[6] Phillip's testimony does not specify that he actually identified the paper as Wilma's will before she tore it.

anything." Phillip did not tell his siblings, however, that he had seen Wilma destroy her will in 2006.

Phillip also testified that he had moved into the mobile home that Wilma lived in about one month before her death. He acknowledged that Jarred was "staying in the little trailer [next door], off and on" and that he saw Jarred "now and then." Phillip stated that when Wilma died, he, Jarred, and other family members were present.

Shirley, Wilma's eldest daughter, testified that her mother had never mentioned a will, but Wilma had indicated that her brother, Mr. Childers, knew her wishes. Shirley first heard of a will after her mother died when Jarred showed her a copy of the will. Shirley also recounted that Wilma was angry in 2006, when she learned Jarred was getting married rather than going to college.

Our review of the record establishes that the trial court's judgment is supported by the record. Further, we find no legal error that would support a *de novo* review by this court.[7] Because the original testament, which was readily accessible to Wilma, could not be found after her death, the legal presumption that it was revoked by destruction arose. ***Talbot***, 530 So.2d at 1134-35; also see La. C.C. art. 1607(1). But the trial court was not manifestly erroneous in implicitly concluding that this presumption was rebutted by the testimony regarding the close relationship between Jarred and his grandmother. While they had experienced conflicts, the evidence established that they had remained close during Wilma's lifetime and that she had apparently forgiven him for the actions

[7] Where legal errors have interdicted the fact finding process, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record. ***Wegener v. Lafayette Ins. Co.***, 10-0810, p. 11 (La. 3/15/11), ___ So.3d ___.

that had upset her. Wilma allowed Jarred to live on the same property that she lived on until the time of her death, and shortly before her death, she gave him her pickup truck. This evidence was sufficient to rebut the presumption that she had destroyed her will that bequeathed her property to Jarred. Appellants contend Jarred's proof was not "clear proof" of a contention contrary to destruction. However, we find no manifest error in the trial court's implicit findings that this evidence constituted "clear proof" that was sufficient to prove that Wilma did not intend to destroy her will, and further that Phillip, the only witness of the alleged destruction, was not a credible witness.

For these reasons, we conclude the trial court properly denied the petition to annul the testament. Appeal costs are assessed against appellants.

AFFIRMED.