STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0673

SUCCESSION OF JAMES RAY COON

Judgment Rendered: DEC 30 2020

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On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Trial Court No. 20190030185

Honorable Brenda Bedsole Ricks, Judge Presiding

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BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

HIGGINBOTHAM, J.

In this succession proceeding, the decedent's daughter appeals the judgment of the trial court probating a copy of her father's will and denying her motion for new trial.

FACTS AND PROCEDURAL HISTORY

On March 14, 2019, Mr. James Ray Coon died in Tangipahoa Parish. Thereafter, his daughter, Pamela Coon Golmon, filed a petition in the 21st Judicial District Court requesting that she be appointed administrator of his succession. In her petition, she noted that as of the date of filing, "no valid original testament has been discovered." On May 22, 2019, Pamela was appointed administratrix of Mr. Coon's succession.

On May 24, 2019, Kathleen L. Coon, Mr. Coon's wife, filed a rule to show cause requesting that a Last Will and Testament executed by Mr. Coon on June 20, 2018, be probated and that she be appointed executrix. In her rule, Kathleen stated that the original June 20, 2018 will was destroyed in a house fire in September 2018. She attached to her rule a copy of the June 20, 2018 will.

Pamela opposed the request to probate the June 20, 2018 will pointing out that Kathleen filed a copy of the will and not the original. Thereafter, Kathleen filed a rule requesting that Pamela be removed as the administratrix of Mr. Coon's succession and that she be appointed as executrix. The parties' competing motions came before the court on August 19, 2019. After the hearing, the trial court signed a judgment on September 10, 2009, removing Pamela as adminstratrix of Mr. Coon's succession, probating the June 20, 2018 will, and appointing Kathleen as executrix in accordance with the will, once she complies with all prerequisites of law.

Pamela filed a motion for new trial on September 17, 2019, which was denied. Pamela appeals, contending that the trial court used the incorrect burden of proof

and erred in probating a copy of the June 20, 2018 will. She further contends that the trial court erred in denying her motion for new trial.[1]

LAW AND ANALYSIS

When a will cannot be found at the testator's death, there arises a presumption that the testator has destroyed the will with the intent of revoking it. **Succession of Talbot**, 530 So.2d 1132, 1134-1135 (La. 1988); **In re Succession of Hatchell**, 2003-0163 (La. App. 1st Cir. 11/7/03), 868 So.2d 36, 38. The presumption may be rebutted by "clear proof" (1) that the testator made a valid will; (2) of the contents or substantiality of the will; and (3) that the will was not revoked by the testator. **In Re Succession of Claiborne**, 99-2415 (La. App. 1st Cir. 11/3/00), 769 So.2d 1267, 1268, writs denied, 2000-3283 (La. 2/16/01), 786 So.2d 98 and 2000-3310 (La. 2/16/01), 786 So.2d 99 (citing **Succession of Nunley**, 224 La. 251, 69 So.2d 33, 35 (1953)). An exponent of such a will assumes the burden of demonstrating that the testator did not intend to revoke the will by destroying it. See **Succession of Talbot**, 530 So.2d at 1135-1135. In this regard, the jurisprudence has created a sliding scale of the requisite proof to refute the presumption, depending on the weakness or strength of the evidence surrounding the lost original. **In Re Succession of Claiborne**, 769 So.2d at 1269.

In this case, the first two elements necessary to rebut the presumption were established by clear proof with the introduction of the copy of the June 20, 2018 will. Thus, we must determine whether Kathleen, as exponent of the copy of the will, provided "clear proof" that Mr. Coon did not revoke the will.

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[1] "[T]he established rule in this circuit is that the denial of a motion for new trial is an interlocutory and non-appealable judgment." **McKee v. Wal-Mart Stores, Inc.**, 2006-1672 (La. App. 1st Cir. 6/8/07), 964 So.2d 1008, 1013, writ denied, 2007-1655 (La. 10/26/07), 966 So.2d 583. However, the court may consider interlocutory judgments as part of an unrestricted appeal from a final judgment. **Bailey v. Robert V. Neuhoff Ltd. Partnership**, 95-0616 (La. App. 1st Cir. 11/9/95), 665 So.2d 16, 18, writ denied, 95-2962 (La. 2/9/96), 667 So.2d 534. Because Pamela's challenge of the trial court's denial of her motion for new trial is part of the appeal from the final judgment, we may consider the issue on appeal.

During the hearing, Mr. Bruce Simpson, Mr. Coon's longtime attorney, testified that he drafted the June 20, 2018 will, and he recognized the copy of the June 20, 2018 will introduced into evidence as the will he drafted. Mr. Simpson said that he had previously drafted a will for Mr. Coon in 2010 and prepared a codicil in 2013, but the June 20, 2018 will was the last will he drafted for Mr. Coon. Mr. Simpson acknowledged that he spoke to Mr. Coon after drafting the June 20, 2018 will and told him that they could change what he wanted to change, but he never prepared another will.

Kathleen testified that she was at Mr. Simpson's office the day Mr. Coon signed the June 20, 2018 will. She testified that Mr. Coon placed the original will in a black briefcase where he kept important papers, and he placed the briefcase under a little table in their den. Kathleen testified that the briefcase did not move from that location. According to Kathleen, on September 14, 2018, she and Mr. Coon were at his doctor's appointment when they got a call that their home was on fire. Kathleen testified that they quickly headed home, and when they got there, their home was burned to the ground. When asked if she was able to locate the briefcase in the rubble, Kathleen responded, "[w]e lost everything." She said in November 2018, after the fire, Mr. Coon became ill and ended up spending time in a hospital and in a nursing home. She said he finally returned home, to live in their camper, at the end of January and passed away on March 14, 2019. Kathleen said her relationship with Mr. Coon was "very good" at the time of his death, and she took care of him. Kathleen said that after Mr. Coon died she was unable to find the original will, but she found a copy of the will in his truck.

Pamela testified that she was aware of the briefcase where her father kept important documents, but said it was customary for him to keep it in his truck. Pamela also testified that she had a distant relationship with her father until he went into the hospital in November. Pamela, when asked if she was aware of anything

that suggested her father was going to change his will, responded, "I just know what he told me in December." When asked if she had any personal knowledge if her father revoked or modified his will, Pamela responded, "[n]o, he never did get to do it."

Kathleen's testimony, which was clearly considered credible by the trial court, provided that the will was in the briefcase in the den at the time of the fire, and the briefcase did not survive the fire. Further, we find it relevant that Mr. Coon had access to the copy of the will in his truck and did not destroy the copy. Finally, there was scant testimony that Mr. Coon was considering changing his will, but no testimony that he actually followed through with changing it. After thorough review of the record, we find no error in the judgment of the trial court probating the copy of the June 20, 2018 will. The trial court was not clearly wrong in finding that the evidence in this case provided clear proof that the decedent did not destroy his will with the intention to revoke it, but rather, the original will was destroyed in the September 14, 2018 house fire.[2]

Turning to the motion for new trial, in her final assignment of error, Pamela contends that the trial court committed legal error in denying her motion for new trial based on newly discovered evidence. Louisiana Code of Civil Procedure art. 1972 provides that a new trial shall be granted upon a contradictory motion when the party has discovered, since the trial, evidence important to the cause, which he could not with due diligence, have obtained before trial. Louisiana Code of Civil Procedure art. 1973 provides that a new trial may be granted in any case if there is good ground therefor. The evidence presented by Pamela showed that on February 5, 2019, Mr. Coon sold certain land in Tangipahoa Parish that was a large part of his

[2] Pamela also argued that because the third page of the June 20, 2018 will was incorrectly labeled as page 2 of 2 the trial court erred in allowing probate of the copy of the will. We find no merit to this argument where the June 20, 2018 will meets the statutory requirements of a notarial testament. See La. Code Civ. P. art. 1577.

estate. This sale happened several months before the trial to probate the will and could have been obtained before trial with due diligence. Further, we find no error in the trial court's finding of no good cause to grant a new trial.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court. All costs of the appeal are assessed to appellant, Pamela Coon Golman.

AFFIRMED.