[Cite as *Jackson v. Estate of Henderson*, 2010-Ohio-3084.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93231

FAITH ANN JACKSON

PLAINTIFF-APPELLANT

vs.

ESTATE OF ELIZABETH MAE HENDERSON

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Probate Court Division
Case No. 2007 EST 132207

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED: July 1, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Appellant, Faith Ann Jackson, appeals from a judgment of the Cuyahoga County Court of Common Pleas, Probate Division, denying her application to admit the purported will of her aunt, Elizabeth Mae Henderson, to probate. Appellant raises two assignments of error for our review:

{¶ 2} "[1.] The trial court applied the incorrect standard of law.

{¶ 3} "[2.] The trial court erred in finding that the purported will was not a will."

{¶ 4} Finding merit to her claims, we reverse and remand.

Procedural History and Factual Background[1]

{¶ 5} Henderson was admitted to the hospital in early April 2007. Although she went home for a short period, she died in the hospital in late May 2007.

{¶ 6} In December of that same year, appellant filed an application to administer Henderson's estate and an application to probate Henderson's will. Appellant attached the following handwritten document, purporting to be Henderson's will, to the application:

[1]There is no transcript on appeal. Thus, any facts that we recite come solely from the magistrate's decision or the parties' briefs submitted to the trial court, which are in the record on appeal.

{¶ 7} "4/14/2007/I Elizabeth Henderson/in sound mind give/Faith Ann Jackson/My Neise [sic] all right to myself/and any bank accounts;/House + car [illegible word] property/that I Have/she is my power of attorney."

{¶ 8} The purported will was signed by Henderson, seven people, and a notary public.

{¶ 9} In December 2008, a magistrate held a hearing on the application to admit the purported will to probate. According to the magistrate's decision, five of the seven people who witnessed Henderson sign the purported will testified: appellant, three of her children (Lamar Jackson, Jovanna Jackson, Tramaine Jackson), and Lamar's girlfriend (E. Sheena Holloway). They testified that Henderson was competent and voluntarily signed the purported will.

{¶ 10} The magistrate found that the document lacked testamentary intent required to establish that it was a will. The magistrate explained that although it was clear that Henderson intended to "give all right to herself and her personal property to Ms. Jackson, it is unclear whether the instrument was being executed as a power of attorney or a will." The magistrate concluded that appellant failed to prove by clear and convincing evidence that the document was Henderson's will and thus, denied her application to admit the will to probate.

{¶ 11} Appellant filed objections to the magistrate's decision, which the trial court overruled. The trial court then adopted the magistrate's decision in its entirety and ordered it into law. It is from this judgment that appellant appeals.

{¶ 12} The assigned errors will be addressed together since they both raise issues as to whether the trial court erred by not admitting the purported will to probate.

Admitting a Will to Probate

{¶ 13} R.C. 2107.18 governs the admission of a will to probate. It provides:

{¶ 14} "The probate court *shall admit* a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, *that the execution of the will* complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed, or with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of his death." (Emphasis added.)[2]

[2]R.C. 2107.181 further provides that:

"If it appears that the instrument purporting to be a will is not entitled to admission to probate, the court shall enter an interlocutory order denying probate of the

{¶ 15} Proceedings to admit a will to probate are nonadversarial proceedings where the court determines whether the will submitted for probate appears to have been executed in accordance with the law, and is thereby eligible for admission to probate. See *In re Will of Elvin* (1946), 146 Ohio St. 448, 66 N.E.2d 629; and *In re Estate of Lyons* (1957), 166 Ohio St. 207, 141 N.E.2d 151. In such proceedings, judicial discretion is limited where the will presented for admission to probate appears to comply with the statutory requirements set forth in R.C. 2107.03. Id.

{¶ 16} R.C. 2107.03 provides:

{¶ 17} "Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. Such will shall be signed at the end by the party making it, or by some other person in such party's presence and at his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature."

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instrument, and shall continue the matter for further hearing. * * * Upon further hearing, witnesses may be called, subpoenaed, examined, and cross-examined in open court or by deposition, and their testimony reduced to writing and filed in the same manner as in hearings for the admission of wills to probate. Thereupon, the court shall revoke its interlocutory order denying probate to the instrument, and admit it to probate, or enter a final order refusing to probate it. A final order refusing to probate the instrument may be reviewed on appeal."

It does not appear from the record that the trial court held the R.C. 2107.181 hearing. But since appellant fails to raise this procedural issue, we will not address it.

{¶ 18} Attestation and subscription to a will are two separate and distinct acts in the process of execution, and pursuant to R.C. 2107.03, both are required for proper execution. Subscription is the physical act of affixing a signature for purposes of identification. *In re Estate of Wachsmann* (1988), 55 Ohio App.3d 265, 267, fn. 2, 563 N.E.2d 734. Attestation is the act by which the subscribing witnesses hear the testator acknowledge his signature or see him sign the document in their presence. Id.

{¶ 19} Jackson first argues that the trial court "failed to apply the correct standard of law in determining whether the document met the statutory requirements to be a will." Specifically, she asserts that the trial court erred when it applied a clear and convincing evidence standard under R.C. 2107.24. We agree.

{¶ 20} R.C. 2107.24(A) provides:

{¶ 21} "If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:

{¶ 22} "(1) The decedent prepared the document or caused the document to be prepared.

{¶ 23} "(2) The decedent signed the document and intended the document to constitute the decedent's will.

{¶ 24} "(3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. * * *"

{¶ 25} Here, there is no question that the purported will was executed in compliance with R.C. 2107.03. According to the magistrate's decision, appellant, her three children, and Holloway testified that Henderson was competent and voluntarily signed the purported will and that they witnessed her sign it. They further testified that they signed it, as well as several other witnesses who did not testify. Thus, since the purported will was executed in compliance with R.C. 2107.03, we agree with Jackson that the clear and convincing evidence standard was not required. But R.C. 2107.18 does not specify what standard should be used.

{¶ 26} The Ohio Supreme Court explained in *Elvin*, 146 Ohio St. 448, substantial evidence of a prima facie case in favor of the validity of the execution of the will is all that is required to admit a will to probate. Id. at the syllabus. The burden of establishing the prima facie case of the validity of the R.C. 2107.03 requirements is on the proponent of the purported will.

See *Roosa v. Wickfield* (1950), 90 Ohio App. 213, 105 N.E.2d 454. When the evidence shows that such a prima facie case is made out, the court must admit the will to probate, even though the evidence is conflicting. Id.; see, also, *Lyons*, 166 Ohio St. 207, paragraph one of the syllabus.

{¶ 27} When reviewing an order denying an application to admit a will to probate, this court has the same function as the probate court, that is, to determine whether a prima facie case has been made for the validity of the execution of the will. *Chilcote v. Hoffman* (1918), 97 Ohio St. 98, 100-111. Thus, our review is de novo.

Prima Facie Case

{¶ 28} As we already explained, Jackson presented substantial evidence that the purported will met the execution requirements of R.C. 2107.03. More than two competent witnesses, who signed the purported will, testified they were present, as was a notary public, when Henderson signed it. While R.C. 2107.18 is silent as to the extent of proof required, it states that the probate court *shall* admit a will to probate if "the execution of the will complies with the law in force at the time of the execution of the will."

{¶ 29} Accordingly, we find that the trial court erred in denying Jackson's application to admit Henderson's purported will to probate.

{¶ 30} We note that "[i]n admitting a will to probate, however, the probate court does not rule on the validity of the contents of the will. It merely establishes that the will was validly executed." *Georgekopoulos v. Vasilopoulos* (1984), 26 Ohio App.3d 43, 44, 498 N.E.2d 165, citing *In re Estate of Piasecki* (1964), 95 Ohio Law Abs. 257, 201 N.E.2d 840. Thus, finding that Jackson made a prima facie case that the purported will was in compliance with R.C. 2107.03 does not mean that it cannot be subsequently challenged in a will contest action. A "will contest action raises the single and ultimate issue whether the writing produced is the last will * * * of the testator." *Hess v. Sommers* (1982), 4 Ohio App.3d 281, 283, 448 N.E.2d 494. And in a will contest action, the parties are entitled to have a jury of their peers decide the matter. R.C. 2107.72(B)(1).

{¶ 31} Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR