COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP519 **Cir. Ct. No. 2010PR51**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF FLOYD HECK:

SHELDON HECK,

APPELLANT,

V.

ESTATE OF FLOYD HECK, HARVEY HECK, TRACY HECK, ROBERT BLOCH AND JUSTIN BLOCH,

RESPONDENTS.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Sheldon Heck appeals an order of the circuit court denying the admission of the will of his father, Floyd Heck, to probate on the basis

that the evidence failed to establish that Floyd had knowledge of the contents of the will at the time he executed it.[1] Sheldon also contends that the circuit court erred in denying his motion for reconsideration on the basis of newly discovered evidence, and he asserts that he is entitled to a new hearing in the interest of justice. We affirm the circuit court's order.

BACKGROUND

¶2 Floyd died in July 2010. On January 29, 2005, Floyd executed a will that divided his estate between his three sons, Sheldon, Tracy Heck and Harvey Heck, and his two grandsons. Under the terms of the will, Tracy and the two grandsons were each devised certain specified property. With respect to Harvey, the will stated: "To my son Harvey Heck, whom I have already given 120 acres on June of 1989, I also forgive the debt he and his wife Linda owe me on the home and property … they purchased from me on June of 1989 for the sum of $20,000." And, with respect to Sheldon, the will devised "all other land property and buildings" and "all cattle, machinery and feed."

¶3 In 2011, Sheldon sought to probate the 2005 will. Harvey contested the will, arguing that Floyd did not read, nor was he read, the contents of the will prior to signing the document. The circuit court agreed with Harvey and denied admission of the will to probate on the basis that Sheldon "failed to establish that

[1] This is the second appeal concerning the probate of Floyd's estate. In the first appeal, Sheldon challenged an order of the circuit court denying the admission of a different will of Floyd's to probate on the basis that the will failed to comply with the WIS. STAT. § 853.03 (2009-10) requirement that the testator sign the will, or acknowledge his or her signature on the will itself, in the conscious presence of two individuals before they sign as witnesses to the will's execution. *See* ***Heck v. Heck***, No. 2011AP1086, unpublished slip op. (WI App Feb. 23, 2012). We affirmed on appeal.

[Floyd] was correctly informed of the contents of the [w]ill before he executed" the document. Sheldon moved the court for reconsideration, in part on the basis of newly discovered evidence. This evidence was an affidavit by a former acquaintance of Floyd who averred that he and Floyd had spoken about how Floyd wanted his property disposed of upon his death and that Floyd's 2005 will was consistent with their discussions. The court denied Sheldon's motion for reconsideration, stating that "no 'new evidence' ha[d] been presented … as to the issue previously decided" by the court in the order denying admission to probate of Floyd's 2005 will. Sheldon appeals. Additional facts will be discussed as necessary below.

DISCUSSION

¶4 Sheldon challenges the circuit court's determination that the 2005 will could not be admitted to probate because Floyd did not have knowledge of the contents of the will when he signed it. Sheldon also contends that the circuit court erroneously exercised its discretion when it denied his motion for reconsideration, and he contends that in the interest of justice, he is entitled to a new hearing on his petition to probate the 2005 will. We address each of these contentions in turn below.

A. Knowledge of the Contents of the Will at the Time of the Will's Execution

¶5 Sheldon challenges the court's determination that Floyd did not know the contents of the 2005 will at the time he signed the document and therefore the will was not validly executed and could not be admitted to probate.

¶6 If a will has been duly executed, a presumption arises that the testator understood the contents of the will and that the will is valid. ***Malnar v.***

Stimac, 73 Wis. 2d 192, 199, 243 N.W.2d 435 (1976). This presumption may be overcome by evidence showing that the testator did not know the contents of the will at the time of the will's execution. ***Id.***

¶7 It is undisputed that Floyd executed the 2005 will. Thus, to overcome the presumption of validity, evidence must have been presented showing that Floyd did not know the contents of the will at the time he signed the document. *See* ***id.***

¶8 At the hearing on the validity of Floyd's 2005 will, the sole witness to testify was Floyd's daughter-in-law, Kay Heck, Tracy's wife. Kay testified that in 2000, at the urging of Sheldon's wife, she asked Floyd if he was interested in making a will. Kay testified that Floyd agreed to do so, but wanted Kay to draft a will for him. Kay testified that she met with Floyd over two or three days, during which she "would write up what [Floyd] told [her] to write." Kay testified that when she finished the final draft of the will, she read it to Floyd and that he said "yeah, that was good." Kay testified that she then told Floyd that he needed to sign the will, but that he declined to do so, stating "what do you think, I am going to die now?"

¶9 Kay testified that after drafting the will in 2000, she kept the will at her house and periodically asked Floyd if he wanted to sign the will, but that he declined to do so until 2005. Kay testified that on the date Floyd signed the will, he did not read the document, nor did she review the contents of the will with him. Kay testified that at the time Floyd signed the will, she was presenting other documents to him for his signature and that when she presented the will to him, she asked if he wanted to sign it, which he did without comment. Kay further testified that Floyd had not had access to the will after it was drafted in 2000 until

she gave it to him to sign in 2005, but that to her knowledge there were no changes to the will since she drafted it in 2000. Kay testified that she was unable to say whether Floyd knew what the will provided when he signed the document. However, she testified that when Floyd signed the will, he was unable to see due to macular degeneration (though he was able to see when the will was drafted in 2000), and that the day after Floyd signed the will, Floyd made a confusing statement to her "that the banker was sleeping in his bed and it wouldn't have been so bad if he would have had his shoes off."

¶10 The circuit court found that the evidence showed that Floyd did not know the contents of the 2005 will when he executed that document. It is undisputed that the 2005 will was drafted by Floyd's daughter-in-law in 2000, but was not signed by Floyd until 2005. The circuit court found that the evidence showed that when Floyd finally signed the will in 2005, Floyd had not been made aware of its contents. The court found that the will may have been drafted according to Floyd's instructions in 2000 and "may have been read to [Floyd]" at that time. However, the court further found that when Floyd signed the will in 2005, the will had not been read by him, nor the contents of the will reviewed with him, for five years, and he was not advised that the will was the same document as the one drafted in 2000. The court found that there was no evidence "indicat[ing] that [Floyd] had any understanding of what the will said," and that the will "was simply presented [to Floyd] as here is your will, sign it," along with other formal documents he was asked to sign at that time, and that Floyd was not advised at the time he signed the 2005 will that it was the same document that was drafted in 2000.

¶11 A circuit court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the court's opportunity to judge the

credibility of witnesses. WIS. STAT. § 805.17(2) (2011-12).[2] A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

¶12 The proponent of a will may attempt to show that the contents of the will were communicated to the testator or that the will was drafted according to his or her directions. ***Malnar***, 73 Wis. 2d at 200. The evidence reflects that when the will was originally drafted in 2000, it was done so at Floyd's direction. However, we cannot say that the circuit court was clearly erroneous in finding that when Floyd finally signed the will, he did not know what the will provided. The will was drafted five years prior to Floyd signing the document. The evidence reflects that Floyd had not read the will and that the will had not been read to or reviewed with him any time after it was drafted. Moreover, no evidence was presented showing that Floyd, who was nearly eighty-seven years old when the will was signed, remembered what the will provided. The sole witness at the hearing on the probate of the 2005 will testified that she was uncertain as to whether Floyd knew the contents of the will when he signed it, and evidence was presented that shortly after Floyd signed the will, Floyd was imagining events that did not take place.

¶13 Sheldon argues that the circuit court required that Floyd know "exactly what was on the [will]" when he signed it, which is inconsistent with WIS. STAT. § 853.03. However, Sheldon misreads the court's determination. The

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court did not require that Floyd know "exactly" what was in the will or have "knowledge of the specific language" when he signed it. Rather, the court applied the proper legal standard, which requires that to overcome the presumption that a duly executed will is valid, an objector to the will must show that the testator did not know the contents of the will at the time of execution. *See* ***Malnar***, 73 Wis. 2d at 199-200. The court found that when Floyd signed the will in 2005, it was but one of a number of documents presented to him for signing, with no explanation of its contents. Contrary to Sheldon's suggestion, the court did not find that the will was invalid because Floyd did not have knowledge of the specific language of every provision in the will, but rather because there was no evidence that he had any knowledge of the contents whatsoever.

¶14 Accordingly, we conclude that the circuit court's finding that Floyd did not know of the contents of the will at the time of the will's execution was not clearly erroneous.

B. Motion for Reconsideration

¶15 Sheldon contends that the circuit court erroneously exercised its discretion in denying his motion to reconsider. We review a circuit court's decision to deny or grant a motion for reconsideration for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Under this standard, we review the record to determine whether the circuit court "employed a process of reasoning in which the facts and applicable law are considered in arriving at a conclusion based on logic and founded on proper legal standards," and we will "generally look for reasons to sustain a [circuit] court's

discretionary decision." ***Murray v. Murray***, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999).

¶16 To prevail on a motion for reconsideration, a movant must present either newly discovered evidence or establish a manifest error of law or fact. ***Koepsell's Olde Popcorn Wagons, Inc.***, 275 Wis. 2d 397, ¶44. Sheldon's motion for reconsideration asserted that after trial, he discovered evidence which would have established that Floyd was aware of the contents of the 2005 will when he signed the document. Attached to Sheldon's motion was an affidavit of Charles Johnson, a former acquaintance of Floyd's. Johnson averred that prior to Floyd's death, he had "numerous conversations [with Floyd] about many items, including his executed 2005 [w]ill, and specifically the contents of [the will]." Johnson further averred that "during [] 2000 to beyond 2005," Floyd informed him "on numerous occasions" that Floyd believed the contents of his executed will to be similar to those found in the will.

¶17 Sheldon claims that Johnson's averments warranted reconsideration of the court's order denying probate to Floyd's 2005 will. We disagree. Johnson's proposed testimony could be relevant to the question of how Floyd wanted his property divided upon his death, and evidence of that intent could match perfectly with what is specified in the 2005 will. However, Johnson's averments do not show that Floyd knew that the document he signed in 2005 was the will drafted for him by Kay in 2000, nor do Johnson's averments show that Floyd knew what the will provided when he signed it. Accordingly, we reject Sheldon's contention that the circuit court erroneously exercised its discretion in denying his motion for reconsideration.

C. New Hearing in the Interest of Justice

¶18 Finally, Sheldon contends that he is entitled to a new hearing on his petition to probate the 2005 will in the interest of justice because the real controversy was not tried.

¶19 As an appellate court, we have authority under WIS. STAT. § 752.35 to grant, in the interest of justice, a discretionary reversal of an order from which an appeal is taken if the real controversy was not tried. ***State v. Hubanks***, 173 Wis. 2d 1, 28-29, 496 N.W.2d 96 (Ct. App. 1992). We are to exercise this discretionary power of reversal only in exceptional cases. ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶20 Sheldon argues that the real controversy was not tried because the circuit court applied the wrong legal standard in determining that the 2005 will was not validly executed and in light of the new evidence discussed above. Because we have already concluded that the circuit court was not clearly erroneous in finding that Floyd did not know the contents of the will at the time of execution, and that the court did not erroneously exercise its discretion in denying Sheldon's motion for reconsideration based upon the newly discovered evidence, we reject Sheldon's claim that the real controversy was not tried.

CONCLUSION

¶21 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.