STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1103

In re the Estate of: Georgine R. Perrault a/k/a Georgine Gaudette, Deceased

Filed May 25, 2010
Affirmed
Peterson, Judge

Wadena County District Court
File No. 80-PR-08-535

Rodney C. Hanson, Willmar, Minnesota (for appellants Irving Scott Gaudette, Edward Gaudette, and Sherri Bond)

Paul F. Carlson, Kennedy Nervig & Carlson, Wadena, Minnesota (for respondent James Weeks)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from an order for formal probate of a will and from an order denying appellants' motion for amended findings of fact and conclusions of law or a new trial, appellants argue that the district court (1) erred in determining that the will was duly

executed, (2) improperly applied the doctrine of dependent relative revocation, and (3) erroneously admitted hearsay testimony. We affirm.

FACTS

Appellants Irving Scott Gaudette, Edward Gaudette, and Sherri Bond are the adult children of decedent Georgine Perrault. When appellants were young, decedent divorced their father and was granted custody of appellants. Decedent later married Larry Perrault in 1988. Appellants did not have a good relationship with Perrault, which led to an "up-and-down" relationship with decedent. Decedent and Perrault remained married until her death on January 22, 2008. Perrault died in April 2008.

Before their deaths, decedent and Perrault asked decedent's nephew, respondent James Weeks, to be executor of their wills. They sent Weeks copies of their wills, dated May 29, 1999. They later sent Weeks correspondence purporting to update the wills. Following Perrault's death, Weeks petitioned the district court, requesting that a "conformed copy" of decedent's will dated August 6, 1992, and an original will dated May 29, 1999, which was signed and notarized but improperly executed, be formally probated. Appellants, who were specifically disinherited in both of the wills, challenged the probate of the wills in a bench trial.

Will of August 6, 1992

Decedent's original 1992 will was not produced at trial, but attorney Luther Nervig from the law firm of Kennedy, Nervig, Carlson, and VanBruggen offered a "conformed copy" of the will from his office files as evidence that the will had been executed. Nervig testified that his normal practice for executing a will is that he first has

a meeting with the client regarding the client's estate plan, during which he takes notes. Following the meeting, Nervig drafts a will and sends it to the client for review. In the case of a simple will, he then usually meets with the client once more to review and sign the will. One of the employees in his office normally serves as a witness, and Nervig serves as the other witness. He then places the original will in a special envelope and sends it with the client. Nervig keeps in his file what he refers to as a "conformed copy"—an unsigned copy of the will with handwritten notations in the spaces where date of execution and signatures of witnesses are placed. Nervig testified that his practice is to complete a conformed copy of the will only after its execution. The conformed copies are then placed in the law firm's "will file cabinet," and a staff person enters information about the will into a computer index called "signed wills" so that the law firm has a list of all the wills that it has drafted.

Nervig testified that he recalled his first meeting with decedent and Perrault because they both disinherited their children in their wills. However, he did not specifically recall their follow-up meeting. Nervig relied on four documents that were entered into evidence to show that a follow-up meeting took place: Nervig's notes from his initial meeting with decedent and Perrault; a letter to them asking them to review the wills; conformed copies of decedent's and Perrault's wills, which were mirror wills that listed Nervig and an office staff member as witnesses; and a copy of the page in his firm's "signed wills" computer index that included decedent's and Perrault's names and indicated that they signed their wills on August 6, 1992. Decedent's 1992 will left everything to Perrault, if he survived her, and named Kenneth Moench as a contingent

beneficiary and as an alternate personal representative. The fifth paragraph of the 1992 will states: "I have intentionally, and not as a result of error or omission, made no provision for my following named children, namely: Irving Scott Gaudette; Eddie Gaudette; Sherri Gaudette[.]"

Wills of May 29, 1999

Decedent and Perrault drafted new wills that were dated May 29, 1999, and notarized by a Wadena First National Bank employee on June 1, 1999. The language in decedent's 1999 will is very similar to her 1992 will. The only material changes are that the words "funeral and interment" are replaced by a handwritten, initialed, and dated notation stating, "Cremation only soon as the law allows."; the contingent beneficiary is changed from Moench to "James Weeks my nephew"; Weeks's contact information is included; and Moench is no longer named as an alternate personal representative. The 1999 will states that it is decedent's last will and testament, "HEREBY REVOKING EVERY FORMER WILLS [sic] MADE BY ME." Only a notary's signature and decedent's signature appear on the will.

After decedent died, a family friend, Craig Folkestad, went to see Perrault. Perrault told Folkestad that he and decedent had made the new wills by copying the form of their old wills and removing Moench as a contingent beneficiary. They then destroyed the old wills, and Perrault later learned that decedent's will was invalid. Folkestad testified that Perrault then pulled out a yellowed and coffee-stained envelope with the words "Last Will and Testament, Kennedy and Nervig" on it, which Folkestad identified as being the same as the envelopes that the law firm uses for wills. Folkestad never

handled the document, but he testified that the document that Perrault pulled out of the envelope was the item that Perrault had said was invalid. Perrault could not remember who drafted his and decedent's previous wills, and Folkestad suggested that Perrault call the firm named on the envelope. Perrault then called Nervig and learned that the 1992 wills had been drafted by his law firm. Nervig confirmed to Perrault that the 1999 will did not meet Minnesota's will requirements.

District Court Order

The district court determined that (1) decedent's 1992 will had been duly executed, (2) decedent revoked her 1992 will at the time she attempted to make her 1999 will, (3) decedent's 1999 will was invalid for lack of witness signatures, and (4) decedent's 1992 will was revived through the doctrine of dependent relative revocation. The district court ordered formal probate of the conformed copy of decedent's 1992 will, with Weeks as executor. The district court affirmed its order of formal probate in an order denying appellants' motion for amended findings of fact, conclusions of law, or a new trial. This appeal followed.

D E C I S I O N

I.

Appellants argue that the district court erred in finding that decedent's 1992 will was duly executed. Whether a will was executed in the manner required by law is a question of fact. *Johnson v. Heltne*, 298 Minn. 187, 190, 214 N.W.2d 224, 226 (1974). "Review of the [district] court's finding of fact is limited to determining if the court clearly erred. The finding should not be overturned unless this court is left with the

definite and firm conviction that a mistake has been committed." *In re Estate of Botko*, 541 N.W.2d 616, 618 (Minn. App. 1996) (quotation and citation omitted), *review denied* (Minn. Feb. 26, 1996). "If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

With limited exceptions that do not apply here, to be valid, "a will must be: (1) in writing; (2) signed by the testator . . .; and (3) signed by at least two individuals, each of whom signed within a reasonable time after witnessing . . . the signing of the will. . . ." Minn. Stat. § 524.2-502 (2008). "If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the state competent and able to testify, is required. Due execution of a will may be proved by other evidence." Minn. Stat. § 524.3-406(a) (2008). The same requirements must be met to prove due execution of a will when the instrument is not physically present before the district court. *Sandstrom v. Wahlstrom (In re Estate of Sandstrom)*, 252 Minn. 46, 57, 89 N.W.2d 19, 26 (1958).

Although Nervig did not specifically remember the execution of the 1992 will, he testified that his conformed copy of the will indicated that he and an employee of the law firm witnessed decedent signing the 1992 will. "[T]he fact that subscribing witnesses to a will could not recall the circumstances surrounding their signing of the will does not require the conclusion that the will was not properly executed." *Johnson*, 298 Minn. at 191, 214 N.W.2d at 226.

Based on our review of the evidence, we are not left with the definite and firm conviction that the district court committed a mistake when it found that decedent's 1992 will was duly executed. The conformed copy of decedent's 1992 will that was entered as an exhibit contains notations that are consistent with those that Nervig normally places on executed copies of wills, and it was found in a file in Nervig's office reserved for copies of executed wills. Also, decedent's name appears on Nervig's computer index of signed wills, which states that decedent signed the will on August 6, 1992. In addition, Nervig testified that it has always been the custom of his firm to send the final executed will home with the client, and Folkestad testified that Perrault was in possession of a yellowed and stained will envelope like the one that the law firm gave to clients for their wills. Finally, the language in decedent's 1999 will was very similar to and addressed matters in the same order as the language in the conformed copy of the 1992 will that was in Nervig's file cabinet, which strongly suggests that Nervig sent decedent's original 1992 will with decedent and the 1992 will was copied to create the 1999 will.

II.

Appellants argue that the district court misapplied the doctrine of dependent relative revocation.

> We give the district court's factual findings great deference and do not set them aside unless clearly erroneous. . . . When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the district court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Porch v. Gen. Motors Acceptance Corp., 642 N.W.2d 473, 477 (Minn. App. 2002) (quotation and citations omitted), *review denied* (Minn. June 26, 2002).

The Minnesota Supreme Court has described the doctrine of dependent relative revocation as follows:

> Where the circumstances connected with the revocation [of a will] are such as to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and if through lack of formality or otherwise the intended new will is inoperative the revocation fails and the original will remains in force. Revocations ordinarily included within the doctrine of "dependent relative revocation" are properly either conditional revocations or revocations made under mistake. Of course where the revocation is not absolute, but is dependent upon the making by the testator of a new will, the doctrine will protect the old will if the relative act proves futile.

Person v. Johnson (In re Nelson's Estate), 183 Minn. 295, 298, 236 N.W. 459, 461 (1931) (citations omitted). The doctrine is predicated in part on the assumption that a decedent who has previously made a validly executed will prefers probate of that will to intestacy. *Anthony v. Evangelical Lutheran Church (In re Estate of Anthony)*, 265 Minn. 382, 390, 121 N.W.2d 772, 779 (1963). Three requirements must be met for the doctrine of dependent relative revocation to apply: (1) the decedent must have had a valid will; (2) the decedent must have revoked or destroyed that will with the intention of making a new will; and (3) the new will, if made, must fail for any reason or be inoperative through lack of formality. *See Person*, 183 Minn. at 298-99, 236 N.W. at 461 (discussing doctrine).

Appellants do not challenge that the third element is met. All parties agree that decedent's 1999 will failed for lack of witnesses. And, as we have already discussed above, decedent's 1992 will was valid, which satisfies the first element. Therefore, the remaining issue is whether the district court erred when it found that decedent revoked or destroyed her 1992 will with the intention of making a new will.

Regarding this issue, the district court found: "The evidence demonstrates that the Decedent intended to revoke and destroy her 1992 will when she drafted her 1999 will. Decedent's 1999 will explicitly revokes any of her prior wills, which would necessarily include her 1992 will." *See Anthony*, 265 Minn. at 389, 121 N.W.2d at 778 (stating that ineffective will may act as revocation of previous will notwithstanding its ineffectiveness). Our review of the record confirms the district court's finding that decedent's 1999 will explicitly revokes her 1992 will. Also, decedent mailed her 1999 will to Weeks, which is additional evidence that she intended her 1999 will to govern her estate. Finally, decedent sent correspondence to Weeks in 2007 that expressly refers to her 1999 will and the instructions it contained regarding her estate. Because all of this evidence indicates that decedent intended her 1999 will to govern her estate, the district court's finding that decedent intended to revoke her 1992 will when she drafted her 1999 will is not clearly erroneous. And because decedent intended that her inoperative 1999 will would revoke her 1992 will, the district court did not abuse its discretion in applying the doctrine of dependent relative revocation to revive decedent's 1992 will, based on the assumption that decedent preferred probate of that will to intestacy.

III.

Appellants challenge the district court's admission of hearsay evidence to prove decedent's state of mind with respect to the creation and revocation of the 1992 will and the creation of the 1999 will. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* at 46 (quotation omitted).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Unless a recognized hearsay exception applies, hearsay is not admissible. Minn. R. Evid. 802. In their brief, appellants do not identify the specific hearsay statements that they claim were improperly admitted. However, during oral argument, counsel for appellants stated that the hearsay testimony is reflected in the district court's finding of fact XVIII and its conclusions of law 6, 8, 11, and 13.

Finding of fact XVIII states:

> Craig Folkestad, a family friend, testified that in a conversation with Perrault after the death of decedent, Larry Perrault, decedent's surviving spouse, told him that decedent and he had made new wills to remove Kenneth Moench as an alternate beneficiary, and to name decedent's nephew James Weeks as alternate beneficiary. Perrault stated that they copied the "old wills," took the new wills into the bank to have them notarized and then "they destroyed the old wills."

The hearsay rule does not exclude

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Minn. R. Evid. 803(3).

Appellants argue that testimony regarding conversations with Perrault following decedent's death was erroneously admitted under this exception to the hearsay rule to prove decedent's state of mind. Appellants contend that this exception does not apply to Perrault's statements about decedent's state of mind because Perrault, not decedent, was the declarant, and the exception applies to statements of the declarant's state of mind. We agree with appellants that Perrault's statements to Folkestad are not admissible under rule 803(3) to prove decedent's state of mind. But even if Folkestad's testimony about what Perrault told him was erroneously admitted to prove decedent's state of mind, appellants have not shown that the error was prejudicial.

Finding of fact XVIII describes Perrault's statement that he and decedent "made new wills to remove Kenneth Moench as an alternate beneficiary, and to name decedent's nephew James Weeks as alternate beneficiary." Although this finding does not expressly state that decedent made her will for the reason that Perrault described, the finding could be interpreted as a finding of decedent's intent, which Perrault's hearsay statement would not be admissible to prove.

But other nonhearsay evidence in the record is sufficient to prove decedent's intent with respect to the 1999 will. The document introduced and described as decedent's 1999 will states that it is decedent's last will and testament and specifically revokes every former will made by decedent. And comparing the 1999 will with the 1992 will reveals that the 1999 will changes the alternate beneficiary of decedent's estate from Moench to Weeks. Also, although it adds little to the determination of decedent's intent with respect to the 1999 will, the striking similarity of the language in the two documents demonstrates that the 1992 will was copied to create the 1999 will, and the certificate of acknowledgment attached to the 1999 will proves that decedent had her signature notarized. Consequently, each individual material fact in finding of fact XVIII that could be based on Perrault's statements to Folkestad is sufficiently proved using only nonhearsay evidence.

Conclusion of law 8 states, in part, "Folkestad testified that Perrault informed him that he and Decedent 'destroyed' the old wills when they made the new wills to avoid any confusion." This statement suggests that the district court relied on Perrault's hearsay statement when making its conclusion of law. But because the nonhearsay evidence that we have just discussed is sufficient to prove that decedent intended to revoke her 1992 will, it is immaterial whether she also intended to destroy it.

Conclusion of law 6 states: "The language in Decedent's 1999 will is almost identical to the language used in Decendent's 1992 will, tending to show that when she drafted her 1999 will, Decedent was in possession of her 1992 will drafted by Attorney Nervig." Conclusion of law 11 refers to Folkestad's testimony that decedent and Perrault

brought their wills to his office for safekeeping while on vacation. Finally, conclusion of law 13 applies the doctrine of dependent relative revocation to the facts found by the district court. We find nothing in conclusion 6, 11, or 13 that indicates that the district court based its conclusion of law on hearsay.

Because nonhearsay evidence in the record is sufficient to prove that decedent intended to revoke her 1992 will when she made a new will in 1999 to change the alternate beneficiary of her estate, any error in admitting Perrault's hearsay statements to prove decedent's intent was not prejudicial.

Affirmed.