COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0348

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

IN RE THE ESTATE OF MICHAEL A. GRAVES,
DECEASED:

LINDA KAMM,

APPELLANT,

V.

CRAIG WEBSTER, CHAD WEBSTER, JODI WEBSTER
AND JOYCE PLAYTER,

RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Linda Kamm appeals from an order removing her as personal representative of the Estate of Michael A. Graves and admitting for

administration Graves' unsigned 1995 will. She argues that the trial court applied the wrong burden of proof to Craig and Chad Webster's claim that the 1995 will was merely lost and had not been revoked, that the evidence was insufficient to support a finding that the 1995 will had been validly executed by Graves, and that there was no basis for removing Kamm and refusing to appoint her husband, Richard Kamm, as personal representative and trustee as nominated in the 1995 will. We reject Kamm's arguments and affirm the probate court's order.

In 1977, Michael Graves executed a will which provided for the distribution of his estate to his mother or, in the event his mother predeceased him, the estate was to be distributed to his sister, Linda Kamm. The will named Michael's mother or Linda as the personal representative of his estate. Michael died on August 13, 1996. Linda applied for informal administration of the 1977 will; the original will was filed with the probate court. *See* § 865.06, STATS. Domiciliary letters were issued naming Linda the personal representative of the estate.

Brothers Craig and Chad Webster filed an objection to the will. Craig and Chad had a very close relationship with Michael as a result of Michael's nearly twenty-year relationship with their mother, Nancy Webster. They sought administration of a different will which distributed Michael's estate to them. The will had been drafted by an attorney for Michael in 1992. Two of Michael's neighbors testified that they had witnessed Michael's execution of the will in 1995. Only an unsigned copy of the 1995 will was produced.

The 1995 will was admitted to probate over the 1977 will. Jodi Webster, Craig's wife, was named as successor personal representative. Joyce Playter was named successor trustee.

Linda first claims that in determining that the 1995 will was executed by Michael and not later revoked, the trial court failed to apply the "clear and satisfactory evidence" burden of proof. *See* ***Kruse v. Horlamus Indus., Inc.***, 130 Wis.2d 357, 363, 387 N.W.2d 64, 66 (1986) ("The middle burden of proof requires that the jury be convinced to a reasonable certainty by evidence that is clear, satisfactory and convincing."). The trial court did not specifically state the burden of proof applicable to the issues before it. The applicable standard of proof was not an issue briefed by either party before the trial court and apparently was not in dispute. In the absence of anything reflecting application of a contrary burden of proof, we assume the trial court examined the evidence under the appropriate standard. Moreover, Linda challenges the sufficiency of the evidence and we will conduct that review as if "clear and satisfactory evidence" was required. *See* ***Curtis v. McGaffee***, 259 Wis. 642, 648, 49 N.W.2d 914, 917 (1951) (intent to revoke a bequest must be established by clear and satisfactory evidence).

The parties agree that in determining whether the 1995 will should be admitted to probate the trial court was required to first determine if the 1995 will had been properly executed and then whether it had been revoked by destruction. *See* Robert C. Burrell and Jack A. Porter, *Lost Wills: The Wisconsin Law*, 60 MARQ. L. REV. 351, 352 (1977). "On appeal, the findings of fact of the trial court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." ***Godfrey Co. v. Lopardo***, 164 Wis.2d 352, 365, 474 N.W.2d 786, 791 (Ct. App. 1991); ***Mielke v. Nordeng***, 114 Wis.2d 20, 25, 337 N.W.2d 462, 465 (Ct. App. 1983) (when proof is required by clear, satisfactory and convincing evidence, we must accept the factual findings unless they are against the great weight and clear preponderance of the evidence). "[T]he evidence must be viewed most favorably

to the findings." ***Zeimaitis v. Burlington Mills, Inc.***, 56 Wis.2d 449, 458, 202 N.W.2d 244, 248 (1972). Reversal is not required if there is evidence to support a contrary finding. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. *See* ***id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. *See* ***id.***

The testimony of the married couple who lived next door to Michael that he executed the will in their presence is enough to sustain the trial court's finding that Michael had signed the 1995 will. The witnesses were close friends of Michael's. One day in the summer of 1995, Michael asked them to witness his will. It was a brief suppertime visit remarkable only by the good-natured remark about the neighbors not getting anything and thereby qualifying as two "disinterested parties."

Linda attempts to discredit this evidence by pointing out that the couple did not remember executing the will with Michael when, shortly after Michael's death, Craig asked them if they had witnessed a will for Michael. They recalled the will execution about two months after Michael's death. This raises a credibility determination which the trial court made in favor of the neighbors.

Linda also claims that there was no proof that the 1995 will offered at trial was the same document which Michael executed with his neighbors. The attorney who drafted the will for Michael in 1992 indicated that Michael had never contacted her about changes to the will despite follow-up letters she sent about completing a blank space for specific bequests and executing the will. The parties stipulated that Michael did not pay any other lawyer's fees after paying for the will

drafted in 1992. The neighbors identified the document they signed as being "legal" size, as was the will offered at trial. Finally, Nancy testified that in the summer of 1995, Michael gave her a copy of the 1995 will and identified it as his will. There was sufficient evidence that the 1995 will was the same one Michael executed with his neighbors as witnesses.

The trial court noted that the testimony that Michael had executed the will was uncontroverted. This did not have the effect, as Linda claims, of improperly reversing the burden of proof or requiring Linda to rebut a presumption of valid execution. Rather, the trial court was merely stating the condition of the evidentiary presentation on this issue. With that, the trial court made the finding that the 1995 will had been validly executed and moved on to determine whether the inability to locate the 1995 will meant that Michael had revoked it.

There is a presumption that a will that cannot be found was destroyed by the testator with the intent of revoking it. *See* ***State v. John***, 252 Wis. 117, 125, 31 N.W.2d 163, 167 (1948). Linda does not directly challenge the sufficiency of the evidence to rebut the presumption. However, her reply brief discusses the evidence that she believes supports a finding that Michael never executed or destroyed the 1995 will. She argues that there was a complete failure to meet the burden of proof to validate the 1995 will. Thus, we address whether the presumption of destruction was overcome.

The presumption that a lost will was deliberately destroyed is overcome by the absence of any testimony that the testator was dissatisfied with the will, by evidence that the testator referred to the will in the time preceding death and evidence that the manner in which the testator kept important papers

was such that they could become lost. *See* ***Quantius v. Cotter***, 47 Wis.2d 769, 778-79, 178 N.W.2d 9, 14-15 (1970). Further, "whatever virtue the presumption created by a failure to find may start with, that virtue is seriously diminished when it must depend on a search made by those whose interests will be impaired by production of the will." ***Id.*** at 778, 178 N.W.2d at 14.

The evidence was that Michael intended to leave his estate to Craig and Chad. He told people this repeatedly and at times close to his death. The trial court found that Michael had a habit of leaving important papers lie about. It also found that after Michael's death Linda had greater access to Michael's personal papers and therefore an opportunity to destroy the will divesting her inheritance. There is sufficient evidence to support the conclusion that the 1995 will was not intentionally destroyed but it was merely lost. We affirm the trial court's admission of the 1995 will to probate.

The 1995 will names Linda or, in the alternative, her husband Richard as the personal representative of the estate and trustee of any trust that may be necessary to administer the will. Linda argues that the trial court lacked authority to remove her as personal representative and trustee because the criteria for removal under either § 701.18(2), STATS., or § 857.15, STATS., were not satisfied. She claims that she cannot be removed because there was controversy between herself and the beneficiaries.

A petition for the removal of a personal representative or testamentary trustee is addressed to the sound discretion of the trial court and its action will not be reversed unless there has been an erroneous exercise of discretion. *See* ***Gehl v. Hansen***, 5 Wis.2d 91, 96, 92 N.W.2d 372, 376 (1958). While the dissatisfaction of the beneficiaries alone is not sufficient cause for

removal, *see* ***id.*** at 98, 92 N.W.2d at 377, "open, avowed hostility" toward a beneficiary is, *see* ***Laughlin v. Griswold***, 179 Wis. 56, 59, 190 N.W. 899, 900 (1922).

Section 857.15, STATS., speaks to removing a personal representative who becomes "incompetent, disqualified, unsuitable, [or] incapable of discharging the personal representative's duties." The trial court found that Linda and, by close association, her husband Richard were not suitable to act as personal representative or trustee. Linda had forced Chad and Craig to begin a replevin action for the purpose of retrieving personal property they stored in Michael's house. The history of the will litigation confirms the conflict between the parties. The hostility and the loss of faith and confidence between Linda and the beneficiaries support Linda's removal. *See* ***Dreier v. Durst***, 204 Wis. 221, 227, 235 N.W. 439, 442 (1931).

In removing Linda as the personal representative and trustee, the trial court also acted in the interest of judicial economy. It found that conflict between Linda, acting as the personal representative, and the beneficiaries would prolong administration of the estate. As the trial court aptly stated, "common sense" dictated appointing a personal representative "more closely in line with the beneficiaries" so that there would be "peace in our time." It was a proper exercise of discretion to appoint a personal representative and trustee who would better serve the needs of the beneficiaries and the court.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.