COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP937 **Cir. Ct. No. 2012PR47**

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

BERNA BIG THUNDER-HINDSLEY,

APPELLANT,

V.

VICKIE NOREEN HINDSLEY, PATRICIA EAGLEMAN, WILLIAM HINDSLEY, CHARLES HINDSLEY, TINA HINDSLEY AND LUCY HINDSLEY-SNAKE,

RESPONDENTS.

APPEAL from orders of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This is a will contest brought by the children of George W. Hindsley, Jr. George executed several testamentary

documents. George's last will was executed in 2005 and in that will he left his entire estate to his second wife, Berna Big Thunder-Hindsley.[1] Following a hearing on the children's objection to the 2005 will and on Berna's motion for reconsideration, the circuit court invalidated the will based on two findings.[2] Berna challenges those two findings. For the reasons that follow, we reverse the circuit court's findings on testamentary capacity and the validity of George's signature on the 2005 will. Accordingly, we reverse the circuit court's orders and remand with directions to admit the 2005 will to probate.

BACKGROUND

¶2 After George W. Hindsley Jr., died on December 12, 2011, Berna petitioned the Jackson County Circuit Court for administration of George's estate and offered George's will dated July 26, 2005, for admission to probate. George's children from a prior marriage objected to the admission of the 2005 will on the grounds that George lacked the required capacity to execute the will. Following an evidentiary hearing, the circuit court invalidated the 2005 will (including an attached list disposing of tangible personal property) and a prior will executed on

[1] For ease of reference, we refer to George and Berna by their first names in this opinion.

[2] The circuit court also invalidated George's first will, which was executed in 1999, and the two codicils to that will on the same grounds that it invalidated the 2005 will. Although the validity of the signatures on the 1999 will and the codicils were not raised by either party, the court sua sponte took up the issue to determine whether George's 1999 will and codicils would stand if the court invalidated the 2005 will. On appeal, Berna also seeks review of the court's invalidation of the 1999 will and the codicils. We need not reach this issue because we conclude that the 2005 will is valid.

Nevertheless, we refer to the 1999 will and codicils in our section regarding the execution of the will because the circuit court relied on its examination of the signatures on those documents, along with the signatures on the 2005 will, affidavit, and list of tangible personal property in making its findings and rulings.

May 21, 1999, along with two codicils to the 1999 will. It appears that the court invalidated George's wills on the basis that his signatures on at least some of the testamentary documents in question were forged. The court reasoned:

> It was the apparent signing of [George's] name by a third party to certain documents related to both wills that must lead the Court to conclude that I don't know what his true wishes were, and rather than guess, I believe it would be best that the matter proceed pursuant to intestate law.

¶3 Berna filed a motion for reconsideration. Berna argued that the affidavit accompanying the 2005 will, signed in accordance with WIS. STAT. § 853.04 (2005-06),[3] made the 2005 will self-proved; therefore, without any showing of fraud or forgery in connection with the affidavit, the court should have conclusively presumed the 2005 will to be validly executed. Berna pointed out that one of the drafting attorneys testified that she personally witnessed George sign the 2005 will, which provided additional conclusive evidence that George signed the 2005 will.

¶4 The circuit court denied Berna's motion for reconsideration. It concluded:

> Based upon my belief that he was not himself when he executed the will in 2005, when combined with evidence, physical evidence that somebody else was having some influence on him in signing his name, I cannot trust these wills. I have to invalidate these wills. I do invalidate them. And my decision remains the same, leaving Mr. Hindsley's estate to proceed as if he died intestate.

[3] All references to the Wisconsin statutes are to the 2005-06 version unless otherwise noted.

DISCUSSION

¶5 On appeal, Berna argues: (1) that the circuit court's determination that George lacked testamentary capacity at the time George executed the 2005 testamentary documents is erroneous; and (2) the circuit court erred in finding that the 2005 will and affidavit were not signed by George. We agree and address each argument in turn.

¶6 The requirements for making an enforceable will are set forth in WIS. STAT. ch. 853: the testator must have testamentary capacity—§ 853.01; and the testator must execute the will in conformity with the formalities required under § 853.03. A court may deny the admission of a will to probate on one or more of the following grounds: (1) the testator did not properly execute the will; (2) the testator lacked testamentary capacity; or (3) the will was the product of undue influence. *See* ***Chase v. Amadon***, 178 Wis. 517, 519, 190 N.W. 355 (1922). This case concerns the first and second ground.

1. Testamentary Capacity

¶7 Berna argues that the circuit court's finding that George was mentally incompetent at the time he signed the will is erroneous. We agree.

¶8 In a will contest, there is a legal presumption that the testator has the mental capacity to make a valid will. *See* ***Schwoch v. Bickner***, 259 Wis. 425, 433 49 N.W.2d 404 (1951). The party contesting a will on the basis of testamentary incapacity has the burden to prove such incapacity by clear and satisfactory evidence. ***Swartwout, III v. Bilsie***, 100 Wis. 2d 342, 354, 302 N.W.2d 508 (Ct. App. 1981). The question of a testator's mental capacity to execute a will is to be

determined as of the time of the execution of the will. ***Sorensen v. Ziemke,*** 87 Wis. 2d 339, 345, 274 N.W.2d 694 (1979).

¶9 The requirements for testamentary capacity are:

> The testator must have mental capacity to comprehend the nature, the extent, and the state of affairs of his property. The central idea is that the testator must have a general, meaningful understanding of the nature, state, and the scope of his property but does not need to have in his mind a detailed itemization of every asset; nor does he need to know the exact value of his property. A perfect memory is not an element of a testamentary capacity. The testator must know and understand his relationship to persons who are or might naturally or reasonably be expected to become the objects of his bounty from which he must be able to make a rational selection of his beneficiaries. He must understand the scope and general effect of the provisions of his will in relation to his legatees and devisees. Finally, the testator must be able to contemplate these elements together for a sufficient length of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will.

Zelner v. Krueger, 83 Wis. 2d 259, 276, 265 N.W.2d 529 (1978) (citation omitted) (quoting another source).

¶10 On appeal, we will not overturn a circuit court's finding of testamentary incapacity unless it is against the great weight and clear preponderance of the evidence. ***Swartout, III***, 100 Wis. 2d at 354.

¶11 This issue is easily resolved on the ground that the record contains almost no evidence that George lacked testamentary capacity when he signed the will on July 26, 2005. We acknowledge there was testimony referring generally to George's problems with alcohol and how his drinking affected his personality and his physical health, and testimony that George had only a fourth grade education and that he had problems with reading. However, none of this evidence provides

more than indirect and weak support for a finding that George lacked the mental capacity to understand "the nature, extent and scope of his property and the natural objects of his bounty" at the time he executed the 2005 will. Indeed, the evidence shows that none of the children were present when George signed that will, or had any contact with him during that day or during several days prior.

¶12 Indeed, the only significant evidence in the record regarding George's testamentary capacity at the time he signed the will and affidavit is the testimony of an attorney who drafted part of the will, Sunshine Lemieux. She testified that she discussed the will with George on the phone and through letters prior to the execution of the will. Lemieux testified that she reviewed the contents of the will with George in her office and "read over the procedures and the provisions" with him. Lemieux stated that George agreed with the contents of the will and stated that the will was his. She testified that George was mentally competent and showed no indications that he was under the influence of alcohol or drugs. Lemieux stated that, based on her dealings with George surrounding the will, George was competent to handle his affairs. Lemieux's testimony was unimpeached.

¶13 In sum, we conclude that the circuit court's finding of testamentary incapacity is against the great weight and clear preponderance of the evidence.

2. Execution of the Will

¶14 Berna argues that the circuit court erred in finding that the 2005 will and affidavit were not properly executed. We agree.

¶15 A will accompanied by a notarized affidavit in substantial compliance with WIS. STAT. § 853.04(1) is a self-proved will. A self-proved will

is conclusively presumed to be validly executed by the testator. WIS. STAT. §§ 856.16(1),[4] 853.03(1).[5] This presumption can be overcome only upon proof of fraud or forgery in connection with an attestation affidavit that is substantially in compliance as to form under § 856.16(1). We will not overturn a circuit court's finding that a testamentary document is forged or is a product of fraud unless that finding is against the clear preponderance of the credible evidence. *See* ***Fairbank v. Stroup***, 201 Wis. 148, 150, 229 N.W. 656 (1930).

¶16 It is undisputed that the 2005 will is self-proved because it meets the requirements in WIS. STAT. § 856.16(1) and, therefore, a conclusive presumption exists that George validly executed the will. Our inquiry, then, focuses on whether the circuit court's finding that the signatures on the will and attestation affidavit were forged is against the clear preponderance of the credible evidence. We conclude that it is.

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[4] WISCONSIN STAT. § 856.16(1), provides in pertinent part:

> Unless there is proof of fraud or forgery in connection with the affidavit, if a will includes an affidavit in substantially the form under s. 853.04(1) or (2), all of the following apply:
>
> (a) The will is conclusively presumed to have been executed in compliance with s. 853.03.
>
> (b) Other requirements related to the valid execution of the will are rebuttably presumed.

[5] WISCONSIN STAT. § 853.03(1) states in part:

> Every will in order to be validly executed must be in writing and executed with all of the following formalities:
>
> **(1)** It must be signed by the testator ….

¶17 We first note that the children's effort to support the circuit court's finding does not address Berna's self-proved arguments or analyze the facts and the law on the topic. We could end our inquiry here, and summarily reverse the circuit court's rulings based on the children's implicit concession that the will is self-proved. However, because we reverse the circuit court, we choose to analyze the issue and explain why we agree with Berna that the finding is against the clear preponderance of the credible evidence.

¶18 Turning to the circuit court's finding, we note that we treat the circuit court's statements as including a finding that George did not sign the testamentary documents. It is true that the court also indicated it was possible that George signed, but that he did so under undue influence. The children do not pursue the undue influence issue on appeal, and we find no evidence of undue influence. What is left is the circuit court's apparent suspicion that, as the children argued, George did not sign the documents. In this regard, if all the circuit court did was to express suspicion, then it is readily apparent that there is no finding that would support overcoming the statutory presumption of validity. Thus, we proceed to address the parties' apparent dispute over whether the circuit court's finding that the signatures were forged can be sustained.

¶19 As noted, the court apparently relied on the testimony of George's children, who testified that they did not believe that the signatures on the will and affidavit belonged to George. The children testified that the signatures found on the testamentary documents were "too neat," in comparison to George's usual "chicken scratch" signature. They also testified that George's last name, Hindsley, was misspelled on the 2005 will and affidavit as "Hindsly;" the signatures conclude with "Jr.," which the children assert is inconsistent with George's practice of not including the abbreviation except on legal documents; and that

George's signature on the 2005 list for disposition of personal tangible property includes an abbreviation of his middle name as "Wm" rather than just "W," which the children testified was his usual practice.

¶20 However, as we indicated, the record shows that Attorney Lemieux was the only hearing witness who testified that she observed George sign the will and affidavit. She testified that she read the will to George and then observed George sign the will and attestation affidavit. She also testified that two other attorneys were present in Attorney Lemieux's office and observed George sign the testamentary documents, and the two attorneys signed the will and the affidavit.

¶21 We conclude that the children have failed to overcome the conclusive presumption that the testator's signature on the 2005 attestation affidavit was valid by showing that it was a product of forgery. At worst, the perceived anomalies in the signatures on the 2005 will and affidavit, and the list for disposition of tangible personal property, are nothing more than insignificant inconsistencies. None of the inconsistencies in the signatures alone or considered together prove that the testamentary documents were forged. The testimony is that George would include the abbreviation "Jr." only when he signed legal documents. The children seemingly fail to recognize that the will and affidavit are, in fact, legal documents.

¶22 As for the other inconsistencies, the record does not contain any examples of George's verified handwriting, nor is there expert testimony by a document examiner or other writing expert regarding the authenticity of the signatures. As a result, it would not have been possible for the circuit court to determine whether any of the signatures on the testamentary documents were inconsistent with signatures the children agree were made by George. This

problem is best demonstrated by the court's conclusion that it could not conclude that any of the signatures found on the testamentary documents were made by George or by a third party. Had the court been presented with a verified signature belonging to George, even if unassisted by expert testimony, the court at least would have had a basis for determining whether the signatures on the testamentary documents were made by George.

¶23 In addition, the circuit court inexplicably gave little or no weight to Attorney Lemieux's testimony and credited the children's speculation that their father did not sign the 2005 will and affidavit and the other testamentary documents. The court did not explain why it discredited the testimony of the only hearing witness who witnessed George sign the testamentary documents, and why the evidence the court relied on to invalidate the will was given greater weight. The evidence introduced by the children regarding George's signature simply does not hold up against the strong weight of Attorney Lemiuex's testimony that she personally observed George sign the 2005 will and affidavit.[6] The credible testimony of Lemieux is not overridden by the opinions of the interested parties. *See* ***Fairbank***, 201 Wis. at 150 (quoting another source) (" the positive testimony of witnesses whose integrity and credibility is otherwise unassailed is not outweighed or overcome by the testimony of handwriting experts who express opinions only. The testimony of honest witnesses, who state that they know what they testify to, is more convincing than theory. It is not likely that the testimony

[6] We have reviewed the signatures on the testamentary documents that the circuit court examined and find little support for the court's finding of inconsistencies in the signatures on the documents. While we do not presume to engage in fact finding, our review reveals that the signatures on these documents are more similar than not. Stated differently, we acknowledge that the signatures vary to some degree, but not enough to bring into question the credibility of Attorney Lemieux and the authenticity of George's signature on the 2005 will and affidavit.

of the several witnesses who testify that they were present and know what took place would make up such a story.").

¶24 Having concluded that the children have failed to overcome the conclusive presumption that the testator's signature on the 2005 attestation affidavit was valid by showing that it was a product of forgery, and because there is no argument or evidence to support the proposition that George's signatures were obtained by fraud, we see nothing else on which to base a decision affirming the circuit court.

¶25 In sum, as a self-proved will, the 2005 will is afforded a conclusive presumption of valid execution and the circuit court's decision to invalidate the will was against the clear preponderance of the credible evidence.[7]

CONCLUSION

¶26 For the above reasons, we reverse the circuit court and remand with directions to admit the 2005 will to probate.

By the Court.—Orders reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

[7] Berna also argued that the circuit court erred by relying on evidence regarding George's testamentary intent in finding that George lacked testamentary capacity. We need not reach this issue because this case is disposed of on other grounds.