IN THE COURT OF APPEALS OF IOWA

No. 0-796 / 99-2059
Filed March 14, 2001

IN THE MATTER OF THE ESTATE OF JERILYN J. OLIVER OLSEN, Deceased,

AMY OLIVER and JOHN OLIVER,
Plaintiffs-Appellants/Cross-Appellees,

vs.

GEORGE A. OLSEN, SR., and CYNTHIA LEE METSGER, et al.,
Defendants-Appellees/Cross-Appellants,

and

GEORGE A. OLSEN, JR.,
Defendant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Iowa County, David M. Remley, Judge.

The plaintiffs appeal, and defendants cross-appeal, from a district court ruling granting the defendants' motion for judgment notwithstanding the verdict in plaintiffs' action contesting the decedent's 1968 will. The plaintiffs contend: (1) there was clear and convincing evidence that the decedent had drafted and signed wills in 1987 and 1994 that preempted her 1968 will; (2) the defendants failed to satisfy the burden of proof of showing special circumstances necessary to imply a gift by the decedent to the contingent beneficiaries in the 1968 will; and (3) the court improperly instructed the jury on the extent they could consider Jerilyn's own statements and George Jr.'s activities immediately following Jerilyn's death. On cross-appeal, the defendants argue: (1) the plaintiffs are barred from relitigating the issue of the 1968 will's validity since a California court,

in a related probate case, concluded the will was valid and enforceable; and (2) the district court abused its discretion in allowing the plaintiffs to reopen their case to amend their pleadings and introduce additional evidence to prove California law. **AFFIRMED IN PART AND REVERSED IN PART.**

Barbara A. Hering of Hopkins & Huebner, P.C., Des Moines, and William H. Carmichael and Forrest W. Rosser of Blades, Carmichael & Rosser, Cedar Rapids, for appellants.

Webb L. Wassmer of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, and James P. Bodenheimer of Bodenheimer, Jones & Szwak, L.L.P., Shreveport, Louisiana, for appellees George Olsen, Sr. and Cynthia Metsger.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Appellants Amy Oliver and John Oliver appeal from the district court's issuance of a Judgment Notwithstanding the Verdict (JNOV) finding insufficient evidence to support the jury verdict that decedent Jerilyn Oliver executed a valid will in 1987 and another in 1994. As a result of the JNOV, Jerilyn's 1968 will remains unrevoked. The district court also found that appellees George Olsen, Sr., and Cynthia Metsger, father and daughter of Jerilyn's ex-husband, are implied-gift beneficiaries under the 1968 will. Appellants contend the district court erred in its JNOV ruling. They claim 1) there was sufficient evidence to support the jury verdict that both the 1987 and the 1994 wills existed and revoked the 1968 will; and 2) bequests in the 1968 will in favor of appellees George Olsen, Sr., and Cynthia Metsger are unenforceable.

Jerilyn Oliver Olsen's 1968 will was admitted to probate in California in May of 1997. That will directed the disbursement of Jerilyn's California property. Under that will all of her property went to her then-husband Bud Olsen. In the event that Bud was not living at the time of Jerilyn's death, the 1968 will distributed her property, in thirds, to Bud's parents, Mr. and Mrs. George A. Olsen, Sr.; Jerilyn's parents, Mr. and Mrs. Leslie C. Oliver; and Bud's daughter, Cynthia Lee Olsen Metsger. Jerilyn and Bud divorced in 1983. Jerilyn died in 1995.

For the purpose of administering Jerilyn's real and personal property in Iowa, Jerilyn's mother commenced an estate proceeding in Iowa County. The appellants, Amy and John Oliver, who are Jerilyn's only niece and nephew, claimed that the 1968 will did not govern the disposition of the Iowa property, that

several wills subsequent to that 1968 will directed the property go to them instead. The appellants argued that, regardless of these subsequent wills' eligibility for admission to probate (which they claim mysteriously disappeared upon Jerilyn's death), at the very least they served to revoke the 1968 will. At trial the jury agreed, concluding from testimony and circumstantial evidence that Jerilyn had indeed executed two valid holographic wills in California. Although these two subsequent wills had been lost and were thus unavailable to govern the disposition of the Iowa property, the jury found that they revoked the 1968 will. Under the jury decision Jerilyn's Iowa property would have passed, by way of intestacy, to her niece and nephew, Amy and John Oliver.[1]

The trial court disagreed with the jury verdict. It issued a Judgment Notwithstanding the Verdict (JNOV), ruling that there was insubstantial evidence to support the existence of the purported 1987 or 1994 wills. Under the trial court's ruling, no subsequent wills revoked the 1968 will. The 1968 will therefore directed the disposition of all of Jerilyn's property. The trial court also ruled that appellees could take under the will as implied-gift beneficiaries.

I. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE VERDICT

Appellants first contend on appeal that the evidence was sufficient to support the jury's findings that the decedent had executed subsequent wills in 1987 and 1994 that revoked the 1968 will. Appellees respond that 1) the district court was correct in finding there was insufficient evidence to support the jury's verdict that the decedent had executed valid wills in either 1987 or 1994; and alternatively, 2) even if this court finds there was sufficient evidence to support

[1]Amy and John Oliver's father disclaimed his interest.

the jury verdict, under the doctrine of issue preclusion appellants are precluded from relitigating the issue of the validity of the 1968 will.

A. SUFFICIENCY OF THE EVIDENCE

We first address the issue of whether there was sufficient evidence to support a jury verdict that a valid 1987 and a valid 1994 will existed and revoked the 1968 will. Iowa Code section 633.284 (1995) provides that a will can be revoked in whole or in part by the execution of a subsequent will. The subsequent will must be validly executed, whether or not it is ever eventually admitted to probate. *Blackett v. Ziegler,* 153 Iowa 344, 353, 133 N.W. 901, 904 (1911) ("Upon the execution of [the revoking will], the prior will is revoked, no matter whether the instrument of revocation be probated or not.") In this case the subsequent wills thus far have been unrecoverable and will never be admitted to probate. Although unrecoverable, they can still revoke the 1968 will if their existence can be established with sufficient certainty. To establish the existence of lost wills such as these it is incumbent upon the appellant to prove by clear, satisfactory and convincing evidence 1) due execution and former existence of the alleged wills; 2) that they have been lost and cannot be found after diligent search; 3) that the presumption of destruction by decedent with intent to revoke them, arising from their absence at death, has been rebutted; and 4) contents of the wills. *In re Crozier's Estate,* 232 N.W.2d 554, 556 (Iowa 1975).

We review the district court's grant of JNOV for correction of errors at law. Iowa R. App. 4; *Wessler v. Sisters of Mercy Health Corp.,* 540 N.W.2d 445, 448 (Iowa 1995). The motion for JNOV should not be granted if there is substantial

evidence supporting each element of the plaintiffs' claims. *Kamerick v. Wal-Mart Stores, Inc.*, 503 N.W.2d 24, 25 (Iowa Ct. App. 1993).

The trial court found there was insufficient evidence with respect to the first element of the lost will requirements, due execution and former existence of the alleged wills. The evidence need not be free from doubt. *Matter of Estate of Wiarda,* 508 N.W.2d 740, 742 (Iowa Ct. App. 1993). *In re Estate of Fisher,* 344 N.W.2d 579, 581 (Iowa Ct. App. 1983). However it must be sufficient to support the jury verdict. A showing of a lost will must be made through "clear, satisfactory, and convincing evidence." *Estate of Crozier,* 232 N.W. 2d at 556. Evidence is clear, convincing and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it." Iowa Uniform Civil Jury Instruction No. 100.19; *Raim v. Stancel, 339 N.W.2d 621, 624* (Iowa Ct. App. 1983); *see Sinclair v. Allender*, 238 Iowa 212, 223, 26 N.W.2d 320, 326 (1947).

In spite of the jury's finding, there simply is not enough evidence to establish that Jerilyn's intentions in 1987 or 1994 were in the form of a valid will. There is plenty of evidence that she intended to bequeath her property to the appellants. Testimony to this effect was given by Amy Oliver, John Oliver, Gerri Whyman, Judy Humphrey, Ron Nielsen, Gary Chipman, and James Claypool. Jerilyn even included notations in her daily planner indicating she was making changes to (or perhaps rewriting) a will. In fact evidence of her intentions is fairly unmistakable. Amy Oliver testified that Jerilyn read her will aloud to Amy on the telephone, including her own name at the end of it for emphasis. Additionally John Oliver testified that he saw some sort of a will in 1987 and was a party to Jerilyn's Thanksgiving discussions as to her intended disposition of property.

But however clear Jerilyn's intentions, they do not translate into valid bequests or, specifically in this case, valid revocations of the 1968 will. In order for either the 1987 will or the 1994 will to revoke the 1968 will, it must have been valid. The determination of whether or not a document constitutes a valid holographic will is governed by statute. *In re Estate of Sola,* 275 Cal. Rptr. 98, 101 (Cal. Ct. App. 1 Dist. 1990). Iowa law does not recognize holographic wills. In California a will is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. Calif. Prob. Code § 6111(a) (1991). Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will. Calif. Prob. Code § 6111(c). The primary purpose of the statutory holographic will provisions is to prevent fraud. Because forging another's handwriting is "exceedingly difficult," California law requires the material provisions of a holographic will to be in the handwriting of the testator. *Estate of Southworth,* 59 Cal.Rptr. 2d 272, 276 (Cal. Ct. App. 1996). *See Estate of Black,* 641 P.2d 754, 756 (Cal. 1982).

The trial court found there to be substantial evidence that the 1987 will was signed in California. But it could not find substantial evidence with respect to the 1987 or 1994 wills that the material terms of either were in Jerilyn's handwriting.

We agree with the trial court. The only evidence we have of the 1987 will document itself comes from John. His testimony, however, is based only on his impressions of what he believed to be a will as he sat in on his father's and Jerilyn's discussion of the disposition of her property. He never read the

document, nor did he peruse it long enough to determine which provisions were typewritten standard will language and which provisions had been filled in with handwriting. Even if we were to make all possible inferences -- that the document was a statement of testamentary intent, that it had been signed in California, that the blanks had been filled in, that they had been filled in by Jerilyn, and that she had filled them in in handwriting – we still have no way to determine whether the statutory requirements were met. Without the document there is no way of knowing whether its material provisions were indeed handwritten by Jerilyn. Evidence of the 1994 will is even less concrete. There was evidence that Jerilyn read her stated intent over the phone to Amy Oliver, concluding with her own name, apparently to emphasize her endorsement of the document. Apart from hearing Jerilyn repeat her name, there is no evidence that the document was signed. Further, no one ever even saw this 1994 document. Again there is no way to determine if its material terms are in Jerilyn's handwriting.

If the law is to recognize a testator's intent, that intent must manifest itself in a valid will. With no means of examining the document we cannot superimpose Jerilyn's intent onto a fill-in-the-blank form and treat it as a valid will. As the district court concluded, there simply is not enough evidence here for us to find that either a valid 1987 will or a valid 1994 will existed. The district court correctly determined that there was insubstantial evidence to support a jury finding that Jerilyn executed a valid will either in 1987 or in 1994.

B. ISSUE PRECLUSION

Appellees claim alternatively that, even if there was sufficient evidence to support the jury verdict, the California courts already ruled on the validity of the 1968 will. They argue that under the doctrine of issue preclusion the appellants are barred from contesting its validity. We have found that there was insufficient evidence to support the jury verdict. We therefore do not address the issue of whether the California ruling on the validity of the 1968 will precludes further litigation involving the validity of subsequent wills to revoke that 1968 will.

II. INTERPRETATION OF THE 1968 WILL

Secondly, appellants contend that the appellees failed to prove they were contingent beneficiaries under the will. Appellants claim that even if there is insufficient evidence to revoke the 1968 will, the contingency in the 1968 will allowing the appellees to inherit has not occurred, and they therefore cannot take as contingent beneficiaries under the will. Appellees counter that although the contingency has not occurred, they are recipients of an implied gift in the 1968 will and therefore do take as contingent beneficiaries.

The 1968 will contained the following bequest:

> In the event of my death during this forthcoming trip or at any time thereafter or until this is updated by a new will, I hereby wish the following . . .:
>
> The portion of my estate and personal effects shall all be given to *my husband*, George A.Olsen, Jr. to do with as he sees fit.
>
> *In the event that he is not alive*, please see to the following:
>
> My portion of the estate shall be divided into three equal parts-
>
> 1/3 to Mr. & Mrs. George A. Olsen
>
> 1/3 to Mr. & Mrs. Leslie C. Oliver
>
> 1/3 to Cynthia Lee Olsen, step-daughter, with the exception of the following [pieces of personal property]. (Emphasis added.)

In 1983, Jerilyn and Bud Olsen's Marital Settlement Agreement included as part of its boilerplate language a waiver provision stating that both Jerilyn and Bud were waiving "any and all right to inherit the estate of the other at his or her death, or to take property from the other by devise or bequest." The California Court of Appeals for the Second District affirmed the Ventura County Superior Court's finding that this provision did not preclude Bud from inheriting from Jerilyn's estate. With respect to California property, then, Bud is the sole heir under the will.

Under Iowa law all provisions in favor of an ex-spouse are revoked upon divorce if a testator's will was written before the divorce. Iowa Code § 633.271 (1997). Appellees concede that under Iowa law Bud Olsen cannot inherit under the 1968 will.

In ruling on the 1968 will the California courts ruled only on the validity of the will and whether Bud, as an ex-spouse, remained a beneficiary. Finding that Bud could indeed remain a beneficiary, the California courts did not address whether, in the alternative, the contingent beneficiaries could inherit under the will if Bud remained alive but could not take. We address only whether the contingent beneficiaries are able to inherit under the will. Issue preclusion therefore does not apply to constrain our interpretation of the will. Even if the California courts had ruled on this issue, however, we probably would not be constrained by a California court's ruling when determining the disposition of Iowa property. The general rule is that the validity, operation, and effect of a will by which real property is devised is determined by the law of the place where the land is situated. *In Re Barrie's Estate, 240 Iowa 431, 435-36,* 35 N.W.2d 658,

661 (1949) (Smith, J., dissenting), citing Volume 4, *Page on Wills,* p. 688. The disposition of real property, whether by purchase or descent, is subject to the government within whose jurisdiction the property is situated. *Id.*, 35 N.W.2d at 661.

We now address the appellants' claim that the divorce-induced failure of a bequest to Bud Olsen, who is still living, does not result in the invocation of the alternative bequest in the will in favor of Mr. and Mrs. Olsen, Mr. and Mrs. Oliver, and Cynthia Olsen Metsger, but rather results in intestacy. We find that Jerilyn's property passes by intestacy.

The construction and interpretation of a will is a legal issue decided by the court in equity. *See Estate of Rogers,* 473 N.W.2d 36, 39 (Iowa 1991). Our review is de novo. *Id.* We give weight to the district court's findings, but we are not bound by them. *Id.* The testator's intent is the guiding light in will interpretation. *Covert v. Sebern,* 73 Iowa 564, 566-7, 35 N.W.636, 638 (1887). In ascertaining the intent of the testator we rely primarily on the language contained in the will; however, the substance and intent, rather than the words are to control. *Porter v. Porter,* 286 N.W.2d 649 (Iowa 1979); *Matter of Estate of Kalouse,* 282 N.W.2d 98, 104 (Iowa 1979). To ascertain the substance and intent we examine the entire will, and the circumstances surrounding the decedent at the time she made the will, to determine the scheme of the distribution and ultimately, the testator's intent. *Russell v. Johnston,* 327 N.W.2d 226, 229 (Iowa 1982).

Appellees claim that George Olsen, Sr., and Cynthia Olsen Metsger take under the 1968 will as recipients of an implied gift, that the express contingency

for their taking under the will, namely Bud's death, was not a literal requirement. Appellees have authority for their position that express statements of contingency in a will need not always be met. In *Porter v. Porter,* 286 N.W.2d 649 (Iowa 1979) (McGiverin, J., dissenting), the decedent's stepson, whose status as contingent beneficiary hinged upon his mother's death, sought to take under the will even though his mother and stepfather had divorced and his mother was barred from inheriting by Iowa Code section 633.271. Looking to the testator's intent, the court applied the doctrine of gift by implication to find that, despite the divorce, the stepson was an intended beneficiary and nevertheless took under the will. *Porter,* 286 N.W.2d at 655. In *Russell v. Johnston,* 327 N.W.2d 226 (Iowa 1982), the testator's friend, whose contingent beneficiary status hinged upon the testator's wife's death, sought to take under the will even though the testator and his wife divorced, and the wife, precluded from inheriting by section 633.271, was still living. Again the court looked to the testator's general intent, concluding that because the testator had expressed clear preference for the friend over any of his heirs at law, (even changing the beneficiary status on his life insurance policies from his first wife and children to his estate), the friend's ability to take under the will survived the failed contingency.[2] *Russell,* 327 N.W.2d at 230.

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[2] Appellees also point to cases in other jurisdictions where courts have not applied the literal language of contingency to preclude a gift-over beneficiary from taking under the will, in spite of the contingency's not being met: *Lamontagne v. Hunter,* 341 So.2d 1074 (Ct. App. Fla. 1977); *Steele v. Chase,* 281 N.E.2d 137 (Ind. Ct. App. 1972); *Estate of Kerr,* 520 N.W.2d 512 (Minn. Ct. App. 1994); *Bloom v. Selfon,* 555 A.2d 75 (Pa. 1989); *Matter of Estate of Graef,* 368 N.W.2d 633 (Wis. 1985).

In cases in which courts have expanded the terms of a will to include an unanticipated contingency resulting from an ex-spouse's disinheritance by law, either there was no indication that the testator anticipated unexpected future contingencies, express language in the will rejected heirs at law (favoring probate over intestacy), or there was evidence of a preference for a gift-over beneficiary whose relationship with the testator was unrelated to his marital status. As evidenced in these cases, the purpose for expanding the terms of a will was clear: courts were trying to avoid invalidating wills due to technicalities unforeseen by the testator which, if not resolved by the courts, would have resulted in intestacy dispositions the testator probably never intended. In all of these cases the overriding policy judgment was that the testator's intended disposition should be given priority, whenever possible, over the default intestacy disposition provided at law.

Jerilyn Olsen did not subscribe to that policy judgment. Instead she chose to defer to the laws of intestacy if the terms of her will were not easily executed. For that reason this case is distinguishable. In order to implement the intent of the testator in this case the court need not expand the terms of the will in order to avoid intestacy. In fact the testator provides for intestacy as a viable alternative. The plain meaning of the will states that in order for the alternative beneficiaries to take, Bud Olsen must not be living. The will provides in plain language what to do if that distribution scheme is problematic. Jerilyn Olsen directs that we discard the will:

> If I've made a mistake in this writing, please forgive me, but I have every confidence that this will, will never be read – If it causes a legal and tax problem, please do me a favor and throw it away as if it was never written – I would appreciate it!!!

Unlike the testators in the prior cases who believed their wills to be final and comprehensive statements of donative intent, Jerilyn foresaw the possibility that her will might not be dispositive. She provided for that possibility. We merely follow her direction.

Considering the format of the will, its terms, and the circumstances under which she wrote it, it is entirely logical that Jerilyn would have wished that all problems with her will be resolved by its nullification. The will appears to have been written relatively quickly. Most notably, it was handwritten. The acknowledgment of the misspelling of "bequeath," and the added "P.S." at the end indicate that it was probably written without an extended period of forethought as even the logistics of a more formal will would require. The terms of the will are not totally conclusive. The paragraph preceding the closing paragraph leaves some of the disposition decisions to the family members themselves: "If there's anything else of value or that you want, as far as personal effects go, you'll have to go over it yourselves – Sorry!!!" The will contemplates that it will probably never be read, and it concludes with her direction to throw it out should any problems arise. Furthermore, Jerilyn was writing this will just before leaving on a trip in 1968 and was providing for the possibility of her death during that trip. Her introductory statements indicate that she would very possibly rewrite the will at a later time. Significantly, at the time of the will she had not yet inherited the family farm that is the subject of this dispute. When writing the will she may very well have intended to distribute only the property she owned at the time. She did not know in 1968 that she would hold title to the Oliver family farm whose integrity and "family-farm" status would be

compromised if it were distributed in 2001 among her ex-husband's family members in California. All of this evidence, most of which is extracted from the document itself, indicates that the will may have been written on impulse and was not considered by Jerilyn to be her final statement of disposition unless she did not survive the 1968 trip. For these reasons it is fully understandable that Jerilyn Oliver, wanting to control the disposition of her property but fearing she might do more harm than good, deferred to the law in the case that her stated wishes caused unforeseen complications.

Whatever the reasons, it is unmistakable that Jerilyn expressly provided for the resolution of unknowable contingencies arising under her will: the will was to be voided, or in her words treated "as if it was never written." In this case unknowable contingencies did arise: Jerilyn and Bud divorced, and Bud was still living when Jerilyn died. The question as to whether the contingent beneficiaries continued to take in these circumstances certainly qualifies as a legal problem. Faced with this legal problem we rule in accordance with Jerilyn's wishes. We consider the will invalid and direct that her Iowa property be distributed according to the laws of intestacy in Iowa.

AFFIRMED IN PART AND REVERSED IN PART.