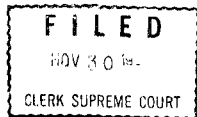


IN THE COURT OF APPEALS OF IOWA



40

IN THE MATTER OF THE ESTATE OF)
MILO M. BRADY,)

SUSAN BRADY RYERSON,)

Claimant-Appellant,)

vs.)

DAVENPORT BANK AND TRUST)
COMPANY, RUTH STROM BRADY,)
EDWARD BRADY, CORNELIA LEVI,)
ALAN LEVI and ROSEMARY)
MARGULIES,)

Respondents-Appellees.)

Filed November 30, 1987

7-409
86-1718

Appeal from the Iowa District Court for Scott County (51927), L.D.
Carstenson, Judge.

Appellant appeals the decision of the trial court to admit a copy of the
will of the decedent to probate. **AFFIRMED.**

Herbert M. Spector of Spector, Tappa, Kopp and Nathan, Rock Island,
Illinois; and John T. Flynn of Brubaker, Flynn and Darland, Davenport; for
claimant-appellant.

Michael K. Bush of Carlin, Hellstrom and Bittner, Davenport, for
respondent-appellee Davenport Bank and Trust Company.

Charles G. Rehling and John S. Gosma of Rehling, Lindburg, and Gosma,
Davenport, for respondent-appellee Ruth Strom Brady.

Thomas J. Pastrnak of Heninger and Heninger, Davenport, for respondents-
appellees Edward Brady, Rosemary Margulies, Cornelia Levi, and Alan Levi.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

41

Objector, Susan Brady Ryerson, appeals the decision of the trial court to admit a copy of the will of the decedent, Milo Brady, to probate. She asserts the trial court erred as a matter of law by not requiring the proponents to show evidence as to the *circumstances of destruction of the original of the will before* considering additional evidence rebutting the presumption Brady destroyed the original with the intention of revoking the will. She also asserts there is not substantial evidence in the record to support the trial court's finding the original of the will was lost and not destroyed by Brady with the intention of revoking it.

On March 16, 1982, Brady, Ryerson's father, executed the will that is the subject of this appeal. The primary purpose of the will was to act as a pour-over mechanism to fund a revocable inter vivos trust previously established at the Davenport Bank and Trust Company. The stated intention of Brady was the original of the will was to be put into a safe deposit box at Bettendorf Bank and Trust Company. In fact, his attorney's file contained a notation the original was in safety deposit box number 1277, at that bank. By the time of Brady's death on May 4, 1985, however, the downtown branch of Bettendorf Bank and Trust Company had been closed and there was no longer a safe deposit box at that location. An exhaustive attempt to locate the original at other banks in the Quad Cities area, and at banks in Florida, where Brady frequently vacationed, failed.

The proponents then sought to admit a copy of the will to probate. The significant difference to Ryerson between taking under the will and taking through intestate succession (if the will is not admitted) is the trust, into which the estate pours under the will, contains a spendthrift provision restricting Ryerson's access to the funds.

Our scope of review is not de novo, but only on errors assigned. In re Estate of Crozier, 232 N.W.2d 554, 556 (Iowa 1975). The fact findings of the trial court are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1); Harsha v. State Savings Bank, 346 N.W.2d 791, 794 (Iowa 1984). Evidence is substantial if a reasonable mind could find it adequate to reach the given conclusion. See Baty v. Binns, 354 N.W.2d 777, 780 (Iowa 1984). We view the evidence in the light most favorable to the trial court's judgment, as the fact findings have the force of a special verdict. R.E.T. Corp. v. Frank Paxton, Inc., 329 N.W.2d 416, 419 (Iowa 1983). Our deference to the trial court does not, however, extend to its determinations of law. Id.

I.

Ryerson asserts the trial court erred as a matter of law regarding the type of evidence needed initially to rebut the presumption a missing will was revoked. She contends Goodale v. Murray, 227 Iowa 843, 289 N.W. 450 (1940), holds that a proponent of a missing will must first show evidence as to the circumstances of destruction of the original of the will before the trial court can consider additional evidence rebutting the presumption of revocation. She relies on the following language from Goodale:

With respect to the third essential in the establishment of a lost will, it may be said that the rule is practically unquestioned that in the absence of any evidence, as to circumstances of destruction, a presumption arises that a Will which was in the custody of a testator, and which cannot be found at his death, was destroyed by him with the intention of revoking it. However, the presumption is a rebuttable one, and may be strengthened or overcome by proof of declarations of the testator, either for or against it, or by proof of the circumstances of the testator, or of his relations to the persons involved. (Ryerson's emphasis.)

Id. at 862-63, 289 N.W. at 459. We disagree with Ryerson's interpretation of this language. We conclude the meaning of this passage from Goodale is that the presumption of revocation, upon which Ryerson now relies, arises upon the

absence of any evidence as to circumstances of destruction of the original of the will. It does not state the proponents must show these circumstances before they can offer evidence rebutting the presumption created. We conclude, therefore, the trial court was correct in not imposing such a requirement on the proponents.

II.

Ryerson asserts there was not substantial evidence in the record to support the trial court's finding the original of the will was lost and not destroyed by Brady with the intention of revoking it.

It is well-settled that to establish a lost will, it is incumbent upon the proponent to prove by clear, satisfactory, and convincing evidence: (1) due execution and former existence of the alleged will; (2) that it has been lost and could not be found after diligent search; (3) that the presumption of destruction by decedent with intent to revoke it, arising from its absence at death, has been rebutted; and (4) the contents of the will. In re Estate of Crozier, 232 N.W.2d 554, 556 (Iowa 1975); In re Estate of Fisher, 344 N.W.2d 579, 581 (Iowa App. 1983). The evidence need not, however, remove all doubt. Goodale v Murphy, 227 Iowa 843, 857, 289 N.W. 450, 462-63 (1940).

In this case, only item number three, whether the presumption of revocation was rebutted, is disputed. The other requirements have been met. As stated earlier, our review is at law. We must determine whether there is substantial evidence in the record to support the trial court's finding that the proponents rebutted the presumption of revocation by clear, satisfactory, and convincing evidence.

The record reflects Brady, within one day of his death, discussed changing his will. It is likely, however, he was actually referring to the trust at this time. He frequently used the terms "will" and "trust" interchangeably. This

is understandable since they were the interconnected components of his estate plan. The changes discussed, eliminating a niece and stepson from his "will," clearly involved the trust and not the will. Nonetheless, Brady's discussion of changing his "will" certainly suggests he had not revoked his estate plan at the time, or more specifically, the "will" component of that plan.

Brady's use of the terms "will" and "trust" interchangeably also serves to explain the loss of the will, when placed in the context of his estate planning efforts. Brady had made numerous changes in the trust after execution of the 1982 will containing the pourover provision. He clearly viewed the trust as the primary dispositive instrument in his estate plan. Thus, the location of the will was of less importance than the location of the trust instrument. This lesser importance suggests its disappearance is more properly ascribed to its having been mislaid than destroyed with intent to revoke.

The evidence supporting the finding that Brady did not revoke his will also includes his perception his daughter, Ryerson, was irresponsible with money. This perception is disclosed by the trust instrument itself and numerous discussions he had with his attorney. Brady was also concerned with the effect on Ryerson's inheritance of the community property laws in California, her home state. He had been extremely irritated when Ryerson's prior spouse had received, in dissolution proceedings, a share of a condominium he had paid for in part. These perceptions of Brady are important, for they provide the rationale for the spendthrift provision in the trust. To the extent these perceptions persisted until the time of his death, they support the finding of the trial court that the will was lost, not destroyed.

Ryerson contends, however, her relationship with her father was improving. He had given her a number of cash gifts in the months preceding his death. These included numerous \$100 gifts for dinner or entertainment, \$3,000 for

carpeting, and \$3,000 for dissolution attorney's fees. He had also purchased securities in her name in the amount of \$13,600. Ryerson asserts these gifts, in the context of an improving relationship, show that her father's attitude regarding her alleged profligacy had changed. We disagree.

Although these gifts show a warming relationship, they also evidence the caution of a man who still does not trust his daughter with large sums of money. The sums given her to be spent at her discretion were all small; the larger sums were given for a specific purpose, e.g., carpeting or attorney's fees. There is no other evidence Brady's increased expressions of love and concern for his daughter manifested a desire to effectively eliminate the spendthrift provision in the trust by destroying his will. If anything, these expressions show the continuing vitality of his paternalistic feelings until the time of his death.

We also note Brady was a perfectionist, a man who was constantly tinkering with the disposition of his property through the trust. He was not, in short, the type of man who would likely desire to have his property disposed of through intestacy. Nor did he ever mention such an inclination before his death. In fact, there is no evidence he destroyed his will, except that it cannot be found.

Under these circumstances, we conclude there was substantial evidence in the record to support the trial court's finding that the proponents rebutted the presumption of revocation by clear, satisfactory, and convincing evidence.

AFFIRMED.