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In re: Estate of Scheide, Jr., 136 Nev. Adv. Op. 84 (Dec. 31, 2020)

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WILLS AND ESTATES: PROBATING A LOST WILL

Summary

After a father died, his will went missing. His son believed that his father's estate should go to him, while St. Jude Children's Research Hospital believed that the estate should go to it. The father executed a will in June, leaving his estate to St. Jude. Then in October, the father executed a new will, with the only change from the June will being a change in the executor. After the father died, the October will went missing. However, an accurate copy of the October will existed. St. Jude attempted to probate the missing October will by presenting the copy of the October will and two witnesses who testified to the lost will's contents. However, one of the witnesses only testified to the father's signature on the will and the will's execution but could not recall the contents of the lost will. The son argued that the lost October will was not in existence when the father died, claiming that the father destroyed it before his death. The Court ruled that a lost will needs to be only in legal existence at the time of the testator's death. The Court also ruled that when an accurate copy of the lost will exists, that one of the two witnesses needs to only testify to the will's execution, but not the contents of the will. Therefore, the Court held that the father's will was in legal existence at the time of his death and that the two witnesses adequately testified to the lost will, even though one of them testified only to the will's execution.

Background

Theodore Scheide Jr. (Theodore) had a will in which he disinherited his son, Theodore Scheide III (Chip), and instead left his estate to St. Jude Children's Research Hospital (St. Jude). An attorney (Tyler) and her assistant (DeWalt) drafted and executed the new will in June in which Theodore disinherited Chip. Tyler retained the original June will. In October, Theodore executed a new will. However, the only change between the June will and the October will was that Theodore replaced the executor in the October will. Kristen and Diane drafted and executed the October will.

After Theodore's wife died, Theodore's stepdaughter, Kathy, began helping Theodore with various caretaking tasks. Theodore's care became too burdensome on Kathy, so Theodore was moved into a nursing home. His belongings and documents were moved into a storage unit. While moving Theodore's things into storage, Theodore's guardian (Hoy) found a copy of Theodore's October will and delivered it to him.

Once Theodore passed, Hoy was unable to find Theodore's original October will, but did find a copy of it. Hoy was appointed as the special administrator of Theodore's estate. Hoy stated that she believed that Theodore destroyed the October will because Theodore decided he wanted his estate to pass to Chip instead of St. Jude. Once Tyler learned about Hoy's assumption, she filed the original June will with the court and stated that the June will was essentially the same will as the October will.

¹ By Holly Parr.

Multiple parties testified before the court to argue who should receive Theodore's estate. St. Jude petitioned the court to probate the October will. Chip argued that Theodore attempted to make amends with him before passing, and thus, the estate should go to him. Tyler and DeWalt acknowledged that they witnessed Theodore sign the October will and had no knowledge that Theodore attempted to modify it. Tyler also testified that in both the June and October will, Theodore left his estate to St. Jude. DeWalt admitted that she did not remember the date the will was signed, but did remember executing it. In addition, Kathy stated that while she was taking care of Theodore, Theodore told her that he intended his estate to be left with St. Jude.

The district court denied St. Jude's petition to validate the missing October original will. It ruled that Theodore could have destroyed the October will. The district court also ruled that DeWalt's testimony did not satisfy the two-witness requirement for proving a lost will's details because DeWalt could not remember the specifics of the will. Therefore, because two people could not verify the lost will's provisions, St. Jude could not prove that Theodore did not destroy the October will.

Discussion

NRS 136.240(3) states that a lost will cannot be validated unless the will existed at the time of the testator's death or was "fraudulently destroyed," and two witnesses can "clearly and distinctly" verify the will's details.² The Court must determine if the October will existed at the time Theodore passed and if Tyler and DeWalt "clearly and distinctly" verified the will's provisions.

Standard of review

A court interprets a will according to the testator's intent.³ Determining whether a testator destroyed his or her will before his or her death is a factual inquiry; thus, the reviewing court will defer to the district court's finding and will uphold the district court's finding if it is supported by "substantial evidence."⁴ When the Court determines that a statute could have two or more possible interpretations, the Court may determine that the statute's language is ambiguous and use legislative history and public policy to interpret the statute.⁵

Whether the will was in existence at Theodore's death

There is a presumption that a will was destroyed before the testator's death if it is lost after the testator's death.⁶ In order for a will to be considered in existence at the time of the testator's death, the will is required to be only in legal existence at the time of death, not physical existence.⁷

² NEV. REV. STAT. § 136.240(3) (2009).

³ *Zirovcic v. Kordic*, 101 Nev. 740, 741, 709 P.2d 1022, 1023 (1985).

⁴ *In re Estate of Irvine v. Doyle*, 101 Nev. 698, 703, 710 P.2d 1366, 1369 (1985); *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013).

⁵ *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019).

⁶ *In re Irvine*, 101 Nev. at 703, 710 P.2d at 1369.

⁷ *Id.*

For a will to be in legal existence, it must have been “validly executed” and “unrevoked by the testator.”⁸ A lost will may still be validated if a party can show by a preponderance of the evidence that the testator did not revoke or destroy the will during the testator’s lifetime.⁹ To show that a lost will was in legal existence at the time of the testator’s death, a party may show that testator’s intent regarding the will’s contents did not change after executing the will. The Court determined that this standard ensures that the testator’s true intentions are respected even though the will may be lost. The Court determined that the lost October will was in legal existence at the time of Theodore’s death, which rebuts the initial presumption that the will was destroyed. The Court found that both the June will and the copy of the October will showed Theodore’s estate was to be left with St. Jude, that Theodore made consistent and frequent donations to St. Jude, including donations after the wills were executed, Theodore made many comments to others that he wanted his estate to be left with St. Jude, Theodore kept the October copy of the will with him, and Theodore asserted he wanted to remain separated from Chip. These facts lead the Court to rule that the lost will was in legal existence at the time of Theodore’s death.

Whether the witnesses satisfied NRS 136.240(3)

Two credible witnesses are required to testify to the will’s provisions as is required by NRS 136.240(3).¹⁰ Statements from the testator cannot be used as a substitute as one of the witnesses.¹¹ Both witnesses must use their own “personal knowledge” to testify to “the contents of the will.”¹² However, when a copy of the disputed will is available, the two-witness requirement is more liberal.¹³ The Court reasoned that a more relaxed two-witness requirement was justified when a copy of the lost will was in existence because requiring a more strict standard would impose an unnecessary and incredible hardship on the second witness and party attempting to probate the lost will.¹⁴ In addition, the legislators enacted NRS 136.240 with the intent to make lost wills easier to probate where it is clear that the testator did not intend to revoke it.¹⁵ So, the Court announced that when a copy of the lost will is in existence and at least one credible witness can testify to the details of the lost will, the second witness is only required to testify to the “testator’s signature on the copy” of the missing will to meet the two-witness requirement stated in NRS 136.240(3). Using this new, less strict approach to the two-witness requirement, the Court ruled that Tyler adequately testified to the contents of the October will, which established her as a valid witness according to NRS 136.240(3). The Court then ruled that DeWalt adequately testified to Theodore’s signature on the copy of the October will, which established her as the necessary second witnesses required according to NRS 136.240(3). Hence, two credible witnesses adequately testified to the lost October will’s provisions.

⁸ *Id.*

⁹ *Id.*

¹⁰ NEV. REV. STAT. § 136.240(3) (2019).

¹¹ *Howard Hughes Medical Institute v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490 (1980).

¹² *Id.*

¹³ *In re Moramarco’s Estate*, 194 P.2d 740, 741–42 (Cal. Dist. Ct. App. 1948); *In re Estate of Wilner*, 142 A.3d 796, 803 (2016).

¹⁴ *See State, Private Investigator’s Licensing Bd. v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013).

¹⁵ Hearing on S.B. 277 Before the Senate Judiciary Comm., 75th Leg. (Nev., Mar. 24, 2009) (testimony of Mark Solomon, Chair, Prob. & Trs. Leg. Subcomm.).

Conclusion

To probate a lost will, a party must prove that the will was in legal existence at the time of the testator's death and that two credible witnesses testify to the lost will's provisions, with one witness allowed to testify to only the execution of the will when an accurate copy of the lost will is available. The Court ruled that Theodore's lost October will was in legal existence at the time of his death because Theodore showed no intent to change the provisions on his will before his death. The Court also ruled that Tyler and DeWalt were credible witnesses because Tyler testified to the contents of the lost October will, DeWalt testified the execution of the will, and an accurate copy of the lost October will was available. Therefore, the Court reversed the district court's holding and remanded the case to probate the lost October will in favor of St. Jude.