2017 IL App (3d) 160499-U

Order filed November 16, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

In re ESTATE OF	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
DOROTHY DREHER LeROY,	)	Peoria County, Illinois.
	)	
Deceased	)	Appeal No. 3-16-0499
	)	Circuit No. 15-P-452
(STEPHEN WILLIAM LeROY and	)	
GREGORY MICHAEL LeROY,	)	
	)	
Petitioners-Appellants,	)	
	)	
v.	)	
	)	Honorable
JEFFREY LeROY,	)	James A. Mack and
	)	Katherine Gorman Hubler,
Respondent-Appellee).	)	Judges, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Presiding Justice Holdridge concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) By merely acting as co-executors under a will, petitioners did not acquire a beneficial interest under that will that estopped them from contesting the will's validity. (2) The petitioners, as proponents of a will, failed to meet their burden of proving that will had been properly executed where there was insufficient

evidence that the attesting witnesses believed the testator to be of sound mind and memory at the time she executed the will.

¶ 2 This appeal arises from the administration of the estate of the decedent, Dorothy Dreher LeRoy. In the trial court, Dorothy's sons, the petitioners, Stephen William LeRoy and Gregory Michael LeRoy, petitioned for a will allegedly executed by Dorothy on August 18, 2015, to be admitted to probate. Upon the petition of Dorothy's other son, respondent, Jeffrey Roger LeRoy, the trial court vacated its order admitting the will to probate. Stephen and Gregory were as appointed as co-executors of Dorothy's estate under Dorothy's will of May 12, 2015, after they had petitioned to have that will admitted to probate. Stephen and Gregory subsequently filed a petition to contest the denial of admission to probate in regard to the will of August 18, 2015, and sought partial summary judgment on the issue of whether the denial of probate of that will should be reversed as a matter of law. Jeffrey filed a motion to dismiss Stephen and Gregory's petition, arguing they were estopped from contesting the denial of admission to probate of the will dated August 18, 2015, because they were acting as co-executors over the probated will of May 12, 2015. The trial court denied Stephen and Gregory's motion for partial summary judgment and granted Jeffrey's motion to dismiss their petition.

¶ 3 On appeal, Stephen and Gregory argue: (1) the trial court erred by dismissing their petition contesting the denial of admission to probate in regard to the will of August 18, 2015; and (2) the trial court erred by denying their motion for partial summary judgment. We reverse the trial court's dismissal of Stephen and Gregory's petition contesting the denial of admission to probate of Dorothy's will of August 18, 2015, and affirm the trial court's denial of their motion for partial summary judgment.

¶ 4 FACTS

¶ 5 On September 28, 2015, Stephen filed a verified petition for the admission to probate of Dorothy's will of August 18, 2015. The petition indicated that Dorothy's three sons—Stephen, Gregory, and Jeffrey—were Dorothy's only three heirs. Under Dorothy's purported will, Stephen had been nominated to act as executor of the Dorothy's estate. Based on Stephen's verified petition for admission of the will to probate, the trial court ordered Dorothy's will dated August 18, 2015, be admitted to probate and letters of office be issued to Stephen as the executor of the will.

¶ 6 In the will dated August 18, 2015, Dorothy divided her estate equally between Stephen and Gregory, with Jeffrey to receive no part of the estate. The will was witnessed by Emilee Rotermond and Jared Carrell, who signed the will attesting that: Dorothy willingly executed the instrument; they, as witnesses, each signed the will "in the conscious presence" of Dorothy; and "to the best of their knowledge," Dorothy was at least 18 years old and "of sound mind and memory and under no constraint or undue influence."

¶ 7 On November 6, 2015, Jeffrey filed a petition to require formal proof of Dorothy's will in the manner required by section 6-21 of the Probate Act of 1975 (Probate Act). 755 ILCS 5/6-21 (West 2014) (providing that any person entitled to notice of the will may file a petition to require proof of the will by the proponent, who must establish the will by testimony of the witnesses or other evidence so that the original order admitting the will to probate and the original order appointing the representative shall be confirmed and are effective as to all persons, unless there is proof of fraud, forgery, compulsion or other improper conduct, which in the opinion of the court is sufficient to invalidate or destroy the will). The trial court held a formal prove-up hearing.

¶ 8 A. Prove-Up Hearing of the Will dated August 18, 2015

¶ 9 At the prove-up hearing, Emilee testified that she was a "dining service associate at Lutheran Hillside Village." Emilee testified that her signature was on page nine of the purported will and that she recalled signing the document. In describing the circumstances of her signing the will, Emilee testified that the notary had asked her and the other witness, Jared Carroll, to witness Dorothy execute the will. Emilee further testified, "she [Dorothy] came in with someone else and we sat down and we signed it, and she didn't say anything and that was it." Emilee confirmed that she, Jared, Dorothy, and the notary had all signed the will in each others' presence. Emilee testified that she did not have any conversation with Dorothy on the day of the will signing but Emilee had no reason to believe that Dorothy was not of sound mind and memory. Emilee was asked, "Did she [Dorothy] appear to be okay to you?" Emilee responded, "Yes."

¶ 10 On cross-examination, Jeffrey's attorney asked Emilee, "so you don't have any opinion as to whether or not she understood the will, was being forced to sign a will; you don't have any idea, would that be fair to say?" Emilee responded, "[c]orrect."

¶ 11 Jared testified that he worked at Lutheran Hillside Village as a dining services associate. He confirmed that he signed on pages 9 and 10 of a document purported to be the last will and testament of Dorothy Dreher LeRoy. Jared testified that at the time he signed the document, Emilee, the notary, Dorothy, and the man with Dorothy, were all present. Jared did not know the identity of the man who was with Dorothy. Jared confirmed that on page 10 of the document it said that he believed Dorothy to be of sound mind and memory. Jared testified that he did not have a conversation with Dorothy. He was asked, "[w]as there anything that led you to believe she [Dorothy] was not of sound mind and memory?" Jared replied, "There was not."

¶ 12 On cross-examination, Jeffrey's attorney asked Jared, "was there anything that led you to believe she was sound of mind?" Jared replied, "I didn't have much conversation with her, so there's no way for me—as far as I could tell, that she was of sound mind." Jared confirmed that Dorothy had not asked him to be a witness to her will. Jared testified that he had never seen Dorothy or the man that was with Dorothy before the day Jared signed as a witness to Dorothy's will.

¶ 13 On December 17, 2015, the trial court entered a written order indicating that, for the reasons stated on the record, the order admitting the will to probate was vacated. On the record, the trial court had indicated that in order to prove the validity of a will the proponent was required to show that the witnesses to the will believed the testatrix was of sound mind and memory at the time of the signing. The trial court stated that the negative statement of Emilee that she did not form a belief that Dorothy lacked sound mind and memory at the time of the signing was not sufficient to show that Emilee formed a belief that Dorothy was, in fact, of sound mind and memory. The trial court further found that Jared was more direct in his testimony that there was no way for him to tell if Dorothy was of sound mind. The trial court found proof of the will to be "deficient" and vacated the order that had admitted the will to probate.

¶ 14 B. Will of April 15, 2013, and Will of May 12, 2015

¶ 15 A week later, on December 21, 2015, pursuant to Jeffrey's petition, the trial court admitted a will dated April 15, 2013, to probate. In the will dated April 15, 2013, Dorothy named Jeffrey as the executor of her estate and divided her estate equally among her three sons. Eight days after that will had been admitted to probate, pursuant to the petition of Stephen and Gregory, a will dated May 12, 2015, was admitted to probate. Under the will of May 12, 2015,

Dorothy designated Stephen and Gregory as co-executors of her estate and divided her estate equally between her three sons. The trial court ordered that the will of May 12, 2015, be admitted to probate, letters of office be issued to Stephen and Gregory as co-executors, and the letters of office previously issued to Jeffrey be revoked.

¶ 16 C. Petition to Contest the Denial of Admission to Probate of the Will of August 18, 2015

¶ 17 On June 1, 2016, Stephen and Gregory filed a petition to contest the denial of admission to probate of the will dated August 18, 2015. In the petition, Stephen and Gregory requested that the will from August 18, 2015, be admitted to probate and that the trial court vacate its order from December 17, 2015, which vacated the admission of the will of August 18, 2015 to probate.

¶ 18 In response, Jeffrey filed a motion to dismiss Stephen and Gregory's petition. In the motion to dismiss, Jeffrey argued the trial court did not err in denying the admission of the will dated August 18, 2015, to probate because the attesting witnesses had not formed a belief that Dorothy was of sound mind and memory at the time of Dorothy signing the will. Jeffrey also argued that Stephen and Gregory were estopped from attempting to probate the will dated August 18, 2015, because they were proponents of the currently probated will of May 12, 2015.

¶ 19 On July 5, 2016, Stephen and Gregory filed a motion for partial summary judgment in regard to their petition contesting the denial of admission to probate of the will of August 18, 2015. They also filed a response to respondent's motion to dismiss, reiterating their request for partial summary judgment.

¶ 20 On August 5, 2016, the trial court denied Stephen and Gregory's request for partial summary judgment, finding the trial court's order admitting the will from August 2015, to probate had been properly vacated based upon the attesting witnesses' inability to testify that Dorothy was of sound mind and memory when she signed the will. The trial court also

dismissed the Stephen and Gregory's petition contesting the denial of the will into probate with prejudice, finding the petitioners were estopped from challenging the validity of the currently probated will because "[t]he petitioners clearly accepted a benefit from the probated will [dated May 12, 2015]."

¶ 21 Stephen and Gregory appealed.

¶ 22 ANALYSIS

¶ 23 I. Jurisdiction

¶ 24 Prior to briefing on appeal, Jeffrey filed a motion to dismiss this appeal. Jeffrey's motion to dismiss was denied and the parties were ordered to include arguments in their respective appellate briefs, with citation to legal authority, regarding the issue of this court's jurisdiction. In their appellate briefs, both parties concede that this court does, in fact, have jurisdiction over this matter. We agree. See Ill. Sup. Ct. Rule 304(b)(1)(eff. Feb. 26, 2010) (providing that a judgment or order entered by a trial court in the administration of an estate that finally determines a right or status of a party is appealable without a finding that there is no just reason for delaying enforcement or appeal even though the order may not dispose of the entire proceeding).

¶ 25 II. Dismissal of the Petition to Contest the Denial of the Will to Probate

¶ 26 On appeal, Stephen and Gregory argue that the trial court erred by dismissing their petition to contest the denial of admission of Dorothy's will dated August 18, 2015, to probate. Stephen and Gregory argue that trial court's decision to vacate its earlier decision to admit the will of August 18, 2015, to probate was based on the trial court's incorrect finding that they were estopped from pursuing the validity of that will because they were the proponents of, and were serving as co-executors under, the probated will dated May 12, 2015.

¶ 27 In this case, the trial court dismissed Stephen and Gregory's petition contesting the denial of the subject will into probate pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). A section 2-619 motion to dismiss admits the truth of the facts alleged in support of the claim and the legal sufficiency of the claim, but raises affirmative matters that arguably defeat the claim. *Id*. On appeal, a *de novo* standard of review will be applied to a dismissal pursuant to section 2-619 of the Code. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 18.

¶ 28 As a general principle of equity, once one accepts some benefit, one cannot then challenge the validity of the thing by which the benefit was conferred. *In re Estate of Boyar*, 2013 IL 113655, ¶ 40. The rule is based upon principles of logic, fairness, and consistency in that: "Unless you acknowledge that a decree, statute, contract, etc., is valid, then by what right can you claim the benefit you accepted under its terms?" *Id*. In the context of wills, it is well-settled that if any person takes any beneficial interest under a will, he is held to have ratified and confirmed the will which conferred the interest. *In re Estate of Johnson*, 39 Ill. App. 3d 246, 251 (1976). In other words, a beneficiary may not accept a bequest of the testator and, at the same time, pursue a right or claim to defeat or prevent the full operation of the will. *Kyker v. Kyker*, 117 Ill. App. 3d 547, 551 (1983). The rule rests upon the equitable ground that one who elects to take under a will must recognize the equitable rights of all parties under the same will, thereby ratifying all the terms of the will. *Johnson*, 39 Ill. App. 3d at 251. Once a beneficiary accepts a benefit under a will he will be estopped from asserting any claim inconsistent with the validity of that will. *Id*. Generally, the mere performance of the duties of an executor does not prove an election or definite choice to take what is given by the will and the executor of a will is not estopped from denying the validity of the will. *Id.* at 253. There is a distinction between

benefits by inheritance and benefits earned, with the acceptance of the former resulting in an estoppel to renounce a will and the acceptance of the latter constituting mere payment for services rendered. *Id*.

¶ 29 In *Johnson*, the question presented on appeal was whether the plaintiffs' acceptance of the office of executor was, by itself, a sufficient interest or benefit to estop the plaintiffs from contesting the validity of the decedent's will. *Johnson*, 39 Ill. App. 3d 46. The appellate court in *Johnson* found that the plaintiff had not accepted any benefits by inheritance under the will and any fees earned by the plaintiffs were the result of services rendered to the estate that were distinguishable from an interest gained as a devisee or legatee. *Id*. at 253. The *Johnson* court indicated that the fact that the plaintiffs were named in the will in two capacities—as legatees and as executors—did not require both capacities to be treated in the same manner, so that the plaintiffs were free to accept their role as executors and also reject their other role as legatees. *Id*. The *Johnson* court concluded that by merely acting as executors the plaintiffs did not acquire a beneficial interest sufficient to estop them from contesting the validity of the decedent's will. *Id*.

¶ 30 In *In re Donovan's Estate*, Donovan was appointed executor of his deceased wife's will and continued to act as executor after renouncing the will. *In re Donovan's Estate*, 409 Ill. 195 (1951). Donovan did not claim, take, or accept any "devise or legacy" under the will, but he did earn a fee for services rendered in his capacity as executor incident to the administration of the estate. *Id*. at 207. The Illinois Supreme Court found that Donovan's claims for fees was a not a claim as a legatee/devisee and his fees earned for performing executor services did not estop him from renouncing the will under which he was acting as executor. *Id*. at 207-08.

¶ 31 In the present case, there is no indication that the petitioners, who were co-executors, accepted benefits of inheritance under the will of May 12, 2015. By merely acting as executors under that will, petitioners did not acquire a beneficial interest that estopped them from contesting the validity of the will of May 12, 2015, or from arguing the validity of the will of August 18, 2015. See *Johnson*, 39 Ill. App. 3d at 253. In their capacity as co-executors, Stephen and Gregory admitted the will of May 12, 2015, to probate only after the will of August 18, 2015, was rejected by the trial court. Despite acting as executors under the will of May 12, 2015, in their role as legatees Stephen and Gregory maintained their initial position that the will of August 18, 2015, was valid, and they challenged the trial court's rejection of that will, accordingly.

¶ 32 Jeffrey argues that the dismissal of the petition contesting the denial of the subject will to probate should be affirmed because Stephen and Gregory were estopped from challenging the validity of the will of May 12, 2015, due to the fact that, in petitioning for the admission of that will to probate, they were required to state, *inter alia*, that they "believe[d] the will to be the valid will of the testator" in accordance with section 6-2 of the Probate Act. 755 ILCS 5/6-2 (West 2014). However, Stephen and Gregory had originally sought to have Dorothy's most recent will—the will of August 18, 2015—admitted to probate, but the trial court denied the admission of that will. Only after the denial to probate of the will of August 18, 2015, did Stephen and Gregory petition to admit the will of May 12, 2015, to probate. In pursuing their petition to contest the denial of admission to probate of the will dated August 18, 2015, Stephen and Gregory were pursuing their position that the will of August 18, 2015, was valid and should be admitted to probate as Dorothy's last will. See *Coussee v. Efston*, 262 Ill. App. 3d 419, 426 (1994) (generally, an allegation that a will has been revoked is considered a will contest, but

where the revocation is based upon the existence of a subsequent will that has not been lost or destroyed, the proper action is to seek admission of the subsequent will to probate as the last will of the decedent; the admission of a subsequent will to a will already admitted to probate is not a collateral attack on the order admitting the original will to probate).

¶ 33 Under the circumstances of this case, despite having sought to admit the will of May 12, 2015, to probate, Stephen and Gregory were not estopped from continuing to pursue admission to probate of Dorothy's latter will—the will of August 18, 2015—as being the valid last will of Dorothy. Consequently, the trial court erred in dismissing Stephen and Gregory's petition to contest that denial, even though they subsequently petitioned to probate an earlier will.

¶ 34 III. Prove-Up of the Will of August 18, 2015

¶ 35 Stephen and Gregory also argue that the trial court erred by failing to grant their motion for partial summary judgment because, they claim, the testimony of the attesting witnesses at the formal prove-up hearing was sufficient to admit the will into probate as a matter of law. In response, Jeffrey argues that the trial court properly denied the admission of the subject will to probate and properly denied Stephen and Gregory's motion for partial summary judgment.

¶ 36 The admission of a will to probate is governed by statute. *In re Estate of Smith*, 282 Ill. App. 3d 389, 393 (1996). Section 6-4(a) of the Probate Act provides that a will is sufficiently proven for admission to probate when two attesting witnesses state: (1) they were present when the testator signed the will or acknowledged his signature upon the will; (2) they signed as witnesses in the presence of the testator; and (3) they believed the testator to be of sound mind and memory at the time of the execution of the will. 755 ILCS 5/6-4(a) (West 2014). The statements of a witness to prove the will pursuant to section 6-4(a) of the Probate Act may be made by testimony before the court, the attestation clause signed by the witness as part of or

attached to the will, or an affidavit signed by the witness at or after the time of attestation that is part of the will or is attached to the will. 755 ILCS 5/6-4(b) (West 2014). When presented with multiple wills, it is the duty of the court to determine which will was the last will that had been executed according to statute. *In re Estate of Nicola*, 275 Ill. App. 3d 497, 499 (1995). If the instrument shows all of the formalities required by law have been met, and the signatures on the instrument are admittedly genuine, a *prima facie* case has been made in favor of the due execution of the will. *In re Koziol*, 236 Ill. App. 3d 478, 484 (1992).

¶ 37 The admission of a will to probate does not preclude further proceedings regarding the validity of the will. *Nicola*, 275 Ill. App. 3d at 499. If an heir demands formal proof of a will, then the will must be established by testimony of the witnesses or by deposition. *Smith*, 282 Ill. App. 3d at 393-94. If a will is denied admission to probate, an interested person may file a petition to contest the denial and may present proof to establish the will's validity. See 755 ILCS 5/8-2 (West 2014).

¶ 38 Section 8-2 of the Probate Act governs the contests of denied admissions of wills to probate, providing as follows:

> "(a) Within 6 months after the entry of an order denying admission to probate of a domestic will in accordance with the provisions of Section 6-4 *** any interested person desiring to contest the denial of admission may file a petition to admit the will to probate in the proceeding for the administration of the decedent's estate or, if no proceeding is pending, in the court which denied admission of the will to probate. ***
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> * * *

> (c) Any proponent or contestant may demand a trial by jury. An issue shall be made whether or not the instrument produced is the will of the testator. The proponent shall in the first instance proceed with proof to establish the validity of the will and may introduce any evidence competent to establish a will. Any interested person may oppose the petition and may introduce any evidence admissible in a will contest under Section 8-1. At the close of the contestant's case, the proponent may present further evidence to sustain the will." 755 ILCS 5/8-2 (West 2014).

¶ 39 The party seeking to have a will admitted to probate has the burden to prove that the will was properly executed. *Smith*, 282 Ill. App. 3d at 393. A reviewing court will not reverse the trial court's decision to admit a will to probate unless it is against the manifest weight of the evidence. *Id.*

¶ 40 Here, the attestation clause signed by the attesting witnesses indicated that "to the best of their knowledge" Dorothy was "of sound mind and memory and under no constraint or undue influence." The trial court found that the attestation clause was insufficient to meet the statutory requirement of section 6-4(a) of the Probate Act to prove the will for admission to probate. Section 6-4(a) of the Probate Act mandates that two attesting witnesses indicate that, *inter alia*, they "*believed*" the testator to be of sound mind and memory at the time of the execution of the will. (Emphasis added.) See 755 ILCS 5/6-4(a) (West 2014). The attestation statement of the two attesting witnesses in this case, which indicated that Dorothy was of sound mind and memory "to the best of their knowledge," was insufficient to prove they formed a belief that Dorothy was, in fact, of sound mind and memory.

¶ 41 Additionally, at the prove-up hearing, the attesting witnesses did not testify that they had formed a belief that Dorothy was of sound mind when she signed the will dated August 18, 2015. Their testimony indicated that neither attesting witness formed a belief, either way, as to whether Dorothy was of sound mind and memory.

¶ 42 Thus, the trial court's finding that the petitioners failed to sufficiently prove that Dorothy was of sound mind and memory on the day she signed the will of August 18, 2015, was not against the manifest weight of the evidence. Accordingly, we affirm the trial court's denial of Stephen and Gregory's motion for partial summary judgment.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Peoria County is affirmed in part in relation to the denial of the petitioners' motion for partial summary judgment and reversed in part in relation to the dismissal of the petitioners' petition contesting the trial court's denial of the will of August 18, 2015, to probate.

¶ 45 Affirmed in part and reversed in part.

¶ 46 PRESIDING JUSTICE HOLDRIDGE, concurring in part and dissenting in part.

¶ 47 I agree that the trial court's finding that the petitioners failed to prove that Dorothy was of sound mind and memory on the day she executed the August 2015 will was not against the manifest weight of the evidence. I therefore join the majority in affirming the trial court's denial of the petitioners' motion for summary judgment.

¶ 48 However, I would also affirm the trial court's dismissal of the petitioners' petition contesting the denial of admission of the August 2015 will to probate. Although I agree that a party is not estopped from challenging a will merely because he acted as an executor under the will or received a fee for such services (*In re Donovan's Estate*, 409 Ill. 195, 207-08 (1951); *In*

re Estate of Johnson, 39 Ill. App. 246, 253 (1976)), the petitioners in this case did more than that. Here, the petitioners moved to admit the May 2015 will to probate. In doing so, they attested that they believed the May 2015 will to be "the valid last will of the testator." See 755 ILCS 5/6-2 (2014). Moreover, the petitioners knew of the existence of the August 2015 will when they moved to admit the May 2015 will to probate. Accordingly, the petitioners were estopped from subsequently contesting the validity of the May 2015 will by probating the August 2015 will. *Conzet v. Hibben*, 272 Ill. 508, 514 (holding that heirs who consented to the probate of a will despite knowing of the existence of a another, subsequently executed will were estopped from admitting the later will to probate). In my view, it does not matter that the petitioners initially moved to admit the August 2015 will to probate or that the trial court denied that motion. The fact that they subsequently moved to admit the May 2015 will with full knowledge of the August 2015 will estopped them from challenging the May 2015 will thereafter.[1]

[1] In *Johnson*, our appellate court found no estoppel despite the fact that the executor challenging the will had moved to admit the will to probate. *Johnson*, 39 Ill. App. 3d at 248, 252-53. However, *Johnson* did not address the effect of the executor's having moved to admit the will to probate. Rather, the *Johnson* court addressed only the "narrow question" of "whether plaintiffs' acceptance of the office of executor is, by itself, a sufficient interest or benefit to estop plaintiffs from contesting the validity of decedent's will." *Id.* at 251. In addition, *Johnson* was decided before section 6-2 of the Probate Act was enacted. As noted above, that section requires anyone petitioning to have a will admitted to probate to state that he or she "believes the will to be the valid last will of the testator." 755 ILCS 5/6-2 (West 2014).