IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE ESTATE OF LILLIE G. WITT, deceased.	:	APPEAL NO. C-100551 TRIAL NO. 2010002083
	:	
	:	*D E C I S I O N.*

Civil Appeal From: Hamilton County Court of Common Pleas, Probate Division

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: March 11, 2011

Stephen L. Black and *Graydon Head & Ritchey LLP,* for Appellant Jane Kuykendall,

Keith E. Golden, Adam H. Karl, and *Golden & Meizlish Co., LPA*, for Appellee Harold Casey.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Presiding Judge.

{¶1} Appellant, Jane Kuykendall, appeals the judgment of the Hamilton County probate court denying her application to admit a will to probate. The appellee, Harold Casey, has filed a brief defending the probate court's judgment.

The Allegedly Lost Will

{¶2} In 1992, the decedent, Lillie G. Witt, executed a will that had been drafted by her attorney, George Patterson. Patterson and one of his employees, Jami McAdams, witnessed the execution of the will.

{¶3} Witt died in 2009. Kuykendall filed an application to admit a photocopy of the 1992 will to probate, alleging that the original will had been lost. The photocopy of the will was stamped "CLIENT'S COPY."

{¶4} At a hearing conducted in 2010, McAdams testified that she and Patterson had been in Witt's presence when Witt had executed the will. She further testified that Patterson had died before the application to admit the will to probate.

{¶5} At the conclusion of the hearing, the probate court stated, "I don't think I can admit this will because we are--don't have the original and we're short a witness." In its entry denying the application, the court indicated that the sole basis of the denial was that R.C. 2107.27(B) required the testimony of both witnesses to the will.

The Requirements of R.C. 2107.26 and 2107.27

{¶6} In a single assignment of error, Kuykendall now argues that the probate court erred in holding that the testimony of both witnesses was required to admit the photocopied will to probate.

{¶7} R.C. 2107.26, governing the substantive requirements for admitting a lost will to probate, provides that the probate court "shall admit" the will to probate if both of the following apply: (1) the proponent of the will establishes by clear and convincing evidence that the will was executed with the required formalities and proves the contents of the will by the same quantum of evidence; and (2) no person opposing the admission of the will to probate establishes by a preponderance of the evidence that the testator had revoked the will. R.C. 2107.27(B) establishes the procedure for determining whether a lost will is admitted to probate and provides that "the proponents and opponents of the will shall cause the witnesses to the will, and any other witnesses that have relevant and material knowledge about the will, to appear before the court to testify."

{¶8} When reviewing an order denying an application to admit a will to probate, an appellate court has the same function as that of the probate court: to determine whether the applicant has demonstrated the validity of the execution of the will.[1] Thus, we review the probate court's judgment de novo.[2]

{¶9} The probate court apparently relied on the use of the plural term "witnesses" in R.C. 2107.27(B) to hold that the evidence in this case was deficient. We find such a construction to be overly narrow. Although stated in terms of the plural, it seems evident that the statute simply provides for the testimony of both witnesses if they are available. Nowhere in R.C. 2107.26 or 2107.27 does it state that the unavailability of one of the witnesses is fatal to the admission of the will. Rather, the substantive requirements of R.C. 2107.26 are stated in terms of a quantum of proof, and not in terms of a specific number of witnesses. This is in keeping with the

[1] See *Jackson v. Estate of Henderson,* 8th Dist. No. 93231, 2010-Ohio-3084, ¶27.
[2] Id.

axiom that the weight to be given evidence is not a matter of mathematics, but rather the effect of the evidence in inducing belief.[3]

Case Law Under Prior Statutes

{¶10} Although there is apparently no case law addressing this issue under the current statutes, cases decided under analogous provisions of prior statutes are instructive. In *In Re Estate of Lasance*,[4] the putative beneficiaries of an allegedly lost will filed an application with the Hamilton County probate court to have the will admitted to probate. Both of the witnesses to the will were deceased, but the applicants were able to produce the testimony of a person who had seen the will after the death of the testator.[5] The applicants also submitted to the court a contract that embodied the contents of the will.[6]

{¶11} At the time of the *Lasance* decision, R.S. 5946 provided that, in cases of an allegedly lost will, "the said court shall cause the witnesses to such will so executed and lost, spoliated or destroyed, and not revoked, and such other witnesses as any person interested in having such will admitted to probate may desire to come before such court, and said witnesses shall be examined by said probate judge * * *."

{¶12} In holding that the evidence presented by the applicants was sufficient to have the will admitted to probate, the court emphasized that there was no requirement that multiple witnesses testify. As the court stated, "the contents of a lost will, like those of any other instrument, may be proved by secondary evidence; * * * they may be proved by the evidence of a single witness though interested, whose veracity and competency are unimpeached."[7]

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[3] See, e.g., *In re C.M.,* 2nd Dist. No. 21363, 2006-Ohio-3741, ¶42.
[4] (1897), 5 Ohio N.P.(N.S.) 20, 7 Ohio Dec. 246.
[5] Id., 7 Ohio Dec. at 246-247.
[6] Id., 7 Ohio Dec. at 246.
[7] Id., 7 Ohio Dec. at 249 (citation omitted).

{¶13} A similar result was reached in *Egbert v. Egbert*.[8] In *Egbert,* the applicants offered the testimony of the attorney who had drafted and witnessed the allegedly lost will.[9] The attorney testified that he had seen the testator sign the will in the presence of the other witness, and that the testator had acknowledged the document as his will in the presence of both witnesses.[10] The other purported witness to the will, though, testified that he had no recollection of its execution.[11]

{¶14} The statute in effect at the time was G.C. 10545, which provided for the testimony of "witnesses" to the will. Despite the plural noun in the statute, the *Egbert* court stated that "the contents of a lost or spoliated will may be proved by the testimony of a single witness."[12] The court accordingly held that the will was properly admitted to probate.[13]

{¶15} Applying these principles to the case at bar, we hold that the probate court erred in rejecting the photocopy of Witt's will. McAdams demonstrated through her testimony that the will had been executed with the required formalities, and the photocopy of the will established the contents of the original. The probate court found no deficiency in the testimony of McAdams, and no other persons presented evidence.

{¶16} Nonetheless, Casey argues that Kuykendall failed to meet her burden of establishing that Witt had not revoked the will by destroying it. We find no merit in this argument. First, as we have already noted, Kuykendall came forward with ample evidence to satisfy the requirements of R.C. 2107.27. Second, if Witt had intended to revoke the will, it stands to reason that she would have destroyed the

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[8] (1918), 10 Ohio App. 432.
[9] Id. at 434.
[10] Id.
[11] Id.
[12] Id. at 435.
[13] Id. at 438.

document stamped "CLIENT'S COPY" along with the original will. Her failure to do so lent credence to Kuykendall's contention that the original will was simply lost. Therefore, we sustain the assignment of error.

Conclusion

{¶17} We reverse the judgment of the probate court and remand the case for further proceedings consistent with this decision.

SUNDERMANN and **CUNNINGHAM, JJ.,** concur.

Please Note:

The court has recorded its own entry this date.