STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ELEANOR SHEHIN.

STATE PUBLIC ADMINISTRATOR,

Appellant,

v

CHRIS E. KELEL,

Appellee.

UNPUBLISHED
June 18, 2013

No. 308881
Oakland Probate Court
LC No. 2011-335518-DE

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In this dispute over the proper distribution of estate property, the State Public Administrator with the Attorney General's office appeals by right the probate court's opinion and order admitting Eleanor Shehin's missing will to probate. On appeal, the Administrator argues that the probate court erred when it found that Shehin had a valid will that could be admitted to probate. The Administrator maintains that, because Shehin died without a valid will and with no heirs, the probate court should have determined that Shehin's estate escheated to the state. We conclude that the probate court could properly find that Shehin executed a valid will and determine the terms of that will on the basis of oral testimony alone. Because the trial court's findings were not clearly erroneous and there were otherwise no errors warranting relief, we affirm.

I. BASIC FACTS

Shehin died in March 2011. She was 83 years of age and widowed; her husband, Joe Shehin, died in 1995. They did not have any children.

In that same month, appellee Chris Kelel petitioned the probate court for intestate administration of Shehin's estate. Kelel was Shehin's sister-in-law. In her petition, Kelel stated that Shehin had no known heirs. She also nominated Stephen C. Albery to be the estate's

personal representative. The probate court approved Kelel's petition and appointed Albery to serve as the estate personal representative in May 2011.[1]

In December 2011, Albery petitioned the probate court for instructions on how to proceed with the estate. Albery informed the probate court that he had been presented with an affidavit by Nancy Gardella. In the affidavit, Gardella averred that she was Shehin's deceased husband's niece and that she was present when Shehin prepared and executed a will in 2002. She further averred that she, her father, and Shehin discussed the will's terms and it provided that her property should be divided equally between Kelel, Shirley Kojaian, and Patricia Kunkle. Gardella also stated that Shehin gave her the original will for safekeeping in 2010, but that she has since been unable to find it. Albery concluded by stating that he wished to bring this matter to the probate court's attention so that he would "know how to proceed to distribution."

The probate court held a hearing on the petition for instructions in January 2012. At the hearing, Albery told the court that he had received a letter from the Administrator in which he objected to the "allowance of the lost will on behalf of the state" because the state would be entitled to Shehin's entire estate if she died intestate. Albery indicated that he had given the Administrator notice of the hearing, but the Administrator had not appeared. The trial court determined that it would not be appropriate to proceed to take evidence at that time. The probate court explained that it wanted to give the Administrator an opportunity to participate in a contested hearing to determine whether Shehin had a valid will that could be admitted to probate.

The probate court held the contested hearing in February 2012.

Gardella testified that her mother was Shehin's husband's sister. She stated that, in June 2002, she and her father visited with Shehin. After dinner, Shehin and Gardella's father began to speak in Polish. Shehin then wrote out a document by hand, dated it, and signed it. Gardella said her father asked her to witness the document and she read it. The document was in English and was titled, "Eleanor Shehin's Will." Gardella stated that the will provided that, "upon my passing, my home and belongings are to go to Christine [Kelel], Shirley Kojaian, and Patricia Kunkle." Gardella explained that Kelel and Kojaian were her mother's sisters (Shehin's sisters-in-law) and that Kunkle was her own (Gardella's) sister. She and her father then signed the will as witnesses.

Gardella said she did not see the will again until 2010. Kunkle was visiting from Oklahoma and wanted to visit with Shehin and Gardella. Gardella arrived at Shehin's home before her sister and she and Shehin began to chat. She said that Shehin got out a jewelry case and gave it to her along with a necklace that Gardella's uncle had purchased for Shehin. Shehin told Gardella that her will was in the box and showed it to her. Gardella testified that it appeared to be unchanged. After Shehin died, Gardella checked the box, but could not find the will. She speculated that it might have gotten lost when she moved.

[1] Although Albery accepted appointment as the estate's personal representative, he is also a Public Administrator in Oakland County.

The probate court issued its opinion and order concerning the contested hearing on February 9, 2012. The probate court found Gardella's testimony to be credible and, on the basis of her testimony, found that Shehin had executed a valid holographic will. It also found that Shehin gave the will to Gardella for safekeeping and, therefore, there was no presumption that Shehin had revoked her will. Given these findings, the probate court determined that Shehin had a valid and unrevoked will with the terms stated by Gardella and ordered the admission of the will to probate.

The Administrator then appealed to this Court.

II. PROBATING A LOST WILL

A. STANDARDS OF REVIEW

The Administrator argues that the probate court improperly permitted Gardella to establish the existence of a will without any corroborating written evidence and improperly applied the presumption of revocation. This Court reviews de novo whether the probate court properly interpreted and applied the common law. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). Likewise, this Court reviews de novo whether the trial court correctly selected, interpreted, and applied the relevant statutes, such as the estates and protected individuals code (commonly referred to as EPIC), see MCL 700.1101 *et seq*. *Gay v Select Specialty Hosp*, 295 Mich App 284, 291-292; 813 NW2d 354 (2012). This Court, however, reviews the factual findings underlying the probate court's application of the law for clear error. *In re Miller Osborne Perry Trust*, 299 Mich App 525, 529; ___ NW2d ___ (2013); MCR 2.613(C).

B. PROVING LOST WILLS

The Administrator first argues that the probate court erred as a matter of law when it found that Shehin executed a valid holographic will on the basis of oral testimony alone. The Administrator contends that a lost will can only be proved with corroborating written evidence because to hold otherwise would eviscerate the statutory criteria for establishing the existence of a valid will. The Administrator relies heavily on MCL 700.2502 and MCL 700.2503 for this proposition. As such, we will first address whether those statutes limit the proofs that may be used to establish the existence of a valid will. In doing so, we are mindful of the Legislature's admonishment that this Court liberally construe EPIC to, in relevant part, "discover and make effective a decedent's intent in distribution of the decedent's property." MCL 700.1201(b). We shall also keep in mind that the general principles of law and equity—that is, this state's common law practice—will continue to apply unless "displaced by the particular provisions" of EPIC. MCL 700.1203(1).

The Legislature provided a series of criteria that must generally be established in order for there to be a valid will: the will must be in writing, signed by the testator, and witnessed by two witnesses. MCL 700.2502(1). If a will does not comply with these criteria, it may nevertheless still be valid as a holographic will if it is dated and the material portions and signature are in the testator's handwriting. MCL 700.2502(2). As these provisions amply demonstrate, MCL 700.2502 addresses the elements that *must be proved* in order to establish that

a will is valid; the provisions, however, do not address—let alone limit—the *proofs* that can be used to establish those elements. That is, although MCL 700.2502 requires that a will be *in writing*, the Legislature did not require that the writing be proved *by a writing*.

The Administrator's reliance on MCL 700.2503 is similarly misplaced. That statute provides that a document that does not comply with the requirements stated under MCL 700.2502 may nevertheless be treated as a valid will if the proponent establishes by clear and convincing evidence that the decedent intended it to be his or her will. Like MCL 700.2502, this statute provides criteria to establish that a particular writing was intended to be treated as a valid will and does not address or limit the nature of the proofs that may be used to establish the criteria.

We also cannot agree with the Administrator's conclusion that the Legislature foreclosed the use of oral testimony to establish the existence of a will under MCL 700.2514. That statute does on its surface appear to limit the nature of the proofs that may be used to prove a particular type of writing,[2] but the type of writing that the Legislature addressed in that statute was not a will; by its plain terms the statute applies only to *contracts* to make a will or devise, to revoke a will or devise, or to die intestate. MCL 700.2514. And we will not rewrite that statute to apply it to writings to which the Legislature did not intend it to apply. Therefore, we must conclude that MCL 700.2514 too does not limit the proofs that may be used to establish the existence of a will.

The Administrator also argues that a will cannot be proved through oral testimony because there are "no statutory provisions that permit a valid will to be established" solely through oral testimony. That is, the Administrator seems to believe that, because the Legislature did not explicitly permit a party to prove through oral testimony that the decedent executed a valid will that remains in force, the existence of a valid will can only be proved with the original will or a copy of the will. We must reject this contention because it is contradicted by the provisions of EPIC and by more than a century of probate practice in this state.

The Legislature provided for the formal probate of wills under MCL 700.3402. That statute provides that a petition for formal probate must include various items depending on the issues to be probated. One requirement for the petition is that the petitioner include a statement as to whether the decedent's original will is in the probate court's possession or accompanies the petition. MCL 700.3402(1)(c). If the original will is not in the probate court's possession or accompanies the petition, the petitioner must "state the will's contents" and must "indicate that the will is lost, destroyed, or otherwise unavailable." MCL 700.3402(1)(c). Thus, the Legislature explicitly contemplated that a lost, destroyed, or otherwise unavailable will is admissible for formal probate, notwithstanding the fact that the will has been lost, destroyed, or is otherwise unavailable. Moreover, despite permitting the formal probate of such a will, the Legislature refrained from imposing any limitations on the proofs that might be used to establish the terms of the lost, destroyed, or otherwise unavailable will—this despite the fact that the

[2] Because the issue is not now before us, we decline to address whether MCL 700.2514 actually limits the proofs that can be used to establish such contracts.

Legislature has provided such limitations in prior versions of the statutes governing formal probate.

Michigan courts have long permitted the formal probate of lost or destroyed wills. See *Rickabus v Gott*, 51 Mich 227; 16 NW 384 (1883). But, beginning in the early twentieth century, the Legislature limited the proofs that may be used to establish such wills:

> Whenever it is proposed to establish an alleged lost, destroyed or suppressed last will and testament, the petition filed in the probate court praying for the probate of such alleged will, shall contain a full and complete statement of the contents of such alleged will, so far as the same can be ascertained, which shall disclose the names of the subscribing witnesses, if known, and if living, their place of residence, together with the names and residences of all known persons who have personal knowledge of the execution of said alleged will and the contents thereof. *No such alleged will shall be admitted to probate unless and until its due execution and the contents thereof shall be established by at least two reputable witnesses*. [1915 CL 13788 (emphasis added).]

By requiring that the "due execution" and "contents" of the lost will be proved by at least two reputable witnesses, the Legislature recognized that a lost will could be established on the basis of oral testimony alone. And, indeed, this is consistent with long-established practice in Michigan's probate courts. See, e.g., *City of Flint v Stockdale's Estate*, 157 Mich 593, 607-608; 122 NW 279 (1909) (stating that the trial court erred when it instructed the jury in a way that suggested that oral testimony concerning a lost second will must be held to higher scrutiny before the jury would be justified in disregarding a prior written will); *Ewing v McIntyre*, 133 Mich 459; 95 NW 540 (1903) (involving an allegedly wrongfully suppressed will and stating that the statute providing probate courts with jurisdiction to probate wills includes the jurisdiction to probate lost or destroyed wills); *In re Lambie's Estate*, 97 Mich 49; 56 NW 223 (1893) (involving oral proofs that the decedent made a second will, which was missing and purportedly revoked the will that was submitted for probate); *Hope's Appeal*, 48 Mich 518; 12 NW 682 (1882) (stating that it was for the jury to determine whether it believed the witness who claimed that he prepared a second will for the decedent that revoked a previous will); *In re Flury Estate*, 218 Mich App 211, 214-216; 554 NW2d 39 (1996) (recognizing that a lost holographic will may be proved by oral testimony, but holding that there was insufficient evidence to establish the elements of a valid holographic will). Moreover, the Legislature continued to recognize that proof of a lost will could be established through oral testimony alone through to the enactment of the revised probate code. See 1929 CL 15547; MCL 700.149.

Although the Legislature eliminated the two-witness requirement with the adoption of EPIC, it did not make any provision for the nature of the proofs that must be used to establish that a lost, destroyed or otherwise unavailable will is valid. Given that the Legislature required this Court to liberally construe EPIC in order to facilitate the discovery of a decedent's intent and make that intent effective, MCL 700.1201(b), we cannot construe the Legislature's decision to drop the limitations on oral proofs as indicative of an intent to impose a greater limitation on the proofs than existed under the prior scheme—that is, we cannot construe this change in the statute to preclude a finder of fact from relying on oral testimony to establish the validity of a missing will. Rather, because Michigan courts historically permitted parties to prove the validity of a

missing will through oral testimony and that practice has not been "displaced by the particular provisions" of EPIC, see MCL 700.1203(1), we conclude that the proponent of a lost or destroyed will may continue to establish the existence of a valid will through any competent evidence, including oral testimony alone. Consequently, the trial court did not err when it relied on Gardella's testimony to establish the elements of a valid holographic will.

C. CLEAR ERROR

The Administrator also argues that, even if the probate court could properly rely on oral testimony alone to establish the existence of a valid will, it clearly erred when it found Gardella credible. Specifically, the Administrator contends that the probate court should have found her testimony incredible in light of her interest in the outcome and the fact that her aunt, Kelel, stated in her original petition that there was no will. In reviewing a probate court's findings of fact, this Court will defer to the court's superior ability to judge the credibility of the witnesses who appeared before it. *Ambs v Kalamazoo County Rd Comm'n*, 255 Mich App 637, 652; 662 NW2d 637 (2003). Here, the probate court determined that Gardella was credible; and we will not second-guess that determination on appeal. *Id.*

D. PRESUMPTION OF REVOCATION

The Administrator next argues that the probate court erred when it determined that there is no presumption of revocation for a lost or destroyed will where there is evidence that the decedent gave the original will to someone else before it was lost or destroyed. Under Michigan's common law, courts presume that a testator destroyed his or her will with the intent to revoke it if the will cannot be found after the testator's death. *In re Thomas' Estate*, 274 Mich 10, 12; 263 NW 891 (1935). This presumption, however, may be rebutted by evidence that the testator did not destroy the will or that it was otherwise in force, which is generally a question of fact. *In re Taylor's Estate*, 323 Mich 101, 107-108; 34 NW2d 474 (1948); see also *Ewing*, 141 Mich at 511-517 (noting that the jury could consider the evidence that persons with a motive to suppress the will may be responsible for the fact that it was missing when considering whether the presumption had been rebutted); *In re Smith Estate*, 145 Mich App 634, 637; 378 NW2d 555 (1985). This presumption applies to both original wills and copies that were in the testator's possession, but not found after his or her death. See *In re Walsh's Estate*, 196 Mich 42, 66-72; 163 NW 70 (1917).

After the hearing, the probate court found that Shehin gave Gardella the original copy of her holographic will and that it was lost while in Gardella's possession. For that reason, it stated that "the presumption of revocation does not apply." Because the probate court found that Shehin gave the will to Gardella and that it was lost while in Gardella's possession, it necessarily follows that Shehin could not have destroyed the will with the intent to revoke it—that is, the probate court's finding that the only will was lost while in Gardella's possession was, in effect, a finding that the presumption was rebutted. Therefore, whether framed as a finding that the presumption was rebutted or that it did not arise because the will was not lost while in Shehin's possession, the result would be the same. For that reason, even if we were to conclude that the trial court's framing of this issue was inaccurate, because its application of the law to its findings was correct, we conclude that there was no error warranting relief. MCR 2.613(A).

The Administrator also argues that the probate court's finding on the presumption was clearly erroneous because there was no evidence that Gardella had the original will. Contrary to the Administrator's contention on appeal, there was evidence that Gardella had the original and only copy of Shehin's will. Gardella testified that Shehin gave her the jewelry box and that she opened it and "the will was in there." She also testified that the will did not appear to have been changed since she first saw it in 2002. This testimony was sufficient to support the probate court's findings and we are not left with the definite and firm conviction that its findings were mistaken. *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003).

III. CONCLUSION

The probate court did not err when it relied solely on oral testimony to find that Shehin had a valid holographic will. In addition, the trial court's findings were not clearly erroneous and there were otherwise no errors warranting relief.

Affirmed. As the prevailing party, Kelel may tax her costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra