STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Janice Jackson and Deborah Osborne
Defendants Below, Petitioners

vs) No. 11-0160 (Brooke County 09-C-18)

Phillis A. Swain , **Plaintiff Below,**
Respondent

and

Robert Freshwater, Intervenor/Plaintiff
Below, Respondent

FILED
June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Janice Jackson and Deborah Osborne, defendants below, appeal from the circuit court's order granting summary judgment in favor of respondent Phillis Swain, plaintiff below, and respondent Robert Freshwater, intervenor/plaintiff below, and ordering County Clerk Sylvia Benzo, a defendant below, to admit the Will of Morris G. Main to probate. Petitioners state that there are issues of fact that should have precluded summary judgment. Respondents Swain and Freshwater have each filed a response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On December 7, 2008, Morris G. Main passed away. At the time of his death, his Will, which was executed in 1996, was located in a safe deposit box at a bank where it had been placed a year earlier by Mr. Main while accompanied by his friend, James Swiger. No one had accessed the safe deposit box between that time and Mr. Main's death.

Upon learning of Mr. Main's death, Mr. Swiger went to the bank, retrieved the Will and other documents from the safe deposit box, and delivered them to respondent Swain.[1] Thereafter, several persons handled and made copies of the Will. Approximately one month after Mr. Main's death, the Will was taken to County Clerk Benzo for admission to probate. Ms. Benzo refused to admit the document for probate because only the first page was an original, whereas pages two and three were photocopies.

On January 29, 2009, respondent Swain instituted this action against County Clerk Benzo for her refusal to admit the Will to probate. Subsequently, respondent Swain amended her pleading to add petitioners Jackson and Osborne, the daughters and sole heirs-at-law of the decedent, as defendants. Thereafter, the circuit court allowed respondent Freshwater, the son-in-law of respondent Swain and the primary beneficiary of the 1996 Will, to intervene in the action.[2]

There was evidence and argument presented below concerning whether the 1996 Will had been impliedly revoked because pages two and three of the Will, which set forth the appointment of the executor and the signatures of the witnesses, were photocopies,[3] and because there might have been a subsequent will drafted, although neither a subsequent will nor evidence that such a will was duly executed by the decedent was ever produced. Petitioners also questioned whether the signature at the bottom of page one of the 1996 Will was, in fact, the decedent's signature, although the two witnesses to the execution of the 1996 Will testified during their depositions that they recognized the 1996 Will as the document signed by the decedent in their presence.

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[1] While none of the parties state in their briefs what respondent Swain's relationship was to the decedent, there are statements in the record that reflect that Swain worked for the decedent and was his "live-in girlfriend."

[2] The record contains deposition transcripts which reflect that respondent Freshwater was "like a son" to the decedent.

[3] While there is some argument as to whether there had been a diligent search for the original pages two and three of the 1996 Will by respondent Swain, this Court does not disagree with the circuit court's finding that there was a diligent search and that the Will was lost at a time that could not be determined by the circuit court.

The circuit court granted summary judgment in favor of respondent Swain and directed County Clerk Benzo to accept the 1996 Will for probate.[4] The circuit court noted that a will can only be revoked by complying with the West Virginia Code.[5] The circuit court found that the burden of proving the execution of the 1996 Will rested upon its proponents, respondents Swain and Freshwater. The circuit court noted that the two witnesses to the 1996 Will both testified that they read the Will, saw the decedent sign it, and that they each signed the Will in the presence of the decedent and each other. The circuit court concluded that respondents had met their burden of proving the execution of the 1996 Will. Thereafter, the burden shifted to petitioners to prove a revocation, which the circuit court found they had failed to do. While noting that petitioners provide "scenarios, possibilities, and hearsay testimony" regarding a subsequent will, they failed to present any admissible evidence that a subsequent will was actually created and duly executed. Citing syllabus point 10 of *Charleston National Bank v. Thru The Bible Radio Network*, 203 W.Va. 345, 347, 507 S.E.2d 708, 710 (1998), the circuit court noted that the cardinal rule in the construction of testamentary instruments is to give effect to the intent of the testator and, here, all devises were on the first original page of the 1996 Will, which was signed by the decedent.

Petitioners assert that *Canterberry v. Canterberry*, 120 W.Va. 310, 197 S.E. 809 (1938), and *In Re: Estate of Siler*, 155 W.Va. 743, 187 S.E.2d 606 (1972), support their argument that the decedent removed the two original pages two and three of his 1996 Will and substituted photocopies, thereby evidencing his intent to revoke his 1996 Will. Respondent Swain counters that there was no credible or admissible evidence that the decedent revoked his 1996 Will by executing a later one; that the decedent never accessed his 1996 Will after he placed it in the safe deposit box at the bank; and that there is no evidence that the decedent directed another party to destroy his 1996 Will. Respondent Freshwater adds that the first page of the 1996 Will is an original signed by the decedent, and it contains a complete disposition of all Estate property.

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[4] On July 30, 2010, the circuit court granted a sixty-day stay of its ruling conditioned upon petitioners Jackson and Osborne posting a $50,000 bond. They did not do so and, on July 9, 2010, respondent Swain filed the 1996 Will for probate. It appears that respondent Swain has acted as executrix since that time and she states that an appraisement of the estate was filed on October 18, 2010.

[5] West Virginia Code §41-1-6 (revocation by divorce) and §41-1-7 (revocation by "cutting, tearing, burning, obliterating, canceling or destroying").

"A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a de novo review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

After considering the record, the circuit court's summary judgment order, and the arguments of counsel, this Court concludes under the facts and circumstances of this case, there was no error in the circuit court's entry of summary judgment. Accordingly, we affirm.

Affirmed.

ISSUED: June 24, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum