STATE OF MICHIGAN

COURT OF APPEALS

GARY ALBERTS,

Plaintiff-Appellant,

v

ESTATE OF ARTHUR GRAY, Deceased,

Defendant-Appellee.

UNPUBLISHED
February 27, 1998

No. 196666
Manistee Probate Court
LC No. 96-000039-IE

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a probate court order denying his petition to set aside the will of his brother, Arthur Gray. The probate court found that plaintiff's procedural due process rights were not violated even though the will was admitted to probate without notice to plaintiff, that the will was properly executed, that the intended personal representative was appointed, that the intended disposition of the residuary estate was sufficiently clear, that plaintiff failed to establish that the decedent was mentally incompetent at the time of execution, and that the will was properly validated with testimony from the decedent's attorney. We affirm.

Plaintiff first argues that he was not notified of the proceeding at which the decedent's will was admitted to probate, thereby denying him his procedural due process rights as guaranteed by the United States Constitution. After reviewing plaintiff's constitutional claim de novo, we disagree. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). The fundamental requirement of procedural due process is "the opportunity to be heard at a meaningful time and in a meaningful manner." *In re KB*, 221 Mich App 414, 419; 562 NW2d 208 (1997), quoting *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976). Here, although plaintiff was not afforded actual notice, he had a meaningful opportunity to be heard. Plaintiff filed a petition to set aside the will and a hearing was held on his petition, with all interested parties represented. The fundamental requirement of procedural due process was accomplished in that plaintiff was given "an opportunity to be heard at a meaningful time and in a meaningful manner." This proceeding allowed him to raise the same objections to the will that he would have been able to raise at the initial proceeding. Moreover, plaintiff's argument that he was prejudiced by the procedures of the latter proceeding is totally without merit. At this proceeding, as

well as the initial proceeding, the proponents of the will had the burden of establishing proper execution, at which point the burden shifted to plaintiff, as the will contestant, to establish by a preponderance of the evidence that the will should not have been admitted to probate. *In re McIntyre Estate*, 355 Mich 238, 247-248; 94 NW2d 208 (1959).

Plaintiff next argues that the probate court erred in denying his petition because the will was not properly witnessed. We disagree. In order to prove proper execution, the Revised Probate Code requires only the testimony of one of the subscribing witnesses. MCL 700.147; MSA 27.5147. In the present case, both attesting witnesses testified as to the decedent's signature. Plaintiff argues that one of the witness' testimony, suggesting that she may have left the room momentarily during the execution, invalidated the will. However, the will was signed in three places and the witness did testify to the attestation of two of the three signatures. Valid execution requires no more than one witnessed signature. MCL 700.122(1); MSA 27.5122(1).

Plaintiff also argues that the execution was improper because the decedent did not state to one of the witnesses that the document he was signing was indeed his will. In short, plaintiff claims that the failure of the decedent to publish his will invalidated it. However, publication of a will is not a requirement under Michigan law. *In re Fowle's Estate*, 292 Mich 500, 504-505; 290 NW 883 (1940). Therefore, plaintiff's claim of error in this regard is meritless.

Plaintiff also argues that the probate court erred in denying his petition because he introduced evidence to establish that the signature on the will was not that of the decedent. During the proceedings, plaintiff testified that he did not believe the signature was authentic based on his personal opinion after comparing it to handwriting contained on various holiday greeting cards and an affidavit. Plaintiff, however, failed to rebut the prima facie evidence of due execution provided by the proponents of the will, which consisted of the sworn testimony of the two attesting witnesses who stated that it was his signature. Therefore, we find no error.

Plaintiff next argues that the probate court erred when it appointed Myrtle Gernentz to be the personal representative because the will designated "Myrtle Gerbnentz" as the intended personal representative Again, we disagree. In the interpretation of wills, it is paramount to ascertain and give effect to the intent of the testator. *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). This intent should be discovered from the will itself unless an ambiguity exists, in which case the court looks outside the four corners of the will and may consider parol evidence and rules of construction. *Id*. Parol evidence introduced at the proceeding clarified the latent ambiguity created by the spelling of the designated personal representative's name. First, plaintiff testified that the decedent had only three surviving siblings, one of whom was Myrtle Gernentz. Clause four of the will, which appoints the personal representative, designates "my sister, Myrtle Gerbnentz." Second, the decedent's attorney testified that the ambiguity was the result of a typographical error. Finally, as correctly observed by the probate court, no other person came forward and claimed to be Myrtle Gerbnentz so as to call into question whether two reasonable interpretations of the clause in fact existed. Therefore, the court correctly appointed Myrtle Gernentz to be the personal representative even though the will designated "Myrtle Gerbnentz."

Plaintiff next argues that the probate court erred in admitting the will to probate because the clause that attempts to dispose of the residuary estate does not contain words of disposition and therefore, plaintiff maintains, the residuary estate should pass to the decedent's heirs by intestacy. We disagree. Again, the cardinal rule in will cases is to ascertain and give effect to the intent of the testator. *In re Bair Estate*, 128 Mich App 713, 716; 341 NW2d 188 (1983). Moreover, where the will is reasonably susceptible of more than one construction, there is a presumption in favor of testacy over intestate succession. *In re Charlton Estate*, 9 Mich App 625, 630; 157 NW2d 821 (1967). In the present case, plaintiff's position appears to contradict the clear intention of the testator. First, all the language in the residuary clause suggests that the testator intended to divide this portion of the estate between his sisters. The omission of the word "to" was an apparent typographical error that did not create any genuine confusion regarding the testator's intent. Second, even if there was an ambiguity as to the disposition of the residual estate to the testator's sisters, the next statement in the residuary clause clarifies any ambiguity vis-à-vis plaintiff because it expressly disinherits him. Finally, plaintiff offers no evidence, except the error in the text of the will, to overcome the presumption of testacy. Therefore, the probate court correctly interpreted the residuary clause as a valid transfer clause.

Next, plaintiff argues that the probate court erred in finding that the testator possessed testamentary capacity. Again, we disagree. The Revised Probate Code requires that in order to execute a valid will a person must be "of sound mind." MCL 700.121; MSA 27.5121. This standard has been held to require that at the time of the making of the will, the testator must have sufficient mental capacity to (1) comprehend the nature and extent of his property; (2) recall the natural objects of his bounty; and (3) determine and understand the disposition of his property. *In re Vollbrecht Estate*, 26 Mich App 430, 434; 182 NW2d 609 (1970). The burden of establishing lack of testamentary capacity rests upon the will contestants. *Id*. Plaintiff attempted to meet his burden of proof by offering the death certificate, which indicated that the testator suffered from various physical conditions, and by offering his own testimony, which suggested that the testator suffered from an inability to control his bowels, memory loss, and episodes of confusion. Plaintiff offered no evidence to suggest that the decedent did not comprehend the nature of his property or the objects of his bounty. The evidence he did bring forth was insufficient to establish a lack of testamentary capacity on the part of the decedent. First, it should be evident that physical illness alone does not affect the validity of a will unless symptoms of that illness cause mental incompetency. *In re Aylward's Estate*, 243 Mich 9, 17; 219 NW 697 (1928). Second, the Michigan Supreme Court has held that "instances of forgetfulness [and] habits of untidiness increasing with advancing years . . . afford no evidence of lack of testamentary capacity." *In re Grow's Estate*, 299 Mich 133, 138; 299 NW 836 (1941). Finally, the proponents of the will offered evidence that the decedent was aware of his monthly expenses, comprehended the nature of his property to the extent that he obtained a judgment against plaintiff, and recognized the objects of his bounty as evidenced by his specific devises to his sisters and more importantly to this dispute, his express disinheritance of plaintiff. In light of this evidence, the probate court was correct in finding that the testator was mentally competent when he executed his will.

Finally, plaintiff argues that the probate court erred in allowing the decedent's attorney to testify as to the intentions of the decedent because his testimony violated the "Dead Man Statute," MCL 600.2166; MSA 27A.2166, and also breached the attorney-client privilege by divulging conversations

without the decedent's consent. As plaintiff did not present this specific objection at the probate court proceeding, we need not address it because this issue is unpreserved for

appeal. *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987). In any case, we find plaintiff's claim in this regard meritless.

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Hilda R. Gage