

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of GLADYS FINDLAY
HALL, a/k/a GLADYS F. HALL, Deceased,

UNPUBLISHED
February 2, 1999

RICHARD FINDLAY,

Petitioner-Appellant,

v

DORA SCOTT, Personal Representative of the Estate
of GLADYS FINDLAY HALL, Deceased,

Respondent-Appellee.

No. 204036
Oakland Probate Court
LC No. 97-255328 IE

Before: Sawyer, P.J., and Wahls and Hoekstra, JJ.

MEMORANDUM.

Petitioner Richard Findlay appeals of right from the probate court order denying his petition to contest a will. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent Gladys Hall, petitioner's aunt, died on December 6, 1996. Decedent left two wills, one dated November 23, 1996 and the other dated September 21, 1983. The 1983 will named petitioner as personal representative, made three small individual bequests, and divided the remainder of decedent's estate between petitioner and Adeline Findlay, decedent's sister. The 1996 will named Dora Scott, decedent's longtime friend, as personal representative, omitted the individual bequests, and divided the estate between Scott and Adeline Findlay. The 1996 will was admitted to probate, and Scott was named personal representative.

Petitioner contested the 1996 will, seeking supervision of the estate, removal of Scott as personal representative, and admission of the 1983 will to probate. The petition did not allege that the 1996 will had not been executed in accordance with statutory requirements. At the hearing on the petition, the witnesses to the 1996 will, Wilma Zang and George Briston, testified that they saw

decedent sign the will. The testimony from various witnesses established that at the time decedent signed the will Briston was sitting in a small room just off the room where decedent was located.

In his post-hearing summation, petitioner, for the first time, objected to the 1996 will on the grounds that it was not witnessed by two persons who witnessed either the signing or the testator's acknowledgment of the signature or of the will, as required by MCL 700.122(1); MSA 27.5122(1).

The probate court denied the petition. The court found that petitioner failed to preserve his objection to the execution of the will because it was not filed at or before the time of the hearing. MCL 700.148; MSA 27.5148. Nevertheless, the court addressed the issue on the merits, and found that the 1996 will was properly executed. The will was in writing, was signed by the testator, and was signed by two witnesses who observed the testator sign the will.

Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous. A finding is clearly erroneous if the reviewing court is left with the firm and definite conviction that a mistake was made. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

MCL 700.122(1) requires that a will be in writing, be signed by the testator or in the testator's name by some person acting at the testator's direction, and be signed by at least two persons who witnessed the signing or the testator's acknowledgment of the signature or the will. Appellant argues that the probate court clearly erred by finding that the 1996 will was properly executed, because the evidence showed that Briston was in another room at the time decedent signed the will.

While the probate court could have declined to consider the merits of appellant's objection because it was not timely filed, MCL 700.148; *In re Thornton*, 192 Mich App 709, 716-717; 481 NW2d 828 (1992), the court reached the merits and concluded that the 1996 will was properly executed. We affirm the probate court's decision. Undisputed testimony established that decedent signed the 1996 will and that Zang observed decedent do so. While witnesses stated that Briston was in a small room just off the room where decedent was located, Briston testified unequivocally that he observed decedent sign the will. No evidence contradicted Briston's testimony. The probate court's finding that the 1996 will was properly executed was not clearly erroneous. *Erickson, supra*.

We decline to assess actual and punitive damages against petitioner, as requested by respondent. Petitioner was not without a reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a).

Affirmed.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Joel P. Hoekstra