

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of URDINE BERTHA
ALLEN, Deceased.

ROGER FINNEN,

Petitioner-Appellant,

v

STEVEN L. SHERIDAN, Personal Representative
of the Estate of Urdine Bertha Allen, Deceased,

Respondent-Appellee.

UNPUBLISHED
December 6, 2002

No. 233343
Sanilac Probate Court
LC No. 99-027821-SE

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Petitioner appeals as of right from the probate court's order admitting Urdine Allen's will to probate over the objections of petitioner. We affirm.

Urdine Allen died seven days after significantly changing her will. Allen's last will differed from her two previous wills in that it bequeathed her house, the largest portion of her estate, to respondent and his wife, rather than to petitioner. In seeking to prevent the will from being admitted to probate, petitioner argued that the will was not properly witnessed because neither witness saw Allen sign the last will, nor did they observe her acknowledge her signature. Petitioner further claimed that there were discrepancies between the signature dates and the attestation clause, and that Allen lacked testamentary capacity to change her will. The probate court disagreed and, after dismissing petitioner's objections, admitted the will to probate.

Petitioner now argues that the probate court erred in dismissing his objections and admitting the will to probate. We disagree.

The findings of a probate court are reviewed for clear error. MCL 600.866; MCR 2.613(C); *In re Coe Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999). A decision is clearly erroneous when, although there is evidence to support the decision, the reviewing court is left with the definite and firm conviction that a mistake has been made. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994).

When Urdine Allen died on July 2, 1999, the Revised Probate Code, MCL 700.101, *et seq.*, was in effect.¹ Regarding proper witnessing of a will, the Revised Probate Code provided in pertinent part:

A will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction and shall be signed by at least 2 persons each of whom witnessed either the signing or the *testator's acknowledgment* of the signature or *of the will*. [MCL 700.122(1) (Emphasis added).]

The Revised Probate Code further provided that the probate court “may admit the will of a resident testator to probate on the testimony of 1 of the subscribing witnesses if the witness shall testify that the will was executed in all particulars as required by law.” MCL 700.147(1).

Thus, the factual finding challenged on this issue is whether at least one of the subscribing witnesses to the will witnessed at least one of the following: (1) the signing of the will, (2) the testator's acknowledgment of her signature, or (3) the testator's acknowledgment of her will. MCL 700.122(1). Petitioner argued that the will was improperly executed because neither witness to the will saw the testator sign or acknowledge her signature on the will. However, even assuming the veracity of that argument it is to no avail where there is unrefuted evidence, as here, that one or more of the subscribing witnesses witnessed the testator acknowledge her will.

Petitioner also argued that the will should be invalidated because of discrepancies between the will's witness attestation clause and the witnesses' testimony. Specifically, the attestation clause declares that each witness observed the testator and the other witness sign the will; whereas, testimony and dating of the signatures on the will indicated that the witnesses signed two days after the testator and not in the presence of one another.

The Revised Probate Code did not, however, require an attestation clause for execution of a valid will. See MCL 700.122. Moreover, even if such a clause had been required, we do not require strict conformance with will formalities: “‘Publication of a will, defined as ‘the act of making it known, in the presence of witnesses, that the instrument to be executed is the last will and testament of the testator,’ with the strict observance of specific formalities imperative in many jurisdictions, is not required in this state.’” *In re Clark Estate*, 237 Mich App 387, 391-392; 603 NW2d 290 (1999), quoting *In re Kohn's Estate*, 172 Mich 342, 348; 137 NW 735 (1912).

As noted above, there was unrefuted evidence that Allen acknowledged her last will before both of the witnesses. Petitioner produced no evidence to suggest that Allen did not intend to or believe she was executing her will, or to refute that there was sufficient formality to impress on Allen the importance of the disposition of her property by means of her will. There

¹ The Revised Probate Code was repealed by 1998 PA 386, §8102, effective April 1, 2000, and replaced by the Estates and Protected Individuals Code, MCL 700.1101, *et seq.* The parties do not dispute that the prior statutory framework applies to this litigation. See MCL 700.8101.

was no basis, statutory or otherwise, to declare Allen's will invalid on the basis of technical problems within an attestation clause that was not legally required.

Petitioner additionally objected to admission of the will because he claimed Allen lacked testamentary capacity. Specifically, petitioner argued that Allen was taking a number of medications, that she was sometimes depressed and lonely, and that she had mentioned suicide.

Being of "sound mind" has long been a prerequisite for the effective making of a will. MCL 700.121. A long line of cases sets out the requirements for testamentary capacity, including *In re Sprenger's Estate*, 337 Mich 514, 521; 60 NW2d 436 (1953), where the Court stated:

To have testamentary capacity, an individual must be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make. The burden is upon the person questioning the competency of the deceased to establish that incompetency existed at the time the will was drawn. [(Citations omitted)].

Petitioner's allegations that Allen was taking medications, was depressed and lonely, and had talked of suicide do not, without more, indicate that she lacked testamentary capacity. Petitioner presented no evidence that Allen lacked sufficient mental capacity to know what property she possessed, to know the natural objects of her bounty, or to understand the property disposition she was making by her will. Moreover, the competency of the testator is judged at the time of the making of the will. *Id.* None of petitioner's allegations concerning Allen's mental capacity were correlated to the time she prepared and signed her will. Accordingly, petitioner did not meet his burden, and the probate court did not err in admitting the will to probate.

We affirm.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra