SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1738-16T3

IN THE MATTER OF THE ESTATE
OF EDNA M. FONE, Deceased.

Submitted January 24, 2018 – Decided March 8, 2018

Before Judges Alvarez and Currier.

On appeal from Superior Court of New Jersey, Chancery Division, Probate Part, Camden County, Docket No. P-0057-2010.

Daniel B. Zonies, attorney for appellant Richard J. Fone, Jr.

Simeone & Raynor, LLC, attorneys for respondent Katherine Fone (Bryan T. Eggert, of counsel and on the brief; I. Dominic Simeone and Kenneth E. Raynor on the brief).

PER CURIAM

Edna M. Fone, pre-deceased by her husband, had two children, Richard J. Fone, Jr., and Katherine Fone. Her estate has been the subject of two probate actions.[1] In this appeal, Richard asserts that the chancery judge erred in dismissing his complaint in which he sought to admit a 1997 copy of a Will for probate. Because we

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[1] The same chancery judge presided over both actions.

conclude that Richard was unable to overcome the presumption that the absence of an original will assumes its revocation or destruction, we affirm.

Following Edna's death, when Richard sought to probate a 2009 Will, Katherine instituted suit, seeking to invalidate the document, alleging Richard had exerted undue influence over their mother and that Edna did not have the capacity to execute that Will. After a trial, the chancery judge ruled in favor of Katherine, invalidating the 2009 Will and declaring the Estate intestate. Although Richard appealed from that order, he failed to obtain the trial transcripts and the appeal was dismissed.

Just prior to the close of trial in the first action, Richard requested permission to amend his answer to include a counterclaim to admit a copy of a 1997 Will into probate. His motion was denied. During the pendency of the first appeal, Richard began a second action, seeking to probate a copy of a 1997 Will as the original document could not be found. Katherine moved to dismiss the complaint. On November 21, 2016, the chancery judge granted the motion, finding that Richard was unable to rebut the presumption that the 1997 Will had been revoked or destroyed.

Richard asserts on appeal that the chancery judge should have permitted him to present evidence in a "full trial" to rebut the presumption that the 1997 original Will was revoked. We disagree.

A will that cannot be found after the testatrix's death is presumed to be destroyed with the intent to revoke "[i]f such a will was last seen in the custody of the testatrix or she had access to it." In re Will of Davis, 127 N.J. Eq. 55, 57 (E. & A. 1940) (quoting In re Will of Bryan, 125 N.J. Eq. 471, 473-74 (E. & A. 1939)). This presumption of revocation may be rebutted only with "clear, satisfactory and convincing" evidence. Ibid. (quoting Bryan, 125 N.J. Eq. at 474). "The proof necessary to rebut the presumption . . . must be sufficient to exclude every possibility of a destruction of the will by the testatrix herself." In re Estate of Jensen, 141 N.J. Eq. 222, 225 (Prerog. Ct. 1947), aff'd o.b., 142 N.J. Eq. 242, 243 (E. & A. 1948). Furthermore,

> [t]o satisfy the . . . clear-and-convincing standard, the fact finder "must be persuaded that the truth of the contention is 'highly probable.'" Evidence that is clear and convincing "should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."
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> [In re Perskie, 207 N.J. 275, 290 (2011) (citations omitted) (first quoting McCormick on Evidence § 340 (Broun ed., 6th ed. 2006); and then quoting In re Purrazella, 134 N.J. 228, 240 (1993)).]

Richard testified during the 2009 Will trial that after his father died, he searched for his parents' 1997 Wills in a specific location in their bedroom, but was unable to locate them. He

claimed that his parents had disinherited Katherine in those Wills and she must have taken the documents from their home. Katherine denied both knowing anything about her parents' Wills and removing them from their house.

In her decision invalidating the 2009 Will, the judge considered Richard's assertion he now raises in this appeal. She noted that Katherine did not have a relationship with her parents for many years. However, before their deaths she reconciled with them. The judge stated: "The Court's interpretation of the series of events is that Katherine and her mother reconciled first, then Katherine and her father and at some point in time the elderly couple decided to revoke their existing Wills from 1997 which had effectively disinherited Katherine."

The factual findings of the trial court are binding on appeal if supported by "adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Factual findings will be disturbed only when it is clear that they are "manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms, 65 N.J. at 484 (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

Richard has not provided any credible evidence that "exclude[s] every possibility of a destruction of the will by the testatrix herself." Jensen, 141 N.J. Eq. at 225. As a result, he has not met the heavy burden of providing the clear and convincing evidence necessary to overcome the presumption that the 1997 Will was destroyed.

Affirmed.