COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3007

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF ELMER R. NEEDHAM, DECEASED:

DOUGLAS NEEDHAM, JAMES NEUENDORF, AND CHRIS PRANGE,

PETITIONERS-RESPONDENTS,

V.

LEILA BAILIE, DAVID SCOTT, KERRY SCOTT, AND ALLEN SCOTT,

APPELLANTS.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. David, Kerry and Allen Scott and Leila Bailie (collectively, "the Scotts") appeal from an order admitting into probate Elmer

Needham's will. The issues are: (1) whether the trial court properly found that the will was not forged; (2) whether the trial court properly found that the will was not revoked; and (3) whether the trial court improperly "blended" its discussion of these two issues in its analysis. We resolve these issues against the Scotts and affirm.

Elmer Needham died at the age of seventy-two, leaving a sizable estate. He never married and was close to only a few of his relatives, particularly Douglas Needham, his nephew, with whom he worked together every day running several farms. Although a will could not be found when Elmer died, Douglas found a copy of Elmer's will dated February 11, 1980, in the basement of Elmer's house about six months after he died. The will left everything to Douglas.

The intestate heirs of Elmer challenged the will. After a lengthy hearing during which the trial court heard testimony from numerous people about the authenticity of the copy of the will and Elmer's intent, the trial court concluded that the copy of the will was not a forgery, that the will was validly executed, and that Elmer had not revoked his will. The trial court then admitted a copy of the will into probate.

The Scotts first argue that the trial court erred in concluding that the copy of the will was not forged, a factual finding that they characterize as contrary to the great weight and clear preponderance of the evidence.

Whether the copy of the will found by Douglas was forged is a factual finding and, as such, will not be set aside by the court unless it is "clearly

erroneous." *See* § 805.17(2), STATS.[1] Where the trial court acts as a finder of fact and the testimony conflicts, the trial court is the ultimate arbiter of the credibility of the witnesses and the weight to be given their testimony. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979).

After considering the testimony of two handwriting experts, the trial court found that the two pages of the will ran together in a logical manner, that the paper on the two pages was consistent, including the type on both pages and the type of copy paper that was used. Based on the testimony of Elizabeth Orthaus, a secretary employed for over twenty years at the Franz law firm where the will was purportedly executed, the trial court found that the will was consistent with the usage at the Franz law firm in the early 1980's. The trial court also found that, contrary to the Scotts' argument, there was no significant difference in the color of the two pages of the document.

Based on the testimony of two associates of Elmer, the trial court found that Elmer carried the will in the front pocket of his bib overalls at times and that he had shown the two men the copy of his will. Both men identified the copy proffered by Douglas as the document shown to them by Elmer.

Based on all of these findings, the trial court concluded that the document proffered by Douglas was not forged. This "ultimate" factual finding, a conclusion drawn from the other facts found by the trial court, was not clearly erroneous. *See* ***Cogswell,*** 87 Wis.2d at 250, 274 N.W.2d at 650 (trial court is

[1] The "clearly erroneous" test and the "great weight and clear preponderance of the evidence" test are essentially the same. ***Noll v. Dimiceli's Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

ultimate arbiter of the credibility of witnesses and the weight to be given their testimony).

The Scotts argue at great length that the trial court erred in ruling that there was no forgery, pointing to evidence in the record that supports their position.[2] Based upon our review of the testimony and other evidence, however, we conclude that the evidence contrary to the trial court's conclusion does not, as the Scotts' argue, constitute the great weight and clear preponderance of the evidence. *See* ***id.*** at 249-50, 274 N.W.2d at 650.

The Scotts next challenge the trial court's finding that Elmer did not revoke his will. When an original will cannot be found after the testator's death and the will was last in the testator's possession, a presumption arises that the testator intended to revoke the will. *See* ***State v. John***, 252 Wis. 117, 119, 31 N.W.2d 163, 164 (1948). This presumption may be rebutted by affirmations of the will's existence by the testator. *Cf.* ***Quantius v. Cotter***, 47 Wis.2d 769, 779, 178 N.W.2d 9, 14-15 (1970).

The trial court found that Elmer took the original of the will from the Franz law offices and that, therefore, the presumption of revocation applied because Elmer last had possession of the will. However, after considering all of the testimony, the court concluded that the presumption that Elmer revoked the will was rebutted.

[2] Although we believe that it is not necessary to go into the contrary evidence at length, the Scotts point to the fact that entries were not made in a record book by the Franz law firm when the will was executed which would usually be the case. They also point to anomalies regarding the copy of the will, such as the fact that Elmer's signature was exactly the same length on both pages of the will when usually, according to the handwriting experts, there would be some variation in the length of a person's signature.

After considering the testimony of Jerry Wilkinson, Willard Noble, Bill Barnes and Bill Hennesey, associates of Elmer, the trial court made the following factual findings: (1) Elmer told Jerry Wilkinson in 1994 that he was leaving everything to Douglas and gave similar indications five different times in conversations with Willard Noble; (2) the will was shown to Bill Barnes in early 1994, and Elmer affirmed that this was his last will at that time; (3) Bill Hennessey, who the trial court characterized as "very credible," identified the proffered copy of the will as the same document shown to him in the spring or summer of 1994 by Elmer who, at that time, said the document was his will; (4) no inconsistent oral statements were ever made by Elmer; (5) there had been no falling out between Elmer and Douglas; (6) the contents of the will were consistent with Elmer's long-standing, good relationship with Douglas and his relationship with other relatives; (7) there was no change in Elmer's relationship with any interested party; and (8) the fact that the will was found in the basement on an air duct was consistent with the testimony that Elmer hid papers, including important papers.

We conclude that these factual findings are not clearly erroneous and support the trial court's ultimate legal determination that the will was not revoked. *See* ***Quantius***, 47 Wis.2d at 779, 178 N.W.2d at 14-15.

Finally, the Scotts argue that the trial court erred in blending the discussion in its decision of whether the will was ever properly executed and whether the will was subsequently revoked. Having reviewed the trial court's oral and written decisions, we conclude that the trial court acted properly. It discussed the fact situation in its entirety before drawing legal conclusions. Many of the facts were interrelated. We conclude there was no error.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.