

SUCCESSION OF GREGORY CHARLES
ETHER

NO. 24-CA-545

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 828-734, DIVISION "C"
HONORABLE JUNE B. DARENSBURG, JUDGE PRESIDING

April 30, 2025

MARC E. JOHNSON
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson, and Timothy S. Marcel

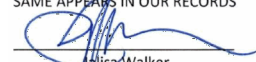
AFFIRMED

MEJ

FHW

TSM

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Alisa Walker
Deputy, Clerk of Court

COUNSEL FOR PLAINTIFF/APPELLEE,

GLEN R. ETHER

R. Scott Buhner

COUNSEL FOR DEFENDANT/APPELLANT,

MARGARET W. ETHER

Ryan C. Higgins

Kaylyn B. Handy

JOHNSON, J.

Petitioner-in-Reconvention/Appellant, Margaret W. Ether, appeals the trial court's judgment that denied her petition to annul probated testament, vacate judgment of possession, and reopen succession rendered in the 24th Judicial District Court, Division "C". For the following reasons, we affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

Decedent, Gregory Charles Ether, died in Jefferson Parish on April 24, 2022. He was survived by his wife of 23 years, Margaret W. Ether, a major child from a previous union,¹ and his half-brother, Glen R. Ether. On May 31, 2022, Glen filed a petition to probate statutory testament, wherein he stated Mr. Ether executed a last will and testament dated November 10, 2016. Glen averred that, under the terms of the will, he was named as the sole legatee of all of Mr. Ether's property, both community and separate. He further averred that Mr. Ether had not wished for Margaret to receive any of the property. He attached a copy of the will, asserting the original will could not be located and Mr. Ether did not intend to revoke it. Glen also sought to be sent into possession of the Succession's property, which he described as an undivided 100% interest in immovable property located in Marrero, Louisiana and an undivided 50% interest in immovable property located in Harvey, Louisiana. Glen was recognized as the sole legatee of Mr. Ether and was awarded possession of Mr. Ether's property in a judgment of possession rendered on July 8, 2022.

On November 4, 2022, Margaret filed a petition to annul probated testament, vacate judgment of possession, and reopen succession. In her petition, Margaret alleged the November 10, 2016 will was null because it was revoked by Mr. Ether,

¹ In pleadings, both Glen and Margaret acknowledge that Mr. Ether had a child from a previous relationship. However, only Margaret alleges specifically that the major child is Tiffany Ether.

and Glen failed to overcome the presumption that the will had been revoked.

Alternatively, Margaret alleged that the November 10, 2016 will was absolutely null because, at the time it was purportedly executed, Mr. Ether lacked the requisite capacity to execute a testament due to various cognitive impairments. She contended that, since the judgment of possession was an absolute nullity, the Succession should pass to intestacy.

Margaret's petition to annul was tried before the trial court on February 22, 23, and 28, 2024. Prior to the start of the trial, the parties agreed to six stipulations: 1) the signature on the copy of the will was Mr. Ether's signature; 2) the original will had not been located; 3) the copy of the will was probated by the trial court on June 3, 2022; 4) Margaret was married to Mr. Ether at the time of his death; 5) Glen is the half-brother of Mr. Ether; and 6) the immovable property and improvements at the Marrero property was the community property of Mr. Ether and Margaret.² After the presentation of the evidence, the matter was taken under advisement by the trial court, and the parties were allowed to submit post-trial memoranda. In its written judgment, the trial court denied Margaret's petition and dismissed it with prejudice.³ Margaret's instant appeal followed.

ASSIGNMENTS OF ERROR

On appeal, Margaret alleges the trial court erred by probating a copy of the November 10, 2016 will and, subsequently, denying her petition to annul probated

² The parties stipulated that the Marrero property was community property. However, other evidence in the record (*i.e.*, the Judgment of Possession) suggests that the Marrero property was Mr. Ether's separate property, and the Harvey property was community property.

³ On January 17, 2025, this Court issued an order directing the trial court to render a judgment that included the appropriate and necessary decretal language. Pursuant to this Court's order, the trial court rendered an amended judgment on February 3, 2025. However, the amended judgment did not contain the appropriate and necessary decretal language. This Court issued a second order on March 3, 2025, directing the trial court to issue an amended judgment that included the appropriate and necessary decretal language. On March 5, 2025, the trial court issued a second amended judgment that complied with this Court's order.

testament, vacate judgment of possession, and reopen succession.

LAW AND ANALYSIS

November 10, 2016 Will

Margaret alleges the trial court erroneously probated a copy of Mr. Ether's November 10, 2016 will. She argues that Glen's petition to probate the will falls woefully short of the heavy burden of proof required to probate a copy of a will. She contends that the proponent of the will, Glen, had the burden of presenting clear proof that Mr. Ether did not intent to destroy or revoke the original will or that it was lost in order to probate the copy of the will. She particularly claims that Glen never diligently searched for the original will and offered no valid reason for not producing it to the court. Margaret further argues that the testimony concerning Mr. Ether's last wishes is conflicting, at best. She asserts that testimony that Mr. Ether wanted Glen to take care of his daughter, Tiffany, and the fact that Mr. Ether distrusted the executor named in his will, Joseph Gilbert, indicated that Mr. Ether's intent changed prior to his death. As a result, Margaret maintains that the trial court erred in denying her petition to annul probated testament, vacate judgment of possession, and reopen succession.

Conversely, Glen avers the trial court properly denied Margaret's petition. He asserts Mr. Ether was of sound mind when he executed the will on November 10, 2016, and the evidence presented at trial overwhelmingly showed Mr. Ether's desire to leave all of his property to him. He argues that, if Mr. Ether desired for Tiffany to inherit his estate, Mr. Ether would have stated so in the will, instead of instructing him to "take care" of Tiffany. He contends that he provided sufficient, clear, and conclusive proof that Mr. Ether's will had not been revoked or destroyed. Glen further asserts that Margaret's claim that he failed to make a diligent search for Mr. Ether's original will is a "red herring." He avers that he had no access to either the Marrero property or the Harvey property, and Margaret

testified that she and Joseph Gilbert thoroughly searched for the original will; thus, appointing a lawyer to search for the will would have been unwarranted and futile.

Diligent Search for Original Will

Margaret argues that Glen failed to diligently search for Mr. Ether's original will. She contends that Glen offered no reason for failing to present the court with the original will. She further contends that Glen should have requested a notary be appointed to search for the original will.

If the testament is not in the possession of the petitioner, he shall pray that the court direct that a search be made for the testament by a notary of the parish. La. C.C.P. art. 2854. In its order directing the search, the court may order any person having in his possession or under his control any books, papers, or documents of the deceased, or any bank box, safety deposit vault, or other receptacle likely to contain the testament of the deceased, to permit the examination of the books, papers, and documents, and of the contents of the bank box, safety deposit vault, or other receptacle, by the notary. *Id.*

At trial, Glen testified that he was informed of the existence of Mr. Ether's will on the morning of Mr. Ether's death during a phone conversation between the two of them. He did not know where the original will was located. Mr. Ether's attorney, Philip Riegel, testified that, after Mr. Ether's death, he sent Margaret letters on behalf of Glen, in an attempt to locate the original will. Margaret did not respond to either of the letters. Although Glen did not search Mr. Ether's belongings for the original will or request that a notary be appointed to conduct the search, Margaret testified that she and Joseph Gilbert, Mr. Ether's cousin, searched Mr. Ether's belongings at both the Marrero and Harvey properties. Their searches failed to yield the recovery of the original will.

A review of Glen's petition reveals that Margaret is correct in her assertion that he failed to request that the court direct a search be made for the will by a

notary of the parish. However, we do not conclude that Glen's failure to make such a request requires the annulment of the probated testament. Margaret's testimony shows that she declined to respond Mr. Riegel's letters, which signaled Glen had no access to the properties, and she and Mr. Gilbert conducted searches of Mr. Ether's belongings at the two properties. Thus, a search for the original will was actually conducted within the property specified in Glen's petition. As argued by Glen, an appointment of a notary to conduct an additional search for the original will would have been futile. Therefore, we do not find that the trial court erred in denying Margaret's petition to annul probated testament, vacate judgment of possession, and reopen succession on this basis.

Probation of the Copy of Mr. Ether's Will

In this matter, evidence was adduced at trial that Mr. Ether executed a notarial will on November 10, 2016 at the legal office of Philip Riegel. Mr. Riegel testified that he had no reason to doubt Mr. Ether's capacity at the time Mr. Ether executed the will. At the end of the consultation, Mr. Riegel testified that he gave Mr. Ether the original will and kept a copy of said will, which was a customary practice of his. He had no other contact with Mr. Ether after that day.

In Glen's petition to probate statutory testament, he alleged that the terms of the will named him as the sole legatee of all of Mr. Ether's property, both community and separate. He attested the original will could not be located, and Mr. Ether had no intention to revoke or destroy the original will. He asserted that Mr. Ether's intentions were evidenced by the fact that, on the morning of Mr. Ether's death, Mr. Ether told him on the phone that he was being left all of Mr. Ether's property, and Mr. Ether did not want his wife, Margaret, to inherit any of the property. Glen attached a copy of Mr. Ether's November 10, 2016 will to his petition.

In an action to annul a notarial testament, the plaintiff always has the burden of proving the invalidity of the testament. La. C.C.P. art. 2932. According to La. C.C. art. 1573, if the formalities prescribed for the execution of a testament are not observed, the testament is absolutely null. *Succession of Pedescleaux*, 21-611 (La. App. 5 Cir. 5/11/22), 341 So.3d 1224, 1231. In general, there is a presumption in favor of the validity of testaments, and proof of the nonobservance of formalities must be exceptionally compelling to rebut the presumption. *Id.*, citing *In re Succession of Holbrook*, 13-1181 (La. 1/28/14), 144 So.3d 845, 853.

Margaret argues that the trial court erred in probating the copy of Mr. Ether's November 10, 2016 will because Glen failed to produce the original will without providing a valid reason for not producing it.

When a will cannot be found at the testator's death, there arises a presumption that the testator has destroyed the will with the intent of revoking it. *Succession of Messina*, 22-172 (La. App. 5 Cir. 11/30/22), 353 So.3d 1009, 1011, citing *Succession of Talbot*, 530 So.2d 1132, 1134-35 (La. 1988). The presumption also arises when a copy of the testament exists but the original cannot be located. *Id.* This presumption may be rebutted upon clear proof: 1) that the testator made a valid will; 2) of the contents or substance of the will; and 3) that the testator did not revoke it. *In re Succession of Morgan*, 22-1763 (La. 9/8/23), 370 So.3d 399, 402. In order to prevail, the proponent of a will bears the burden of establishing that the testator did not intend to revoke the will by destroying it. *Succession of Talbot*, 530 So.2d at 1135.

The jurisprudence has recognized “a sliding scale of proof sufficient to rebut the presumption depending on the weakness or strength of the evidence surrounding the lost original.” *Succession of Messina, supra*. The Louisiana Supreme Court explained this presumption by stating:

The presumption may be weak or strong, and more or less easily rebuttable, depending on the clarity of the evidence as to whether the testator was the author of the will's destruction, whether he expressed an intention to revoke the will, whether he had access to other originals of the will prior to his death, whether he treated any extant copy of the will as not having been revoked, and as to any other issue bearing upon the testator's intention with respect to the destruction and revocation of the will.

Succession of Talbot, 530 So.2d at 1135.

A trial court's finding that the presumption of revocation has been rebutted is subject to manifest error review. *Succession of Foster*, 19-209 (La. App. 4 Cir. 7/31/19), 363 So.3d 505, writ denied, 19-1401 (La. 11/15/19), 281 So.3d 672.

When the trial court's findings are based on determinations regarding the credibility of witnesses, the manifest error standard demands great deference to the factfinder's conclusions, because "only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." *Succession of Messina*, 353 So.3d at 1011-12, quoting *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). Where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even if the appellate court may feel that its own evaluations and inferences are as reasonable. *Id.* at 1012, citing *Desselle v. Jefferson Hosp. Dist. No. 2*, 04-455 (La. App. 5 Cir. 10/12/04), 887 So.2d 524, 528.

At trial, Mr. Riegel, Mr. Ether's attorney, testified as to the formalities taken in executing Mr. Ether's notarial will. He also stated that he gave Mr. Ether the original will at the end of their consultation, and he had no further contact with Mr. Ether after that point. Additionally, witnesses testified as to Mr. Ether's final wishes. The commonalities between the testimonies were that Mr. Ether did not desire for Margaret to inherit any property from him, and he wanted Glen to "take care" of Tiffany. Mr. Ether informed his half-brother (Glen), cousin (Joseph

Gilbert), and friends (Gregory Jackson and Ruffin McShellum) that he had a will; however, none of them knew the location of the original will. Margaret testified that she did not have any knowledge of the existence of Mr. Ether's will prior to his death, and she did not know where the will was located. Thus, there was no evidence presented as to the location of the original will prior to or after Mr. Ether's death.

However, there was ample evidence presented that Mr. Ether had no intention to revoke his will. Glen testified that Mr. Ether reiterated his desire to leave Glen all of his property on the morning of his death. Mr. Ether's friends, Mr. Jackson and Mr. McShellum, corroborated Glen's assertion by both testifying that Mr. Ether did not want to revoke, change, or destroy his will. Mr. Jackson testified that Mr. Ether desired for Glen to inherit all of his property because Mr. Ether felt that Margaret was trying to kill him. Further, while Mr. Ether indicated that he wanted Glen to take care of Tiffany, no evidence was presented to show that Mr. Ether wanted Tiffany to directly inherit any of his property. All of the evidence presented surrounding Mr. Ether's intentions about his property after his death confirm the legacy bestowed in the copy of the will.

After reviewing the evidence presented at trial, we find that Glen successfully rebutted the presumption that Mr. Ether intended to revoke or destroy his November 10, 2016 will with clear proof that: Mr. Ether executed a valid will with Mr. Riegel; Mr. Ether desired for Glen to inherit all of his property and, in turn, desired to exclude Margaret from inheriting any of his property; and, Mr. Ether did not intend to revoke the legacies in his will. Therefore, we cannot find that the trial court erroneously denied Margaret's petition to annul probated testament, vacate judgment of possession, and reopen succession on this basis.

DECREE

For the foregoing reasons, we affirm the trial court's judgment that denied

Margaret W. Ether's petition to annul probated testament, vacate judgment of possession, and reopen succession and dismissed her petition with prejudice.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
STEPHEN J. WINDHORST
JOHN J. MOLAISSON, JR.
SCOTT U. SCHLEGEL
TIMOTHY S. MARCEL

JUDGES



FIFTH CIRCUIT

101 DERBIGNY STREET (70053)

POST OFFICE BOX 489

GRETNA, LOUISIANA 70054

www.fifthcircuit.org

CURTIS B. PURSELL
CLERK OF COURT

SUSAN S. BUCHHOLZ
CHIEF DEPUTY CLERK

LINDA M. WISEMAN
FIRST DEPUTY CLERK

MELISSA C. LEDET
DIRECTOR OF CENTRAL STAFF

(504) 376-1400

(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **APRIL 30, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

24-CA-545

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE JUNE B. DARENSBURG (DISTRICT JUDGE)

R. SCOTT BUHRER (APPELLEE)

KAYLYN B. HANDY (APPELLANT)

RYAN C. HIGGINS (APPELLANT)

MAILED

NO ATTORNEYS WERE MAILED