

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

MELISSA REEVES,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-G-2821
NICHOLAS A. VITT, EXECUTOR OF THE	:	
ESTATE OF BETTY JEAN DiCILLO, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 07 PC 000232.

Judgment: Affirmed.

A. Pearce Leary, 401 South Street, Bldg. 4-A, Chardon, OH 44024 (For Plaintiff-Appellee).

Michael C. Lucas, Wiles and Richards, 35000 Kaiser Court, #306, Willoughby, OH 44904 (For Defendants-Appellants Nicholas A. Vitt and Amy Z. Vitt).

Richard A. Hennig, Baker, Hackenberg and Hennig Co., L.P.A., 100 Society National Bank Building, 77 North St. Clair Street, Painesville, OH 44077 (For Appellee Gayla Amato).

MARY JANE TRAPP, P.J.

{¶1} Nicholas A. Vitt appeals from a judgment of the Geauga County Court of Common Pleas, Probate Division, regarding a will contest filed by his sister, Melissa Reeves. The trial court invalidated the will after finding the signature on the will was forged. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} This appeal stems from a will contest involving three siblings. Plaintiff, Melissa Reeves, is the daughter the late Betty Jean DiCillo. Defendant, Nicholas A. Vitt, now also deceased, was her son and the executor of her estate. Also named as a defendant in the will contest complaint was Mrs. DiCillo's other daughter, Gayla Amato.

{¶4} This court had a previous occasion to review an unrelated appeal involving Mrs. DiCillo and her three children. In that case, Mr. Vitt filed an application in 2004 to be appointed a guardian of the person and estate of Mrs. DiCillo. The trial court appointed Mr. Vitt and Mrs. Reeves as co-guardians. Subsequently, Mrs. DiCillo and Ms. Amato filed a motion to terminate the guardianship, which the trial court denied. Mrs. DiCillo and Ms. Amato appealed that decision, and, on April 13, 2007, this court affirmed the trial court's decision. *In re Guardianship of the Pers. & Estate of DiCillo*, 11th Dist. No. 2006-G-2718, 2007-Ohio-1785. Mrs. DiCillo died on April 12, 2007, the day before our opinion was released.

{¶5} A week after his mother's death, Mr. Vitt, as the executor of her estate, had a Last Will and Testament of Betty Jean DiCillo (hereafter "the will") admitted to the Geauga County Probate Court. The will, which disinherited Ms. Amato, was allegedly executed by Mrs. DiCillo on March 19, 2000, sixteen days after her husband died. Mr. Vitt's attorney, Robert Rosplock, prepared the will according to the instructions he received from Mrs. DiCillo in a telephone call initiated by Mr. Vitt. That call was made while she was at still at the hospital recovering from multiple medical conditions following her husband's sudden death.

{¶6} Mr. Vitt also arranged for the execution of the will. Ronald Simmons and Dale Francis, both casual acquaintances of Mr. Vitt, were asked by him to be witnesses to his mother's will. They both testified they went to her home and signed their names on the will after Mrs. DiCillo apparently signed it; yet the medical records from Geauga Regional Hospital indicate Mrs. DiCillo was an in-patient at its facility on the date the will was allegedly executed.

{¶7} Along with the will, two other documents, a mortgage deed and a mortgage note, were also allegedly signed on the same occasion by Mrs. DiCillo. These documents related to a purported debt owed by Mrs. DiCillo to Mr. Vitt and his wife which arose many years ago; the note stated Mrs. DiCillo owed the Vitts a principal amount of \$142,797.46 at 8% interest from August 1, 1992. These two documents are the subject of a declaratory judgment action in Geauga County Court of Common Pleas and not part of the instant case. However, they were admitted as exhibits in this case, as two handwriting experts testified at trial that the signatures on all three documents were penned by the same individual, who was not Mrs. DiCillo.

{¶8} According to his own testimony, Mr. Vitt was in possession of the purported will since its execution in 2000. After its admission to probate, Mrs. Reeves filed a complaint contesting the will.

{¶9} Although Mrs. Reeves stands to inherit more under the purported will, she asserted her mother did not sign the will. The will contest was actually against her pecuniary interest, as she and her brother would each receive fifty percent of her mother's estate, estimated to be \$1.5 million. If the will were to be declared invalid, however, she would inherit only a one-third share.

{¶10} The Preparation of the Will

{¶11} During the bench trial, Attorney Robert Rosplock testified that he received a telephone call one day from Mr. Vitt from his mother's hospital room. Mr. Vitt informed him his mother desired to speak with him regarding her will. Mrs. DiCillo then got on the phone and Attorney Rosplock talked to her for fifteen to twenty minutes regarding the will's content. Several days later Attorney Rosplock prepared the now contested will and had it delivered to Mr. Vitt. Attorney Rosplock was not involved in its subsequent execution, and he was compensated for the work by Mr. Vitt, who performed auto repair services on Attorney Rosplock's vehicles.

{¶12} The Day the Will was Purportedly Executed

{¶13} Melissa Reeves testified that on March 19, 2000, the alleged date of the signing of the will, her mother was recuperating in Geauga Hospital's skilled nursing facility after falling ill following her father's sudden death. She identified medical records from the hospital, which documented that her mother was admitted on March 11 to the hospital's emergency room, discharged on March 17, 2000, and then transferred to the hospital's sub-acute care center on March 18, where she remained until March 28, 2000. The medical records included progress notes showing Mrs. DiCillo's condition on March 18, 19, and 20. With the help of a journal she kept, Mrs. Reeves testified she remembered she and her husband brought her mother's dog to visit with her mother at the hospital on March 19, 2000 from 4:00 p.m. to 9:40 p.m.

{¶14} Mr. Vitt testified that his mother signed the will on March 19, 2000, at her home. He testified that he called his mother at the nursing facility that day and was told by the staff that she was not there. The person with whom he spoke did not seem

concerned that his mother was gone. He then called her home and she answered the phone. When questioned as to how his mother, who wore a prosthesis and required the assistance of a wheelchair and assistance into and out of a car, could have checked out of the facility on her own on March 19, 2000, and apparently checked herself back into the facility the next day, Mr. Vitt could not explain, other than stating that she had done it before during a previous hospitalization.

{¶15} Both witnesses to the will, Ronald Simmons and Dale Francis, testified. Ronald Simmons, who had some business dealings with Mr. Vitt and was a notary public, was asked by Mr. Vitt to come to Mrs. DiCillo's house to be a witness to her will. When he arrived at her house, Mr. Vitt, Dale Francis, and a third individual, Dean Baber, were already in the house. Mrs. DiCillo was sitting in a chair by the fireplace, with some papers on her lap and a felt tip pen in her hand. Mr. Vitt was next to his mother, and they were having a discussion. Mr. Simmons sat across the room from the two of them. Mr. Vitt approached and handed him the documents, which, for all he knew, were the papers she had just signed. He testified he did not have independent recollection of seeing her sign the will prior to signing it himself. His signature was not on the same page as the purported signature of Mrs. DiCillo. Mr. Simmons was also the notary on the mortgage deed. As to the dating of the will, he testified the handwritten date of "19" does not look like his handwriting. He also testified that he had no independent recollection that the signing of the will occurred on the date of March 19, 2000. When asked, "you didn't know exactly what it was that you were witnessing or notarizing and [] you didn't want to know?" he replied, "yes, sir, that would be fair to say."

{¶16} The other witness to the will, Dale Francis, testified that he went to Mrs. DiCillo's home to sign his name as a witness to her will. He stated he saw her signing some papers and was "pretty confident" the will was among the papers she signed before Mr. Vitt handed them to him for his signature. However, during his deposition, he stated at one point, "I would be lying to you to tell you I seen her sign this paper. All I can tell you, papers were on her lap when I walked in there and she signed the paper and then I signed my paper." Like Mr. Simmons, he also testified that he could not verify independently he went to Mrs. DiCillo's home on the date of March 19, 2000.

{¶17} Dean Baber, a friend of Mr. Vitt, was also asked by Mr. Vitt to be present as a "back-up" witness for Mr. Francis. He testified Mr. Vitt stood next to his mother while Mr. Simmons and Mr. Francis were sitting some distance from her. He testified Mrs. DiCillo had papers in her lap while holding a pen, and he saw papers being passed from her to Mr. Vitt and then to the other two individuals. It was his "assumption" that she signed both documents. He testified the event took place on a Sunday but could not recall whether it was March 19, 2000.

{¶18} Mrs. Reeves testified that the first time she saw the will was after her mother passed away. When she saw it, "it just jumped out at [her] immediately that that was not [her] mother's signature." She explained that she helped her mother with her finances and therefore had often seen her sign her checks. She further described her mother's poor vision and explained that because her mother was blind in one eye and had serious impairment in the other, her mother could not sign her name across a straight line, the way it appeared in the will and the other documents allegedly also signed by her mother on the same occasion.

{¶19} Mrs. Reeves also testified that sometime after March of 2000, her mother asked her to write “void” on an unexecuted copy of the will prepared by Attorney Rosplock.

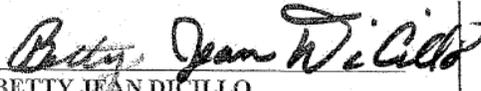
{¶20} Mrs. Reeves’s husband, Kevin Reeves, testified that his mother-in-law told his wife and him that Mr. Vitt had given her a copy of the will while she was at the hospital and she was very upset about it. She asked Mrs. Reeves to write “void” over the will, and his wife complied.

{¶21} The Experts

{¶22} Three handwriting experts offered their opinions. Dr. Philip Bouffard, a forensic document examiner, testified for Mrs. Reeves regarding the authenticity of the signature on the will. He compared Mrs. DiCillo’s alleged signature on the will, the mortgage deed, and the note, to her known signatures in six photocopied documents. He testified that the three questioned signatures were written by the same individual and were “natural” handwriting. He explained that the person writing those signatures did not make any attempt at copying Mrs. DiCillo’s signature, because “there were quite a number of things that were different. Some are very obvious.”

{¶23} The following is a reproduction of Plaintiff’s Exhibit 29, which shows a comparison of the six known signatures by Mrs. DiCillo with the three questioned signatures.

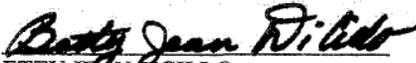
SIGNATURES OF BETTY DiCILLO Size as on documents


BETTY JEAN DICILLO

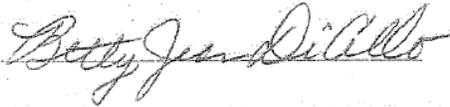
Will Signature


BETTY JEAN DICILLO

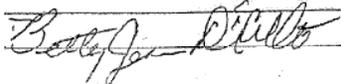
Mortgage Deed


BETTY JEAN DICILLO

Mortgage Note



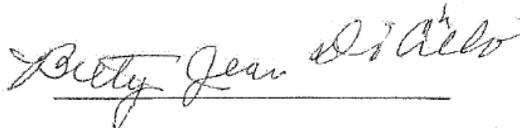
Check 2121 3/3/2000



Geauga Hospital 3/28/2000



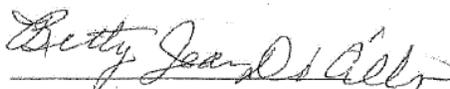
Cleveland Indians Stock Document 4/4/2000



Irrevocable Stock or Bond Power 4/5/2001



Letter of Indemnity 4/5/2001



Affidavit of Domicile 4/5/2001

EXHIBIT 29
(PAGE 1 OF 1 PAGES)

{¶24} The main differences, as Dr. Bouffard observed, concerned the capital letters. Regarding the capital letter “B” in “Betty”, there was a lead-in stroke to the letter “B” in the known signatures but that lead-in stroke was absent in all of the questioned signatures. Regarding the capital letter “J” in “Jean”, the “J” in the known signatures had an axis from northeast to southwest whereas the “J” in the questioned signatures was slanted in the opposite direction. Regarding the capital letter “D” in “DiCillo”, the letter “D” in the question signatures had a prominent loop, which was absent in the known signatures. In addition, the connection from the letter “D” to the next letter “i” in “DiCillo” in the questioned signatures was very different from the known signatures. He noted these differences were “extremely significant.” The differences were so obvious that Dr. Bouffard believed there was not even an attempt at copying Mrs. DiCillo’s signature.

{¶25} He also noted minor differences such as those found in the letter “n” in “Jean” and “C” in “DiCillo” – they were not completely formed in the known signatures but were so in the questioned signatures. He commented however these differences were not as significant as those indicated in the capital letters. After noting all the differences, Dr. Bouffard concluded that “[i]n my opinion in this particular case [], this is somebody else’s writing, writing in a natural fashion, without any real knowledge of what Betty Jean DiCillo’s writing looks like, and just writing the signature.” He testified that, based upon a reasonable degree of scientific certainty, his opinion is that “the signature on the will, the mortgage, and the note are not the writing of the late Betty Jean DiCillo.”

{¶26} Another expert, Harold Rodin, also a forensic document examiner, testified for Ms. Amato. He examined over twenty documents containing Ms. DiCillo’s

known signatures, some of them original documents. He observed the following differences: (1) regarding the letter “B” in “Betty”, there was neither an initial entry stroke nor a loop in the signatures in the will, the mortgage deed, and the note, unlike the signatures in the comparison documents; (2) regarding the letters “b” and “e” in “Betty”, there was a difference in the spacing between these two letters; (3) the positioning of the crossing stroke in “t” in “Betty” was different; (4) the formation of “J” in “Jean” was different; (5) the initial stroke of the capital letter “D” in “DiCillo” was different; and (6) the dots on the letter “i” in “DiCillo” were also different. Mr. Rodin also noted the questioned signatures were written evenly on the signature line while they were off the line in the documents containing the known signatures. He testified that based upon a reasonable scientific certainty the signatures in the questioned documents were not written by the writer of the known documents.

{¶27} Hans Gidion, also a forensic document examiner, testified as an expert for Mr. Vitt. He examined the same known signatures as Mr. Rodin. Comparing these signatures to the alleged signature on the will, he concluded to a reasonable degree of professional certainty that Mrs. DiCillo “had the ability to have written the question signature.” When asked about the lack of the lead-in stroke in the capital letter “B” in “Betty” on the will, he stated that he could not imagine someone who forged another’s signature would omit something so important in the very first stroke of the initial letter. To him, the omission of this important feature raised a “red flag” and led him to believe the signature was actually penned by Mrs. DiCillo *herself*. He also characterized the differences in the letter “J” in “Jean” and “D” in “DiCillo”, as well as other differences

pointed out by Dr. Bouffard and Mr. Rodin, as mere “variations.” He stated that Mrs. DiCillo was “capable of a great range of variation” in her handwriting.

{¶28} The Will is Invalidated

{¶29} The trial court declared the will invalid, finding that “[t]he witnesses to the will signing were present in the room when the decedent allegedly signed the will, but did not carefully witness the signing of the document and paid little attention to the conversation that took place between Nicholas Vitt and his mother at the time the document was allegedly signed.”

{¶30} The court stated: “While the Court finds the testimony of the witnesses, particularly the witness Ronald Simmons, to be credible in that they believed that they were witnessing the Last [W]ill and Testament of Betty Jean DiCillo, the Court finds that the signature on the purported will is not the signature of Betty Jean DiCillo. *** The Court finds specifically after considering the testimony of expert witnesses, and having carefully compared the signatures on documents allegedly signed on the 19th day of March, 2000, to known signatures of the decedent, that the signature on the alleged will is clearly not the signature of Betty Jean DiCillo. The court also noted that it was not possible for her to have participated in a will signing ceremony at her home on March 19, 2000, because she was hospitalized at Geauga Regional Hospital on March 11, 2000, discharged from the hospital to its sub-acute facility on March 17, 2000, and not discharged from that facility until March 28, 2000.”

{¶31} Addressing the discrepancies in the evidence, the court offered the following explanation: “The evidence suggests that what most likely occurred was that sometime after the decedent was discharged from the sub-acute care facility, Nicholas

Vitt staged a will signing ceremony at the home of the decedent. The decedent did in fact sign some document or documents at that time, but not the documents purported to be the will, mortgage deed, and note alleged to have been signed on March 19, 2000. The witnesses were presented with the fraudulent documents to which they in good faith attached their signatures as witnesses in the mistaken belief that the documents were the documents that the decedent had signed while they were present in the room.”

{¶32} Mr. Vitt now appeals, assigning the following error for our review:

{¶33} “The trial court erred in declaring the Last will and Testament of Betty Jean DiCillo invalid contrary to the law and evidence.”

{¶34} **Standard of Review**

{¶35} This court has recognized that “[o]nce a will is entered into probate, there is a presumption that it is valid.” *Mattax v. Moore*, 72 Ohio App.3d 647, 649, citing *Hutson v. Hartley* (1905), 72 Ohio St. 262. However, as in all reviews of civil judgments, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris v. Const. Co.* (1978), 54 Ohio St.2d 279, syllabus. See, also, *Seasons Coal Co. v. Cleveland* (1980), 10 Ohio St.3d 77, 80.

{¶36} As an appellate court, we evaluate the findings of the trial court under a presumption that those findings are correct. *Seasons Coal* at 80. This is because the trier of fact is in the best position “to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Id.*

{¶37} As this case turns on the credibility of the witnesses, we bear in mind that while “[a] finding of an error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not.” *Seasons Coal* at 81. As a reviewing court, we are unwilling to second guess the trial court’s determination where there is competent, credible evidence to support it, nor are we willing to weigh the credibility of the witnesses. *Karnofel v. Girard Police Dept.*, 11th Dist. No. 2004-T-0145, 2005-Ohio-6154, ¶19.

{¶38} In a civil manifest weight of the evidence analysis required by the instant case, a reviewing court may not simply “reweigh[] the evidence and substitute[] its judgment for that of the [trier of fact].” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶40. Cf. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387(in the criminal context, a reviewing court’s role in analyzing a criminal manifest weight of the evidence argument is that of the “thirteenth juror”).

{¶39} In this will contest, the issue to be resolved is whether the signature on the purported will was penned by Mrs. DiCillo. Because the two witnesses to the will were unable to state with certainty that they personally witnessed Mrs. DiCillo signing the will presented for probate and could not verify that the signing of the will occurred on the alleged date, the case necessarily turns on the testimony provided by the handwriting experts. Both Dr. Bouffard and Mr. Rodin compared the signature in the purported will to Mrs. DiCillo’s known signatures and observed significant differences. Both testified to a reasonable degree of scientific certainty that the signature on the will was not written by Mrs. DiCillo.

{¶40} Although Mr. Vitt also presented a handwriting expert, Mr. Gidion, who testified that the signature on the purported will could have been written by Mrs. DiCillo, we note that “[o]nce expert testimony was admitted, it was the jury’s role to assess the experts’ credibility and to assign weight to the experts’ testimony and opinions.” *Pangle v. Joyce* (1996), 76 Ohio St.3d 389, 395. The trial court here found the expert testimony by Dr. Bouffard and Mr. Rodin to be more credible than that of Mr. Gidion. As the rule committing to the trier of fact the determination of the credibility of witnesses and the weight to be given to their testimony applies equally to expert witnesses, we will not second guess the trial court’s determination regarding the credibility and weight of the expert testimony in this case.

{¶41} “In any will-contest action, the person who can give the best evidence of influence is dead. Therefore, most evidence will be circumstantial, leaving the factfinder to draw permissible inferences.” *Redman v. Watch Tower Bible & Tract Soc. of Pennsylvania* (1994), 69 Ohio St.3d 98, 102. Here, the trier of fact did not even have to rely on circumstantial evidence, as direct evidence from two handwriting expert witnesses were presented. See Black’s Dictionary (6 Ed.1990) 460 (defining direct evidence as “[e]vidence, which if believed, proves existence of fact in issue without inference or presumption”).

{¶42} Furthermore, the evidence also shows that on March 19, 2000, the date Mrs. DiCillo and the witnesses allegedly signed the will at her home, she was still recuperating in the Geauga Regional Hospital’s sub-acute care center. This evidence corroborates the testimony of both the expert witnesses and Mrs. Reeves that the signature on the will was not authentic.

{¶43} In explaining the discrepancy between the signature's lack of authenticity and the testimony of the two witnesses who testified Mrs. DiCillo signed what they believed to be the will, the trial court reasonably deduced that Mr. Vitt staged a will signing ceremony, where Mrs. DiCillo did, in fact, sign some document on that occasion but not the document purported to be the will presented to the probate court.

{¶44} There is competent, credible evidence in the record to support the trial court's finding that the signature on the purported will was forged, and we will not reverse the judgment as being against the manifest weight of the evidence.

{¶45} The judgment of the Geauga County Court of Common Pleas, Probate Division, is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.