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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN A. MCCLOSKEY, personally and as Executor of the Estate of Edward McCloskey, THE ESTATE OF EDWARD MCCLOSKEY. Respondents-Below, Appellants. v. RICHARD A. MCCLOSKEY, Petitioner-Below, Appellee.	No. 568, 2014 Court Below, Chancery Court of the State of Delaware, C.A. 6061-AGB

APPELLANTS' REPLY BRIEF

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I. NATURE AND STAGE OF THE PROCEEDINGS

This action commenced on September 10, 2010, by the filing of a Petition to Review Proof of Will, to Specifically Enforce Promise to Make a Testamentary Devise, to Impose a Constructive or Resulting Trust, and to Rescind Deeds. The Appellee Richard McCloskey is the older brother of the Appellant John McCloskey who is the Executor of co-Appellant, the Estate of Edward McCloskey.

The Appellee became aggrieved when he discovered that his father Edward McCloskey had not left him the family farm house in which the Appellee and his family had resided at the time of his father's passing. The Appellee claims that his father had promised to leave him the home on the condition that he, the Appellee, pay for certain repairs and/or improvements to the home over the course of four decades.

There is no writing evidencing this alleged "promise." The only writing to which the Appellee points shows he is entitled to the property is a Will given to him by his father in 1977. Edward McCloskey, however, made two subsequent Wills each revoking all prior Wills. Notably, Edward's 1997 Will left the Appellee a life estate in the home. By 2003, Edward changed his Will again and left the Appellee a one-year estate in the home. The Appellee was unaware of his father's changes to his Will until after Edward had passed away.

The Appellant lived next door to his father and the Appellee for many years. The Appellee claims that the Appellant exerted undue influence over his father, which allegedly caused Edward to change his Will twice.

The parties engaged in substantial discovery and attempted to resolve the action through mediation but such attempt ultimately proved unsuccessful.

Trial in this matter was held from April 22 to April 25, 2013, and then concluded on June 24, 2013. Substantial briefing of the issues took place, including Exceptions to the Master's Draft Bench Report and Final Report. Chancellor Andre G. Bouchard accepted the Master's Final Report and entered it as the Chancery Court Order from which this appeal was taken.

The Appellee filed an Answering Brief on December 17, 2014. This is the Appellants' Reply Brief.

II. SUMMARY OF ARGUMENT

This appeal is from a Chancery Court Opinion of September 3, 2014 (the "Opinion"), which granted the Appellee's claim for an Oral Contract to Make a Will and accordingly rescinded a deed dated 2008 from the decedent to the Appellant John McCloskey. The Opinion should be reversed for five separate reasons.

(1) Whether the evidence presented at trial did not support a finding of an oral contract to make a Will;

(2) Whether the finding of the court regarding the oral contract to make a will did not comply with the statute of frauds at 6 DEL. C. § 2715;

(3) Whether the alleged "oral contract" between the decedent and the Appellee was not supported by adequate consideration;

(4) Whether the alleged "oral contract" was too vague to be enforceable; and

(5) Since the rescission of the 2008 deed of approximately three acres to the Appellant John McCloskey was predicated upon the finding of an oral contract to make a will, whether the rescission count should similarly be reversed.

III. STATEMENT OF FACTS

The Appellant restates and reiterates the Statement of Facts as described in its Amended Opening Brief as if fully stated herein.

This Reply Brief will only address some of the more egregious misstatements of fact and/or law for this Court to decide this Appeal correctly. It should be noted initially that the Appellant fully understands the standard and scope of review of the lower court's findings with respect to *its* findings of fact. While the Appellant strongly disagrees with *some* of those findings, contrary to the Appellee's assertion(s), this Appeal was not taken in an attempt to request that this Court reverse those specific findings of fact. This Appeal is largely based on the lower court's interpretation of law, some issues of which this Court has not yet opined in any legal precedent.

Specifically, this Court has not addressed whether an oral promise to make a Will may be specifically enforced through biased and/or interested testimony of the declarants without any corroborating written agreement(s) thereto.

Second, this Court has not addressed whether the statute of frauds in the context of a validly executed Will may be overcome by the alleged "part-performance" exception to the statute of frauds without any extraneous writing expressing the alleged terms of the parties' agreement.

Third, this Court has not addressed whether a prior unrevoked Will (in this case twice-revoked) may satisfy the written requirement to overcome the statute of frauds' part-performance exception. Even assuming this Court were to accept that a prior revoked Will may establish the writing requirement to the statute of frauds' part-performance exception, this Court has not yet established either way whether such a prior revoked Will must or must not contain the material terms of the parties' agreement.

With these issues in mind, the Appellant turns to some of the more egregious misstatements of the record in its Answering Brief. First, the Appellee stated, "[i]t is undisputed that Edward never paid for a single improvement after Richard moved into his father's home." Answering Brief at 4. It is axiomatic that this statement is not only false, the assertion that Edward never paid for any improvements to the property is completely belied by the record. The April 2000 statement signed by Edward himself outlines several expenses that Edward asserts he paid for contrary to the sworn testimony of the Appellee and his cohorts. In addition, the record reveals several "receipts" undisputedly written in Edward's handwriting that show various payments of cash to Richard and/or Wanda McCloskey. It is noteworthy that both Richard and Wanda categorically denied receiving any such cash payments from Edward, which deserves closer scrutiny regarding their credibility in this action.

In addition, the Appellee stated in its Answering Brief, "Significantly, Richard and/or Edward shared the contents of the 1977 will with [the Appellant], so that [the Appellant] was informed about what he would receive upon Edward's death." Answering Brief at 5. While it is true that the Appellee probably mentioned the fact that the 1977 Will left the Appellant some of Edward's real property, it is undisputed that the Appellee failed to mention that the Appellant was designated as a co-Executor to that Will, and further that the Appellee failed to provide the Appellant with a copy of said Will. In addition, the 1977 Will is largely irrelevant to the issues in this case. The 1977 Will, among other things, was revoked by a 1991 codicil, and two subsequent Wills, which were drawn up and executed solely at the behest of the decedent Edward McCloskey.

It is obviously convenient for the Appellee and his wife to take the position now that Edward has died that Edward made any such alleged oral promise to leave the farm and house to Richard and Wanda in exchange for certain repairs to the home and/or farm. Quite simply, Edward is not here to defend his wishes with respect to the disposition of his assets via the validly executed Wills in 1997 and 2003.

The Appellee further states in its Answering Brief with respect to the April 2000 document signed by Edward, "[i]n fact, [the Appellant] conceded at trial that he prompted his father to write about some of the grievances." Answering Brief at

9. This is a carefully calculated misrepresentation of the record. Since the Appellant, his wife Linda, and Edward were the only individuals who had knowledge of this document, the Appellant's testimony regarding this document is most helpful to its understanding. The Appellant quite clearly stated that he did not "prompt" his father to write anything contained in that document. The Appellant stated unequivocally that he was tired of hearing his father's complaints about the Appellee and his wife, and that if he (the Appellant) wrote down these grievances, would Edward sign it. Edward stated that he would. None of the substantive content in that April 2000 document signed by Edward originated from the Appellant or his wife Linda. Linda simply typed the document and added a signature line for Edward.

The Appellee further bends the record by stating with respect to the 2003 Will, "[a]gain, [the Appellant] scheduled the appointment with a lawyer for Edward to change his will, and again, [the Appellant] participated in the office conference with the lawyer." Answering Brief at 11. This assertion and a few other similar assertions in the Answering Brief suggest that the Appellant somehow influenced his father's wishes with respect to the terms of the 2003 Will. Nothing could be further from the truth, and nothing in the record suggests any such influence took place. The Appellant stated quite clearly that he simply sat and listened to the discussion between his father and the attorney with respect to

the 2003 and 1997 Wills, and said nothing during such meetings. The decedent alone was responsible for terms of those Wills. It should be noted that the Appellee does not dispute that Edward was the sole person responsible for the execution of all of his Wills and their contents.

It should not be lost on this Court that even assuming for the moment that the decedent insinuated such an alleged "promise" to leave certain real property to the Appellee over the course of several decades, the 2003 Will itself leaves the Appellee a one-year estate in the property with the remainder to be divided between the Appellant and his sister. If the Appellant (the youngest of the decedent's children) were really in such alleged control over his father's wishes, it defies comprehension why the Appellant would have the Appellee be devised a one-year estate with a remainder interest divided with another sibling.

Lastly, the Appellee incredibly states in its Answering Brief, "Chuck Holliday and Jordan McCloskey both testified that they heard Edward promise Richard the property on several occasions. . . . Neither witness was a beneficiary of any of Edward's wills, thus, both should be considered disinterested, corroborating witnesses." Answering Brief at 21 (references omitted). These witnesses are at the heart of this case and this appeal. Regardless of the fact that both of these witnesses are not direct beneficiaries of the outcome of this action, it is clear that both are very interested, if not completely biased witnesses. Chuck

Holliday is the Appellee's wife's brother. Moreover, he was (and apparently still is from time to time) the Appellee's employee. Jordan McCloskey is married to the Appellee's only abled son. The Appellee has two sons. The older son is deaf and has little if anything to do with the administration of the farm. The younger son who actively works the farm with the Appellee is married to Jordan McCloskey.

IV. LEGAL ARGUMENT

The lower court's Opinion (the "Opinion") solely made a finding on the Oral Promise to Make a Will claim, and consequently made a finding that the 2008 Deed should be rescinded as a consequence of its ruling on this count. The Appellant does not believe it is necessary to regurgitate the legal arguments previously raised in his Amended Opening Brief. Thus, this Reply Brief will only address and re-emphasize a couple of points in response to the Answering Brief.

The Delaware's Statute of Frauds is a clear legislative mandate. It provides as follows:

> No action shall be brought to charge the personal representatives or heirs of any deceased person *upon any agreement to make a will* of real or personal property, or to give a legacy or make a devise, *unless such agreement is reduced to writing*, or some memorandum or note thereof is signed by the person whose personal representatives or heirs are sought to be charged, or some other person lawfully authorized in writing, by the decedent, to sign for in the decedent's absence. This section shall not apply to any agreement made prior to May 1, 1933.

6 DEL. C. § 2715 (emphases added).

These are not merely words to be quibbled over when a disinherited beneficiary is not happy with a decedent's last wishes. Quite simply, this is all this case is about—a disinherited son was not happy with his father's changes to the conveyance of his property as he saw fit after he died.

Here, the Appellee offered no writing of any kind that would comply with

the Statute of Frauds, and no writing satisfying it was presented in evidence in this matter.

Further, to satisfy the writing requirement, the Appellee relies on a Will (or Codicil) revoked *twice* by the decedent. The Appellants could find no Delaware case that held a prior revoked will could satisfy the writing requirement under the above-referenced Statute of Frauds. If this Court were to find that either the 1977 Will or 1991 Codicil satisfied the writing requirement for the exception to the statute of frauds writing requirement, when those documents were clearly revoked twice, this Court would create new case law not recognized in any other jurisdiction.

Other jurisdictions cited in the Appellant's Brief have addressed the issue of whether a prior revoked Will could satisfy the writing requirement for a prior revoked Will. *See, e.g.*, *Busque v. Marcou*, 147 Me. 289 (Me. 1952); *Gilbert v. Gilbert*, 66 N.J. Super. 246, 254 (App. Div. 1961); *McCraw v. Llewellyn*, 256 N.C. 213 (N.C. 1962); *Luders v. Security Trust & Sav. Bank*, 121 Cal. App. 408, 9 P.2d 271 (Cal. App. 1932). All of these cases are consistent with Delaware's case law on the analysis of the claim for an oral promise to make a will. Specifically, in order for the prior revoked Will to comport with the writing requirement of the Statute of Frauds, it must clearly establish the intent and obligation of the parties. In other words, the Will itself must contain the material terms of the agreement, the

terms must be clear, and those terms cannot be aided by parol evidence. No such evidence is present in this case. Delaware would set new precedent by separating itself from all other jurisdictions regarding the narrow exception to the statute of frauds. It is not nor should this be the law of this State that someone could simply challenge the validity of a properly executed Will by marshalling a handful of biased and/or interested witnesses to the stand to testify that the decedent intended something differently.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellant respectfully request that the Court Reverse the lower court's decision in this action and GRANT the Appellants such other relief, as the Court deems just and proper.

Dated: January 2, 2015

Respectfully submitted,

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/s/ *Jack Shrum*

"J" Jackson Shrum (Bar No. 4757)