

DA 24-0033

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 249

IN THE MATTER OF THE ESTATE OF:

JESSE L. BECK,

Deceased.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Carbon, Cause No. DP-2022-27
Honorable Matthew J. Wald, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Ian P. Gillespie, Driggs, Bills & Day, P.C., Missoula, Montana

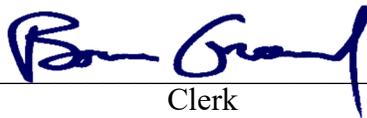
For Appellee:

Eric W. Hinckley, Lowe Law Group, Ogden, Utah

Submitted on Briefs: June 12, 2024

Decided: October 29, 2024

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Jason Beck (Jason) appeals a January 10, 2024 Order from the Twenty-Second Judicial District Court, Carbon County, denying his petition for formal probate of a phone video taken by his brother, Jesse Beck (Jesse), the Decedent, which Jason proffered as Jesse’s Will, on the ground that the video recording was not a “document or writing upon a document” as required by § 72-2-523, MCA, for intended wills.

¶2 We consider the following issue, and affirm:

Whether a video taken by the decedent qualifies as an intended will under § 72-2-523, MCA.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On July 15, 2022, Jesse crashed his motorcycle on Highway 212 in Carbon County, Montana. While Jesse was receiving help on the side of a road from another driver, a Carbon County Sheriff’s Office deputy, who was responding to the report of Jesse’s accident, tragically struck and killed both Jesse and the other driver. Jesse was survived by his only child, Alexia Beck (Alexia).

¶4 Four days prior to his death, Jesse had sent Jason a phone video recording of himself, in which Jesse stated:

I, Jesse Beck, give all my possessions, if anything happens to me whatsoever, I give all my possessions, everything, to Jason Beck, my brother. Christina Fontineau does not get one thing, not one thing.

Limited detail about the circumstances surrounding the video, other than its delivery to Jason’s cellphone, is set forth in the record. No witnesses appear or are apparent in the recording, and Jesse’s words were not reduced to written form and signed by Jesse.

Christina Fontineau is stated to be a nonrelative who would not be entitled to take from Jesse's Estate (the Estate) under the laws of intestacy.

¶5 Following Jesse's death, Alexia filed a petition for informal appointment as personal representative in intestacy to administer the Estate, which was ordered on July 26, 2022. She also initiated a wrongful death action in connection with the accident in which Jesse was struck and killed. In October 2023, Jason filed a complaint seeking intervention in the wrongful death action, a petition for formal proceedings to probate Jesse's video recording as an enforceable will, which he argued would make him the sole devisee, and for appointment as personal representative of the Estate and removal of Alexia as personal representative. Alexia filed an objection, arguing the video did not qualify as a will under statute. The District Court ordered additional briefing on the question of whether the video could constitute a will.

¶6 After briefing, the District Court entered an order explaining that Jason was seeking probate of the video as a will under § 72-2-523, MCA. It noted the statute was titled "writings intended as wills," and permitted probate, in certain circumstances, of "a document or writing added upon a document," even if not executed in compliance with other statutory requirements. The District Court ruled the statute "by its own unambiguous terms does not allow a video to be considered as a document or writing upon a document that was intended as a will." It further reasoned that, even if it accepted Jason's argument that a video could be defined as a "document in a general sense, it makes no sense within the context of [§ 72-2-523, MCA]" because the requirement of a "document or a writing

upon a document impl[ies] that documents can be written on. It strains credulity to imagine that a video can have writing upon it.” The District Court distinguished a video from electronic versions of writings, such as electronic notes, because those could satisfy the definition of a writing or document that would “become indistinguishable from any other writing once printed out.” Consequently, the District Court held that “a video recording of a decedent, even if it records him or her expressing testamentary intent, does not qualify as a ‘document or writing upon a document’ as used in [§ 72-2-523, MCA],” and denied Jason’s petition to probate Jesse’s video recording.

¶7 Jason appeals.

STANDARD OF REVIEW

¶8 Orders “granting or refusing to grant” letters testamentary and “admitting or refusing to admit” wills to probate are immediately appealable. M. R. App. P. 6(4)(a),(b). Whether a district court properly refused to admit a disputed will to probate involves both questions of law and fact. *In re Estate of Hall*, 2002 MT 171, ¶ 9, 310 Mont. 486, 51 P.3d 1134. “We will not disturb a district court’s findings of fact unless they are clearly erroneous. A court’s findings are clearly erroneous if they are not supported by substantial credible evidence, the court has misapprehended the effect of the evidence, or our review of the record convinces us that a mistake has been committed. We review a district court’s conclusions of law to determine whether the interpretation of the law is correct.” *In re Estate of Orr*, 2002 MT 325, ¶ 12, 313 Mont. 179, 60 P.3d 962.

DISCUSSION

¶9 Sections 72-2-522 and 72-2-523, MCA, provide:

Execution — witnessed wills — holographic wills. (1) Except as provided in 72-2-523, 72-2-526, 72-2-533, and subsection (2) of this section, a will must be:

(a) in writing;

(b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and (c) signed by at least two individuals, each of whom signed within a reasonable time after having witnessed either the signing of the will as described in subsection (1)(b) or the testator's acknowledgment of that signature or acknowledgment of the will.

(2) A will that does not comply with subsection (1) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(3) Intent that the document constitute the testator's will may be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

Section 72-2-522, MCA.

Writings intended as wills. Although a document or writing added upon a document was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

(1) the decedent's will;

(2) a partial or complete revocation of the will;

(3) an addition to or an alteration of the will; or

(4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will.

Section 72-2-523, MCA.

¶10 Jason argues the use of the phrase “document or writing” within § 72-2-523, MCA, contrasts the “in writing” requirement for execution of wills under § 72-2-522, MCA, and “establishes the legislature's intent to allow non-written documents, such as video and

audio recordings, to also qualify as intended wills.” Noting dictionary definitions that incorporate electronic documents, and the statutory directive that the Uniform Probate Code (UPC) is to be “liberally construed and applied to promote its underlying purposes and policies,” § 72-1-101(2)(a), MCA, Jason argues that construing § 72-2-523, MCA, “to include video recordings as ‘documents’ would further the purpose of honoring testamentary intent and promote justice.”

¶11 Alexia answers that Jason’s effort to demonstrate the Legislature authorized video wills by his repeated references to the phrase “document or writing” omits critical language from § 72-2-523, MCA, which neither contrasts § 72-2-522, MCA, nor provides authorization of nonwritten wills. Under § 72-2-523, MCA, “writings intended as wills” require “a document or writing *added upon a document.*” Section 72-2-523, MCA (emphasis added). Alexia argues that, while “document” is not expressly defined in the UPC, § 72-2-522, MCA, provides that a holographic will that fails to satisfy will execution requirements can still be valid “if the signature and material portions *of the document* are in the testator’s handwriting,” and thus, she argues a “document” must be capable of both being written upon and signed. Section 72-2-522(2), MCA (emphasis added). Alexia also argues, contrary to Jason’s legislative intent argument, that “notably absent” from either of these statutes or the Official Comments to the statutes is any language whatsoever regarding usage of video or audio recordings as valid testamentary instruments.

¶12 The expansion of electronic media applications has resulted in proposed legislation to provide for and regulate their uses in commercial and legal affairs, but this has not

extended to approval of a nonwritten, video will. In 2001, the Legislature enacted the Uniform Electronic Transactions Act (UETA) to “facilitate electronic transactions consistent with other applicable law” by allowing the use of electronic signatures. Section 30-18-105, MCA. However, the Legislature limited the UETA, in the context here, by “specifically exclud[ing] from its scope laws ‘governing the creation and execution of wills, codicils, or testamentary trusts.’” *Meyer v. Jacobsen*, 2022 MT 93, ¶ 30, 408 Mont. 369, 510 P.3d 52 (citing § 30-18-103, MCA). In recent years, the Uniform Laws Commission (ULC) has produced the Uniform Electronic Wills Act (UEWA), for the purpose of “bring[ing] estate planning into the digital age by allowing the online execution of wills while preserving the legal safeguards to ensure a will’s authenticity.” *See* Unif. Elec. Wills Act (Unif. L. Comm’n 2021), <https://perma.cc/3ETG-FQRC>, <https://perma.cc/8KZF-M5HP>. The Montana Legislature has not adopted the UEWA, but even so, the Act as proposed by the ULC still “requires a testator to make a will that is readable *as text* at the time the testator electronically signs the document,” and the testator’s signature must be witnessed by two witnesses who add their own electronic signatures. *See* Unif. Elec. Wills Act § 5(a)(1)-(2) (emphasis added). There has not been, in any state, legislative authorization of nonwritten, video wills, nor approval of such a will by any court applying the UPC. *See* Natalie Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 Baylor L. Rev. 547, 583 (2019) (“Although statutory approval may not even be needed for documents that exist entirely in digital form saved on a computer, statutory approval would be needed for an electronic will in the form of a video

or audio recording.”). As the comments to the UEWA note, “[s]tatutes that apply to non-electronic wills require that a will be ‘in writing.’” Unif. Elec. Wills Act § 5 cmt. “All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing.” Unif. Elec. Wills Act § 5 cmt. (citing Restatement (Third) of Property: Wills and Donative Transfers § 3.1, cmt. i (Am. L. Inst. 1999).

¶13 Jason relies upon cases such as *In re Estate of Horton*, but the “document” there approved by the Court of Appeals of Michigan was an unsigned electronic note on the decedent’s phone that the decedent had referenced in a separate handwritten note and described as his “farewell,” and which included his instructions about where to find his will. *In re Estate of Horton*, 925 N.W.2d 207 (Mich. App. 2018). The Court reasoned, applying Mich. Comp. Laws § 700.2503, the same uniform provision as § 72-2-523, MCA, that “a will need not be written in a particular form or use any particular words; for example, a letter or other document, such as a deed, can constitute a will.” *In re Horton*, 925 N.W.2d at 212 (emphasis added). This ruling does not further Jason’s statutory argument.

¶14 Alexia’s argument is consistent with construing a statute “by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature.” *Mont. Env’t Info. Ctr. v. Mont. Dep’t of Pub. Serv. Regul.*, 2024 MT 56, ¶ 60, 415 Mont. 499, 545 P.3d 69. It is also consistent with the broader statutory structure. *See Penado v. Hunter*, 2024 MT 216, ¶ 13, 418 Mont. 167, ___ P.3d ___ (“Statutory construction is a holistic endeavor and must account for the

statute’s text, language, structure, and object.” (citations omitted)). The statute’s plain language and its structure and context clearly imply that a “document,” as used in § 72-2-523, MCA, is a physical paper or possibly digital file on which words are produced, and which would be capable of being signed and witnessed, thus not extending to a video or audio recording. There is no language to suggest that the Legislature contemplated audio or video recordings. See § 72-2-523, MCA (“Although a *document or writing added upon a document* was not executed in compliance with 72-2-522, the document or writing is treated as if it had been executed in compliance with that section” (emphasis added)). The Official Comments to the section explain that the purpose of § 72-2-523, MCA, is to “allow[] the probate court to excuse a harmless error in complying with the formal requirements for executing or revoking a will,” and was written to “reduce[] the tension between holographic wills and the two-witness requirement for attested wills.” Section 72-2-523, MCA, *Annotations*, Off. Cmt. There is no indication that this stated purpose—to relax formal execution requirements for written documents that “harmlessly” failed to satisfy all of the requirements—was intended to authorize entirely new forms of testamentary disposition not previously contemplated by the UPC. Jason contends that § 72-2-523, MCA, authorizes courts to “dispense with formalities if it is satisfied that the decedent intended the document to constitute his or her will,” but does not reconcile the statute’s narrowly stated purpose to cure “harmless error” in satisfying execution requirements. Jesse’s video, while undoubtedly expressing testamentary intent, comports with none of the § 72-2-522, MCA, requirements, nor attempts to. Even under the yet-to-be

adopted UEWA, the video satisfies none of its legal standards to ensure a will's authenticity. Unif. Elec. Wills Act § 5(a)(1)-(2). It was neither written, signed, or witnessed by anyone, nor accompanied by documentation attempting to do those things. Thus, to the extent that the video can be considered an attempted will, the errors are not harmless or de minimis. As Alexia argues, such an expansive interpretation of the harmless error exception could "render nearly all will formality obsolete and would likely invalidate both § 72-2-522 and § 72-2-523," the exception swallowing the rules.

¶15 Jason argues that Restatement (Second) of Property (Donative Transfers) supports an expansive reading of "document" to account for changes in technology. He notes that a comment in the Restatement defines a "donative document of transfer" as one that is "a writing, or the equivalent of a writing," which is defined in part as "[a] recording of spoken words" and extends to "[a]ny other technological development that in clear and convincing manner appropriately manifests the donor's intention to make a gift." Restatement (Second) of Property: Donative Transfers §§ 33.1 cmt. a, 32.1 cmt. b. The problem is that such expansive language is used by neither the statute nor the Official Comments to § 72-2-523, MCA. Nor is there any indication that § 72-2-523, MCA, was intended to incorporate that comment of the Restatement. When the Legislature has chosen to rely on the Restatement to support other concepts within the statute, it has done so explicitly. *See* § 72-2-523, MCA, *Annotations*, Off. Cmt. ("The rule of this section is supported by the Restatement (Second) of Property (Donative Transfers) § 33.1 comment g.").

¶16 We acknowledge Jason’s argument that we are required under § 72-1-101(2)(a), MCA, to “liberally construe” the UPC to promote its underlying purposes and policies, but this does not give the Court license to override express statutory language. *See Larson v. State*, 2019 MT 28, ¶ 29, 394 Mont. 167, 434 P.3d 24 (“*Except where contrary to express statutory language, courts must liberally construe statutes enacted for remedial or beneficent purposes*” (emphasis added) (internal quotations omitted)). The language of § 72-2-523, MCA, a UPC provision, requires a will to be a “document,” and for the reasons outlined above, we find no clear basis that would permit broad extensions of that term to entirely new forms of intended wills, here a video recording lacking any form of statutory authentication, even under a liberal construction of the provision. We thus conclude the District Court correctly denied Jason’s petition.

¶17 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR