IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 03, 2014 Session

IN RE ESTATE OF BILL MORRIS

Appeal from the Chancery Court for Franklin County
No. 19721 Jeffrey F. Stewart, Chancellor

No. M2014-00874-COA-R3-CV – Filed February 9, 2015

This is a will contest. Appellants, Bill Morris, Jr., and Cheryl Morris, appeal the trial court's determination that their Father's will was properly executed pursuant to the requirements of Tennessee Code Annotated Section 32-1-104. We conclude that the witnesses to the will only signed the affidavit of attesting witnesses and not the will itself. Accordingly, we reverse and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

KENNY ARMSTRONG, J. delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Eddy R. Smith and J. Scott Griswold, Knoxville, Tennessee, for the appellants, Bill Morris, Jr. and Cheryl Morris

Russell L. Leonard, Winchester, Tennessee, for the appellees, Gary Morris and Pamela Morris

Jerre M. Hood, Winchester, Tennessee, for the Estate of Bill Morris

OPINION

I. Factual and Procedural History

On October 10, 2008, Bill Morris ("Decedent") executed his Last Will and Testament. The Decedent died on July 7, 2011, leaving four surviving children: Bill Morris, Jr. and Cheryl Morris ("Appellants"); Gary Morris and Pamela Morris ("Appellees"). Decedent's daughter, Debbie Roberson, predeceased him and was survived by four children: Deidra Roberson, Vickie Roberson, Judith Roberson,

and Charles Michael Roberson (together "Grandchildren"). Because three of the Grandchildren are minors, the Probate Court appointed a guardian *ad litem* to represent their interests in this case. The will, signed by Decedent, omitted three of his heirs at law: Bill Morris, Jr., Cheryl Morris, and Charles Michael Roberson.

The Decedent's Last Will and Testament was admitted to probate on July 26, 2011, and letters testamentary were issued to Gary Morris and Pamela Morris, who were named in the will as Co-Executors. In support of the petition to admit the will to probate, the affidavits of the two attesting witnesses were submitted to the Probate Court.

On July 25, 2013, Bill Morris, Jr. filed a verified complaint and notice of will contest in the Probate Court of Franklin County, Tennessee. Therein, Appellant averred that Decedent's will was not properly executed because the will was not signed by witnesses as required by Tennessee Code Annotated Section 32-1-104. In response, Appellees filed a motion to dismiss the will contest, alleging that the will was properly executed and valid. On October 29, 2013, the probate court entered an order transferring the will contest to the chancery court for Franklin County, Tennessee. On November 18, 2013, Bill Morris, Jr. filed a motion for summary judgment in the chancery court action, averring that the will was invalid and seeking a determination that the Decedent died intestate. On this same date, Appellant, Cheryl Morris filed a motion to intervene as a Plaintiff in the will contest, and a motion for summary judgment adopting the arguments advanced by Appellant, Bill Morris, Jr. in his motion for summary judgment. Upon consideration of the various motions filed by the parties, the trial court entered a Final Order on April 7, 2014, granting the Appellees' motion to dismiss the will contest, which the trial court treated as a summary judgment motion, and denying the Appellants' motions for summary judgment. Specifically, the trial court found that the testator and the two witnesses executed the will in compliance with Tennessee Code Annotated Section 32-1-104.

II. Issue

Whether the trial court erred when it held that the execution of Decedent's will was in compliance with the statutory requirements set out in Tennessee Code Annotated Section 32-1-104.

III. Standard of Review

As this case presents a question of statutory interpretation, it is a question of law. With respect to the trial court's conclusions of law, our review is *de novo* with no presumption of correctness. ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997); ***Southern Constructors, Inc. v. Loudon County Bd. of Educ.***, 58 S.W.3d

706, 710 (Tenn. 2001); ***Broadbent v. Broadbent***, 211 S.W.3d 216, 219-20 (Tenn. 2006).

IV. Analysis

There is no dispute that the testator properly signed his will at the end of the document. The question raised here is whether the will was properly signed by the witnesses as required by Tennessee Code Annotated Section 32-1-104. This section sets out the formal requirements that must be met for a will to be validly executed in Tennessee:

> The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:
> (1) The testator shall signify to the attesting witnesses that the Instrument is the testator's will and either:
> (A) The testator sign;
> (B) Acknowledge the testator's signature already made; or
> (C) At the testator's direction and in the testator's presence have someone else sign the testator's name; and
> (D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.
> (2) The attesting witnesses must sign:
> (A) In the presence of the testator; and
> (B) In the presence of each other.

Tenn. Code Ann. § 32-1-104. The relevant portions of the Decedent's will are reproduced below:

I do hereby direct that my Co-Executors be excused from making an inventory or accounting regarding the assets of my estate. It is my intent and purpose to simplify the administration of my estate and to minimize the work, difficulty, and expense imposed on my Co-Executors in their capacity as such.

I direct that either my Co-Executors be allowed to serve as such without bond.

IN TESTIMONY WHEREOF, I have hereunto set my signature this 10th day of October, 2008.

BILL MORRIS
Testator

AFFIDAVIT

STATE OF TENNESSEE)

COUNTY OF FRANKLIN)

We, the witnesses, whose names are signed to the foregoing Will and printed below, having been sworn, declared to the undersigned officer that **BILL MORRIS,** in the presence of both witnesses, signed the instrument declaring it to be his last Will, and that each of the witnesses, in the presence of **BILL MORRIS** and in the presence of each other, signed the Will as a witness.

We declare that at the time of our attestation of this Will, **BILL MORRIS** was, according to our best knowledge and belief, over the age of eighteen, under no undue duress or constraint, of

The third page continues as follows:

sound and disposing mind, memory and understanding, and in all respects competent to make a Will.

WITNESS — Mickey Hall (Printed name)

WITNESSES — Kimberly K. Davis (Printed name)

Sworn to and subscribed before me, this 10th day of October, 2008.

Notary Public

My Commission Expires: 10-18-11

As shown above, the two witnesses, Mickey Hall, and Kimberly K. Davis signed the affidavit but did not sign any other part of the will. Appellants, thus, argue that the will is invalid because the two attesting witnesses failed to sign the actual will and only signed what is in effect a "self-proving affidavit." Appellants contend that the affidavit signed by the witnesses is a separate and distinct document and that the witnesses' signatures on the affidavit fail to satisfy the statutory requirement for the witnesses to sign the will. In short, Appellants argue that the attesting witnesses must sign the will itself and then may sign an affidavit pursuant to Tennessee Code Annotated Section 32-2-110. As such, Appellants contend that the will proffered by Appellees should not have been admitted to probate.

Appellees argue that the affidavit executed by the witnesses is not a "separate and distinct document." Rather, they contend that the affidavit, due to its placement in the middle of page two of the will "immediately underneath the testator's signature" was "incorporated in the will as part of the will." The Appellees further argue that the affidavit is merely an attestation clause, and not an affidavit to prove the will as suggested by Appellants.

Tennessee Code Annotated Section 32-2-110 permits the use of witness Affidavits to prove a will. This statute reads as follows:

> Any or all of the attesting witnesses to any will may, at the request of the testator or, after the testator's death, at the request of the executor or any person interested under the will, make and sign an affidavit before any officer authorized to administer oaths in or out of this state, stating the facts to which they would be required to testify in court to prove the will, ***which affidavit shall be written on the will*** or, if that is impracticable, on some paper attached to the will, and the sworn statement of any such witness so taken shall be accepted by the court of probate when the will is not contested as if it had been taken before the court.

Tenn. Code Ann. § 32-2-110 (emphasis added). This statute is separate and distinct from Tennessee Code Annotated Section 32-1-104. While the witness signatures required by 32-1-104 are mandatory for proper execution, the affidavit contemplated by 32-2-110 is permissive, and serves a separate function distinct from execution.

"Where a will is drafted by a lawyer, technical words used therein must be given technical meanings . . .and [e]very word used by the testator is presumed to have some meaning." ***Daughtery v. Daughtery***, 784 S.W. 2d 650, 653 (Tenn. 1990).

In this case, an attorney prepared both the will and the affidavit. The title "AFFIDAVIT" is typed in bold, all capital letters, placed there by an attorney indicating that the document is sworn to by the witnesses. The testimonial aspect of this document is further bolstered by the inclusion of the signature and seal of a notary public.

"The relevant statute clearly and unmistakably requires attesting witnesses to *sign the will* in the presence of the testator and in the presence of each other. Tenn. Code Ann. § 32–1–104. . . . Supplying an affidavit of attesting witnesses pursuant to Tenn. Code Ann. § 32–2–110 does not operate either to negate or satisfy the requirements of Tenn. Code Ann. § 32–1–104." ***In re Estate of Stringfield***, 283 S.W.3d 832, 837 (Tenn. Ct. App. 2008). Relying on ***Whitlow v. Weaver***, 478 S.W. 2d 57 (Tenn. Ct. App. 1970), the Appellees argue that the Affidavit is "not an affidavit to prove the will." The ***Whitlow*** case, however, is distinguishable from the instant appeal.

Unlike the case at bar, in ***Whitlow***, there was no affidavit. There was merely an attestation clause stating:

> Signed by the said Guy H. Weaver, as and for his Last Will and Testament, *consisting of three pages, including this page*, in the presence of us, the undersigned, who, at his request, and in his sight and presence, and in the sight and presence of each other, have subscribed our names as attesting witnesses, the day and date above written.
> /s/ Ernest Ray Barton
> /s/ Bobby E. Barton
> Subscribing Witnesses'

Whitlow, 478 S.W.2d at 58 (*emphasis added*). In ***Whitlow***, the language of the attestation clause clearly indicates that the clause is included as a part of the will. Here, although the affidavit begins on the last page of Decedent's will, the affidavit states that the witnesses' names were "signed to the foregoing will and printed below." In this regard, the affidavit is inaccurate because these witnesses did not in fact, sign the "foregoing will." They only signed the affidavit and their signatures do not appear anywhere else in the document. Merriam-Webster's Dictionary defines "foregoing" as "listed, mentioned, or occurring before." Merriam-Webster, Web. (29 Jan. 2015), http://www.merriam-webster.com/dictionary/foregoing. Because the affidavit refers to the will as a "foregoing" document, we cannot, as Appellees suggest, conclude that the affidavit is part of the will so as to satisfy the requirements of Tennessee Code Annotated Section 32-1-104.

In essence, Appellees are asking this Court to apply the doctrine of integration by which "a separate writing may be deemed an actual part of the testator's will, thereby merging the two documents into a single instrument." ***In re Will of Carter***, 565 A.2d 933, 936 (Del. 1989). In ***In re Estate of Chastain***, 401 S.W.3d 612 (Tenn. 2012), the Tennessee Supreme Court held that the decedent's signature on the affidavit did not satisfy the statute requiring the testator's signature on a will. The ***Chastain*** court explained that, in these types of cases, Tennessee has not adopted the doctrine of integration "because doing so would amount to a relaxation of statutory requirements." ***Id.*** at 622. The Supreme Court opined:

> the General Assembly has not enacted Section 2–504(c) of the Uniform Probate Code, which provides that '[a] signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.' (quoting Unif. Probate Code § 2–504(c) (2008)). . . . the Legislature is the entity authorized to prescribe the conditions by which property may be transferred by will in this State, . . .and courts have no authority to modify those conditions. . . .[W]e decline to adopt the doctrine of integration because doing so would amount to a relaxation of statutory requirements.

Id. at 621-22 (internal citations omitted).

In ***Chastain***, the testator's name was printed on the first page of the will, and the testator's initials, along with the witnesses' initials, appeared on the bottom of the first page of the will. Although all the witnesses signed the second page of the will, the testator's name was not located anywhere on that page of the will, and the testator did not sign the second page. Instead, the witnesses and the testator signed a separate one page document titled "self-proving will affidavit". The affidavit further contained the instructions "attach to will." See ***id.*** at 613-615. Because the Chastain affidavit referred to the will as "the attached or foregoing instrument," the Court held that "both the statute and the affidavit establish that the affidavit is not a continuation of will. Accordingly, Decedent's signature on the affidavit is not sufficient to satisfy the statutory requirement that he sign the will by one of the means provided by statute." ***Id.*** at 621-622**.**

Likewise, in ***In re Estate of Stringfield***, 283 S.W.3d 832 (Tenn. Ct. App. 2008), the witnesses to the will initialed the first two pages of the will. On the third and final page of the will, the names of the witnesses were typed onto the will, but the witnesses did not sign it. The ***Stringfield*** witnesses signed an affidavit of attesting witnesses. In the absence of the witnesses' actual signatures on the will, this Court held that initialing the first two pages and providing affidavits pursuant to Tenn.

Code Ann. §32-2-110 is insufficient to satisfy the explicit requirements of Tenn. Code Ann. §32-1-104 that the witnesses sign the will. ***Id.*** at 832**.**

Courts endeavor to effectuate a testator's intent "unless prohibited by a rule of law or public policy," ***In re Estate of McFarland***, 167 S.W.3d 299, 302 (Tenn. 2005), and courts will sustain a will as legally executed if it can be done consistently with statutory requirements, ***Leathers v. Binkley,*** 264 S.W.2d 561, 563 (Tenn. 1954). However, courts may not ignore statutory mandates in deference to a testator's intent. ***Chastain***, 401 S.W.3d at 621; ***Ball v. Miller***, 214 S.W.2d 446, 449–50 (Tenn. Ct. App. 1948). "Tennessee courts have consistently interpreted statutes prescribing the formalities for execution of an attested will as mandatory and have required strict compliance with these statutory mandates." ***Chastain***, 401 S.W.3d at 619. By allowing the affidavit to "be written on the will or, if that is impracticable, on some paper attached to the will," the legislature has drawn a clear distinction between the affidavit of attesting witnesses and their signatures on a will. ***Id***. at 620. We hold in this case, that the signature of the witnesses on the affidavit, without having signed the will, does not satisfy the statutory formalities for executing a will in this state. As such, we further hold that the Decedent died intestate.

Conclusion

For the foregoing reasons, we reverse the order of the trial court. This case is remanded to the trial court for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellees, Gary Morris and Pamela Morris, for all of which execution may issue if necessary.

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JUDGE KENNY ARMSTRONG