IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2002 Session

IN RE: THE ESTATE OF MARIE H. GUY, DECEASED

Appeal from the Probate Court for Dickson County
No. 10-00-095-P A. Andrew Jackson, Probate Court Judge

No. M2001-02644-COA-R3-CV - Filed December 31, 2002

This case involves a codicil to a will. The decedent executed a valid will, which was signed by two witnesses and included an attestation clause. The decedent later executed a typed codicil to her will, which was signed by two witnesses but did not include an attestation clause. The plaintiff was a beneficiary under the will, but the codicil removed the plaintiff as a beneficiary. Upon the decedent's death, the plaintiff objected to the admission of the codicil into probate. One of the witnesses to the codicil recalled signing it, remembered the decedent stating that it was a codicil, and remembered the second witness signing the document. The second witness to the codicil did not remember signing it, but recognized her signature and said that she would not have signed it unless she first saw the decedent sign it. The probate court admitted the codicil into probate. The plaintiff appeals, arguing that the second witness's lack of an independent recollection of witnessing the decedent's signature on the codicil should prevent its admission into probate. We affirm, finding that the execution of the codicil meets the statutory requirements, and therefore it was validly admitted into probate.

Tenn. R. App. P. 3; Judgment of the Probate Court is Affirmed

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Dan E. Huffstutter, Nashville, Tennessee, for appellant, Linda Sue Guy Minton.

Joseph L. Hornick, Dickson, Tennessee, for appellee, James Hatcher Hayes, Executor.

OPINION

On January 5, 1996, Marie H. Guy ("Decedent") executed a valid Last Will and Testament ("Will"). The Will was signed by two witnesses, and was followed by an attestation clause,[1] which was properly notarized. Under the terms of the Will, Plaintiff/Appellant Linda Sue Guy Minton ("Minton"), along with another beneficiary, was to receive an equal share of one-fourth of the residuary of the Decedent's estate.

On March 2, 1999, Decedent executed a typed document entitled "This is a codicil to my Last Will and Testament" ("Codicil"). The Codicil, inter alia, removed Minton as a beneficiary of the Decedent's estate. The Codicil was signed by two witnesses, Wanda Hemphill ("Hemphill") and Dana Race, now Dana Pack ("Pack"), and was properly notarized. The Codicil was not accompanied by an attestation clause.

The Decedent died on April 19, 2000, at age eighty-nine. Subsequently, the Administrator of the Decedent's estate, Defendant/Appellant James Hatcher Hays ("Administrator"), petitioned the Probate Court to probate the Decedent's 1994 Will, in solemn form. The petition was granted, and the Decedent's Will was admitted into probate. Consideration of whether the Codicil should be admitted into probate was postponed. Minton later filed a Notice of Contest with the Probate Court, contesting the admittance of the Codicil into probate.

On December 12, 2000 and January 23, 2001, the Probate Court held hearings on whether to admit the Codicil into probate. Both witnesses to the signing of the Codicil, Pack and Hemphill, were employed by the bank at which the Decedent was a customer at the time the Codicil was executed. Pack testified that she recognized her signature on the Codicil, and that she knew the Decedent as a long-time customer of the bank. She said the Decedent asked her to witness the signing of the Codicil, and announced to all present that the document was a Codicil, or amendment, to her Will. Pack said that the Decedent signed the Codicil in the presence of both Pack and Hemphill, as well as a notary public. Pack said that she knew the Codicil was an amendment to the Decedent's Will when she signed it. Pack also testified that Hemphill was present when she and the Decedent signed the Codicil, and that Pack was present when Hemphill signed the Codicil.

On January 23, 2001, Hemphill testified that she recognized her signature on the Codicil but did not recall signing it. She said that she did not know the Decedent and that she had no

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[1] An attestation clause is

> [a] provision at the end of an instrument ([especially] a will) that is signed by the instrument's witnesses and that recites the formalities required by the jurisdiction in which the instrument might take effect (such as where the will might be probated). The attestation strengthens the presumption that all the statutory requirements for executing the will have been satisfied.

Black's Law Dictionary 124 (7th ed. 1999).

recollection of the Decedent indicating to her that the document Hemphill was signing was an amendment to her Will. Hemphill testified that she did not remember the Decedent asking her to witness the Decedent's signing of the Codicil, that she could not recall seeing the Decedent sign the Codicil, and that she knew Pack but had no memory of seeing Pack sign the Codicil. Hemphill asserted, however, that she would not have signed the Codicil as a witness unless she had seen the Decedent sign the Codicil.

On February 25, 2001, the Probate Court admitted the Codicil into probate. Minton then moved to vacate the Probate Court's judgment, or obtain a new hearing and object to probate of the Codicil, arguing that the Decedent apparently failed to signify to each witness that the Codicil was an amendment to her Will, and that consequently the Codicil should not have been admitted into probate. The Probate Court denied Minton's motion. From this order, Minton now appeals.

On appeal, Minton notes that the Decedent was required to make each witness aware that she was signing the Decedent's Codicil, and argues that, because Hemphill could not recall anything about signing the Codicil, including whether the Decedent told her that she was signing the Decedent's Codicil, the Probate Court erred in admitting the Codicil into probate.

Because a motion to vacate judgment addresses the sound judgment of the trial court, we review the Probate Court's judgment to determine if it abused its discretion. ***Hall v. Board of Paroles***, No. 01A01-9901-CV-00065, 1999 Tenn. App. LEXIS 688, at *5 (Tenn. Ct. App. Oct. 15, 1999) (citing ***Ellison v. Alley***, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995)). A trial court abuses its discretion when it reaches a decision against logic that causes a harm to the complaining party or when the trial court applies an incorrect legal standard. ***Eldridge v. Eldridge***, 72 S.W.3d 82, 85 (Tenn. 2001) (citing ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999)). The decision of the trial court "will be upheld so long as reasonable minds can disagree as to the propriety of the decision [of the trial court]." ***State v. Scott***, 33 S.W.3d 746, 751 (Tenn. 2000).

Minton's sole argument on appeal is that the testimony shows that the Decedent failed to make Hemphill aware that she was signing the Decedent's Codicil, and therefore, the Codicil was not duly executed. Section 32-1-104 of Tennessee Code Annotated requires the following:

> 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 (2001). Thus, when a will is typed, rather than handwritten or nuncupative, the testator must indicate to any witness signing the document that the document being signed is a will. The same holds true for a codicil to a will. Tenn. Code Ann. §32-1-101(2) (2001) ("As used in this chapter . . . '[w]ill' includes codicil.").

Minton argues that the execution of the Codicil did not meet the statutory requirements, and therefore, the Codicil should not have been entered into probate, relying on ***Lawrence v. Lawrence***, 250 S.W.2d 781 (Tenn. 1951). In ***Lawrence***, only one of the two witnesses to the will was still alive. The remaining living witness offered contradictory testimony regarding whether, at the time she signed the will, she had been informed that the document she was signing was a will. ***Id.*** at 782. Noting that the statute requires that the testator signify that the document is a will, in light of the contradictory testimony from the only remaining witness, the ***Lawrence*** court found that this requirement had not been met. ***Id.*** at 784.

In contrast, in the case at bar, both witnesses are still alive. Although one witness had no recollection of signing the codicil, the other witness testified that both witnesses were informed that the document they were signing was a Codicil. This testimony was undisputed, since Hemphill testified only that she could not recall if the Decedent told her that the document was a Codicil.

Minton also relies on ***Cooper v. Austin***, 837 S.W.2d 606 (Tenn. Ct. App. 1992). In ***Cooper***, affirmative proof was offered that one witness signing the codicil was not told that the document was a codicil. ***Id.*** at 613. In light of this, the ***Cooper*** court found that the testator did not signify to one witness that the document was a will or a codicil and that therefore the trial court did not err in declining to admit the will into probate. ***Id.***

In the instant case, there is no testimony that the Decedent did not tell both witnesses that the document was a codicil. Rather, there is only Hemphill's testimony that she could not recall if Decedent informed her that she was signing her Codicil, and Pack's undisputed testimony that the Decedent signified this fact to both witnesses.

The standard under Tennessee law regarding the witnessing and notice of signing of a will or codicil is outlined in Pritchard on Wills and Estates, which states:

> Infirmity of recollection on the part of the subscribing witnesses is not fatal to the will. The court in such cases will not require positive, affirmative evidence respecting all the requisite formalities, but, if the will is regular on its face, will draw its conclusions from all the circumstances disclosed by the evidence. *Where, for instance, the subscribing witnesses testify that they do not recollect the circumstance, but do recognize their signatures, and declare that they would not have placed them*

> *to the instrument unless they had seen the testator sign it, or heard him acknowledge his signature, the due execution may be presumed.*

Pritchard on Wills and Estates § 350 (formerly § 336) (emphasis added); ***Cooper***, 837 S.W.2d at 612; ***Leathers v. Binkley***, 264 S.W.2d 561, 563 (Tenn. 1954). The ***Cooper*** court further clarifies:

> In establishing the facts essential to the validity of the will by a preponderance of the evidence, proponents are, however, not obliged in all cases to prove each fact by direct evidence; but they may rely upon presumptions. There is, at the outset, no presumption that the alleged testator executed the will in question or any will; but when a paper propounded as a will is shown to have been signed by the alleged testator and the requisite number of witnesses, *in the absence of any satisfactory evidence to the contrary* the presumption is that all the formalities have been complied with.

Cooper, 837 S.W.2d at 612 (quoting ***Leathers***, 264 S.W.2d at 613 (quoting Page on Wills, Vol. 2, § 755 at 462)). Thus, as this Court in ***Cooper*** stated: "[W]e must examine the testimony in the case at bar to determine if there is uncontroverted positive testimony that [the Decedent] did not 'signify to the attesting witnesses' that the . . . instrument was his will or codicil." ***Cooper***, 837 S.W.2d at 612.

To the contrary, in this case, the undisputed testimony offered by Pack establishes clearly that the Decedent signified, in the presence of both witnesses and the notary public, that she was asking them to sign her Codicil. As noted above, Hemphill testified only that she could not recall if the Decedent informed her that she was signing her Codicil. Therefore, there is no testimony that the Decedent did not signify to the witnesses that the instrument was a will or a codicil. Moreover, Hemphill stated affirmatively that she would not have signed the Codicil unless she had seen the Decedent sign the Codicil. Under these circumstances, we must conclude that the Codicil was duly executed, and that the Probate Court properly admitted the Codicil into probate. Likewise, the Probate Court did not abuse its discretion when denying Minton's motion to vacate the judgment, nor did the Probate Court err in denying Minton's motion to obtain a new hearing, as no proof was offered that the Codicil was fraudulently entered into probate.

The decision of the trial court is affirmed. Costs are taxed to appellant, Linda Sue Guy Minton, and her surety, for which execution may issue, if necessary.

HOLLY KIRBY LILLARD, JUDGE