

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned On Brief May 16, 2003

**IN THE MATTER OF THE ESTATE OF JOAN FORSHEA PEARSON,
DECEASED**

**An Appeal from the Chancery Court for Hardeman County
No. P-1120 Dewey C. Whitenton, Chancellor**

No. W2002-02767-COA-R3-CV - Filed October 6, 2003

This case involves a claim against a decedent's estate. The claimant asserted that the decedent owed her a significant sum of money. The executrix of the estate excepted to the claim. Despite considerable evidence of suspicious surrounding circumstances, the trial court claim was allowed. Since we are unable to determine the basis for the trial court's ruling, we remand for clarification of the record.

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

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

William G. Hatton, Bolivar, Tennessee, for the appellant Bonnie White, Executrix for the estate of Joan Forshea Pearson.

H. Morris Denton, Bolivar, Tennessee, for the appellee Bonnie Rudd.

OPINION

Joan Forshea Pearson ("Pearson") died on June 16, 2000. On July 31, 2000, Executrix/Appellant Bonnie K. White ("White"), Pearson's daughter, filed a petition to have Pearson's will admitted into probate, which was granted on August 22, 2000. On August 28, 2000, Claimant/Appellee Bonnie F. Rudd ("Rudd"), Pearson's sister, filed a claim in the amount of \$85,000 against Pearson's estate for a loan that Rudd alleged she made to Pearson. In support of the claim, Rudd filed an unpaid check bearing her name as payee, Pearson's signature as payor, a dollar amount of \$85,000, and a statement on the memo line reading: "Payment in full (Loan)." On September 11, 2000, White filed an exception to Rudd's claim, in which White contended that she had handled Pearson's affairs "for quite some time prior to her death" and that Pearson had never owed any debt to Rudd. White noted that Pearson had occasionally signed blank checks to allow Rudd to see a doctor, purchase groceries, and take care of other personal matters. White also observed that Pearson

had never had a balance as high as \$85,000 in her checking account and asserted that Pearson would not have written a check for an amount that far exceeded her bank balance.

On September 3, 2002, the case went to trial. The record before us does not include a transcript of these proceedings. The record contains an “Amended Statement of the Evidence,” submitted by White in February 2003. The “Amended Statement of the Evidence” does not indicate that the trial judge acted on it, by approving or disapproving it. Consequently, pursuant to Rule 24(f) of the Tennessee Rules of Appellate Procedure, it is deemed approved. The “Amended Statement of the Evidence” says:

The Appellee, Bonnie Rudd, testified that the decedent, Joan Forshea Pearson, borrowed \$ 85,000.00 from her in the past, but can not remember when. There was no note executed concerning this loan. There were no witnesses to this transaction. There were no terms of re-payment agreed upon or even discussed.

The Appellee further testified that the decedent attempted to re-pay her for this loan with a check drawn on the Bank of Middleton, Check No. 786, in the amount of \$85,000.00 dated May 2, 2000. (A copy of which was introduced at trial and is attached hereto as Exhibit I). The Appellee testified that she can not recall whether she received the check on that date or not, but that it was given to her about 1 month before the decedent died, which was on June 16, 2000. There was no one else present when this check was allegedly given.

Bank records were then introduced into evidence, and a copy of which are attached hereto as Exhibit II, in part, which showed that check number 786 was completely out of numerical sequence from the other checks written on this checking account in May, 2000, which ranged numerically from 1368 through 1378. In fact, the name of the bank had even changed. The banking records also reflected that there were never sufficient funds in the checking account to pay the \$85,000.00 check.

Finally, the trial court allowed the filing of a report from Thomas W. Vastrick, a Forensic Document Examiner, a copy of which is attached hereto as Exhibit III. Mr. Vastrick concluded, after examining the original check in question and known handwriting specimens of the decedent, that while the decedent did write the name of the payee on the check, and while the maker’s signature is not in question, it does not appear that she made any of the other entries on the check. In fact, after conducting examinations of the ink, it was his opinion that at least two different inks were used on the check. Specifically, that the ink used to write the name of the payee and the maker’s signature was different from the ink used to fill in the date, the

numeric amount, the written out amount, and the notation which indicates “Payment in full (Loan)”.

Thus, Rudd apparently testified to some extent about the check, indicating that the check, dated May 2, 2000, was given to her sometime in May, with only Rudd and the decedent Pearson present. The handwriting expert indicated that the only portions of the check written by Pearson were the name of the payee and the signature. The records from Pearson’s bank account, exhibits at the trial, show that the balance in her account during the pertinent time period was less than \$20,000, and also show that the number of the check, 786, does not correspond with the numbers of all other checks written during that time period, numbers 1368 through 1378. The “Amended Statement of the Evidence” indicates that the only witnesses at trial were Rudd and White.

On September 16, 2002 White filed a memorandum along with “Late-Filed Evidence” with the trial court’s permission. The late-filed evidence was the handwriting expert’s report stating that, based on differences in handwriting and ink, Pearson did not write the dollar amount on the check, nor did she write the memo portion on the check indicating that it was repayment for a loan. In the accompanying memorandum, White argued that Rudd had failed to meet her burden of proof because: (1) no other writing or witness corroborated Rudd’s testimony; (2) the check’s number was out of sequence by several hundred checks; (3) Pearson’s accounts never contained sufficient funds to cover the check; and (4) Pearson did not write the \$85,000 amount on the check, nor did Pearson write the notation concerning the purpose of the check.

Rudd filed a response the same day. Rudd argued that, despite the late-filed evidence, the trial court had no choice but to allow the claim because there was no evidence explaining the differences in handwriting and ink or indicating who wrote the amount and the memo notation on the check. Rudd contended that, without such evidence, the trial court was not permitted to guess at which of the several possible theories could explain the evidence. Therefore, Rudd continued, the trial court was correct when, at the end of the September 3rd proceedings, it ruled that it was bound to allow the claim because the decedent had signed the check and there was no evidence explaining the completion of the remainder of the check.

On October 17, 2002, the trial court issued its “Final Judgment on Claim” along with a “Trial Opinion.” In its opinion, the trial court noted “several suspicious circumstances” surrounding Rudd’s claim:

1. The note or obligation, for which the check is claimed to be a payment, was not evidenced by any other paper writing or independent witness.
2. The check number 786 was completely out of numerical sequence from the other checks written on the checking account in May 2000.
3. There were never sufficient funds in the checking account to pay the \$85,000.00 check.

4. The Forensic Document Examination established that the amount of the check and the notation of the purpose were not in the handwriting of the decedent. Also, the ink used on the payee name entry and the maker's signature entry is different from the ink used on the numeric amount, the written out amount [and] the "Payment in full (Loan)" entries.

Despite these suspicious circumstances, the trial court went on to say: "However, the Court is not allowed to speculate, and the Court must consider only credible and admissible evidence. The Court also recognizes that the proof and testimony in this cause are severely limited by the restrictions of the Tennessee Dead Man's Statute (T.C.A. §24-1-203)" The trial court then concluded, without explanation, that it was "constrained" to allow Rudd's \$85,000 claim. From this order, White now appeals.

On appeal, White argues that the trial court erred in allowing Rudd's claim because Rudd failed to establish a valid claim by the preponderance of the evidence. Because this was a bench trial, the trial court's factual findings are subject to *de novo* review, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996) (quoting Tenn. R. App. P. 13(d)).

In its ruling, the trial court references the Tennessee Dead Man's Statute, section 24-1-203 of the Tennessee Code Annotated, which states:

In actions or proceedings by or against executors, . . . in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator . . . unless called to testify thereto by the opposite party.

Tenn. Code Ann. § 24-1-203 (2000). Under this statute, it appears clear that testimony by Rudd regarding the purported \$85,000 loan and the check allegedly given to repay the loan would not be permitted. Indeed, the order by the trial court states clearly that an objection based on the Dead Man's Statute was raised ("[P]roof and testimony in this cause are severely limited by the restrictions of the Tennessee Dead Man's Statute"), and does not refer to testimony by Rudd. The Amended Statement of the Evidence, however, refers to testimony by Rudd, at least indicating when she received the check and that it was given in repayment for an \$85,000 loan she purportedly made at a time she does not remember. This Amended Statement is deemed approved under the appellate rules, but was not expressly approved or disapproved by the trial court.

Based on this record, it is difficult for the appellate court to ascertain the evidence considered by the trial court and the basis for its decision. If objections to Rudd's testimony were waived and the trial court made a finding that her testimony on the purported loan was credible, we would, of course, defer to any credibility determinations by the trial judge, since he had the opportunity to observe the witnesses' manner and demeanor. *See Whitaker v. Whitaker*, 957 S.W.2d 834, 837

(Tenn. 1997). However, since the trial court pointedly referred in its order to the limitations on the proof and testimony because of the Dead Man's Statute, this seems unlikely.

Absent admissible testimony by Rudd, the only evidence is the check. In and of itself, the check establishes very little. The only portions of the check written by Pearson were the name of the payee and Pearson's signature. This shows only that, at some unknown time, Pearson gave Rudd a blank check, for an unknown reason. All of the other undisputed evidence mitigates against a finding that the check was given to Rudd for the purpose she contends. The \$85,000 amount and the memo notation stating it was to repay a loan were made by an unknown person at an unknown time; the number of the check, far out of sequence, indicates that it was not given during the time period on which the check was dated; the decedent's balance in her checking account was far below any amount that could cover such a check; and there are no corroborating documents or witnesses. Therefore the check, in and of itself, in light of the surrounding circumstances, cannot be sufficient to permit Rudd's claim against Pearson's estate.

Despite this, the trial court, stating that it was "not allowed to speculate," reluctantly permitted the claim. Given the confusing appellate record, we cannot ascertain the basis for the trial court's conclusion that it was "constrained" to allow the claim.

Section 27-3-128 of the Tennessee Code Annotated permits us to remand when "complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence." Tenn. Code Ann. § 27-3-128 (2000); *In re Estate of Porter*, No. E1999-00194-COA-R3-CV, 2000 WL 337565, at *6 (Tenn. Ct. App. March 30, 2000). This is such a case. Under the circumstances in this case, "complete justice" cannot be had unless we remand for clarification of the record. *See In re Estate of Burns*, No. W1999-01888-COA-R3-CV, 2001 WL 687055, at *3 (Tenn. Ct. App. June 18, 2001). Therefore, we remand the case for this purpose. On remand, the trial court may clarify the basis for its decision or, in its discretion, may reconsider the admissible evidence and change or modify its decision.

The cause is remanded to the trial court for further proceedings not inconsistent with this Opinion. Costs are taxed equally to Appellant, Bonnie K. White, and her surety, and Appellee, Bonnie Rudd, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE