IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 26, 2009

ROBERT REINHARDT, ET AL. v. JO ANN POWELL, ET AL.

Appeal from the Circuit Court for Hamblen County
No. 01CV166 Thomas J. Wright, Judge

No. E2008-01905-COA-R3-CV - FILED JULY 28, 2009

This is a will contest filed by Robert Reinhardt and Jeanne Reinhardt Hopkins ("the Challengers"), the stepchildren of the late Juanita Reinhardt ("the Decedent"), to declare the will she executed March 31, 1999, invalid on grounds of undue influence, coercion, duress and lack of testamentary capacity. The Challengers sought to establish a will dated March 15, 1994, that split the estate equally four ways between the Decedent's two natural children and her two stepchildren. The 1999 will left the entire estate to the Decedent's natural daughters, Jo Ann Powell and Betty Standifer Black ("the Proponents"). The trial court granted partial summary judgment in favor of the Proponents, holding, as a matter of law, that there was no undue influence, coercion or duress. The court submitted the issue of testamentary capacity to a jury which found that the decedent did have testamentary capacity to execute the 1999 will and, thereby, revoke the 1994 will. The Challengers filed a motion for new trial which was denied. The Challengers appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Michael C. Murphy, Morristown, Tennessee, for the appellants, Robert Reinhardt and Jeanne Reinhardt Hopkins.

Clinton R. Anderson, Morristown, Tennessee, for the appellees, Jo Ann Powell, Betty Jane Standifer Black, and Herbert Bacon, Executor.

OPINION

I.

The Decedent died September 27, 2000, at 80 years of age. Her executor, Herbert Bacon, offered her will dated March 31, 1999, for probate in Hamblen County, where the Decedent lived

when she died. Mr. Bacon had prepared the 1999 will as well as the alleged 1994 will. On February 2, 2001, the Challengers filed their "Complaint to Contest Will" in the probate court. The Challengers alleged that the Decedent was in a weakened physical and mental condition and that her natural children exercised "undue influence, coercion and duress" to cause her to execute the 1999 will during a "home visit" by Mr. Bacon. The complaint named the Proponents and Mr. Bacon as defendants.

The Challengers soon moved that the case be transferred to circuit court. The motion was granted by order prepared by the Challengers and signed for entry on May 22, 2001. The Proponents filed a motion to dismiss the contest on the grounds that the Challengers had not filed the alleged 1994 will nor had they established that it had been lost or destroyed without being revoked. On January 27, 2002, the circuit court entered an order declining to dismiss the matter but staying "all further proceedings until such time that [the Challengers] establish a prior lost or destroyed will in a court with appropriate jurisdiction."

After an unsuccessful flurry of motions to mediate, for recusal, and to remand, the Challengers filed a new complaint in the probate court for Hamblen County attaching and adopting the first complaint. The Challengers and the Proponents both filed motions for summary judgment with attached affidavits and other supporting material. Eventually, transcripts of the depositions of Mr. Bacon and the Proponents were taken and filed for the court's consideration.

The dueling motions resulted in the following order:

> This cause came to be heard June 18, 2007, before Special Probate Judge John Wilson, upon respective Summary Judgment Motions of both parties, and upon argument of counsel and the record as a whole, the Court finds as follows:
>
> 1. That a prior will exists upon which [the Challengers] would have taken, dated March 15, 1994, and it is so established. The Court notes that attorneys for both parties stipulated such to the Court during arguments.
>
> 2. That since the pending Circuit Court case (No. 01CV166) is set for jury trial before Circuit Court Judge Tom Wright on December 18, 2007, and in the interests of judicial administration and by agreement of counsel for both parties, this Probate case is consolidated from this point forward with the pending Circuit case. The Probate Court Clerk (Clerk and Master) shall transfer all Probate filings from February 8, 2001(the date of the filing of the Probate Court Complaint) to Circuit Court, and all such filings shall be deemed filed in Circuit Court so as not to necessitate re-filing by either party. Judge Tom Wright is

> hereby appointed Special Probate Court Judge to hear ths matter in conjunction with the pending Circuit Court case.

The Proponents then challenged the first paragraph of the court's order, arguing, among other things, that they did not stipulate as recited and that the order was signed by the court by mistake without approval of counsel or an opportunity to submit a different version of the order. The record does not contain a copy of any order granting relief, but it appears there was relief of some nature granted because the parties continued to file pleadings pertaining to summary judgment, and Judge Wright addressed all issues *de novo* in an order entered December 6, 2007. By the time of the hearing that resulted in the December 6, 2007, order, the file contained transcripts of the depositions of Mr. Bacon and the Proponents. These were taken after Mr. Bacon submitted an affidavit stating that the Decedent had called him at his office and directed him to destroy the original of the 1994 will, which was at his office, and make a new one leaving everything to her natural daughters, which he did.

The December order, among other things, granted Challengers' motion to amend to allege lack of capacity, found that "Testator had a prior will" which the Challengers would have taken under, and found that there existed issues of fact as to whether the decedent suffered from a lack of capacity when she executed the 1999 will. The court granted partial summary judgment upon finding, "[The Challengers] have provided no credible evidence upon which a conclusion can be drawn that the testator was unduly influenced, coerced or was under duress in connection with the revocation of the prior will." The order specifically stated, "The only issues remaining are whether the testator had testamentary capacity at the time of the revocation of the prior will; and, if not, whether she had testamentary capacity at the time of execution of the probated will." The court indicated it would decide the first issue in a bench trial scheduled for December 18, 2007, and the second would be submitted to a jury.

When the matter came on for bench trial, the court found, on the basis of ***In re Estate of Boote***, 198 S.W.3d 699 (Tenn. Ct. App. 2005), "that the oral revocation of the testator and the physical destruction of the will outside her presence by her attorney do not constitute a valid revocation under Tennessee law." The court also noted: "There is, of course, a subsequent will which [the Challengers] seek to set aside on the basis of testator's lack of testamentary capacity at the time the subsequent will was executed. If the testator had testamentary capacity at the time the subsequent will was executed, it revokes the prior will; thus, both the validity of the revocation and the validity of the subsequent will shall be decided as a result of the jury trial will contest." The court further noted its handling of a pretrial conference which resulted in the scheduling of the jury trial the following day "in order to avoid inconvenience to the parties and witnesses involved, many of whom had traveled to be present at the trial."

On April 23, 2008, the trial court entered its judgment on the jury verdict. In pertinent part, the judgment provides:

> After the jury heard the evidence, the argument of counsel, the charge of the Court, and after deliberation, the jury returned and stated their finding that the testator, Juanita Reinhardt did have the testamentary capacity to make and execute her will of March 31, 1999.
>
> IT IS THEREFORE ORDERED:
>
> 1. That Juanita Reinhardt did have the testamentary capacity to make and execute her will dated March 31, 1999, and that the same is established as the last will and testament of Juanita Reinhardt, and should be admitted to probate.
> 2. The execution of this will revoked all previous wills including one sought to be established by the contestants.

The Challengers filed a motion for new trial which the trial court denied. This appeal followed.

II.

The issues on appeal, restated by us, are:

> Whether genuine issues of material fact precluded entry of partial summary judgment holding as a matter of law that the execution of the 1999 will was not the result of undue influence, coercion, or duress.
>
> Whether the trial court committed reversible error in its introduction of Mr. Bacon to the jury as a "distinguished gentleman" who would be assisting in attorney duties.
>
> Whether the transfer of the matter to the circuit court for trial lacked the statutorily required certification needed to put the will contest before the circuit court.
>
> Whether there remained issues concerning the validity of the 1999 will that prevented the court from rendering judgment that the 1999 will was the last will and testament of the decedent.

III.

A.

We begin with the summary judgment issue because it is the only issue with even colorable substance. We review a trial court's entry of summary judgment or partial summary judgment under

Tenn. R. Civ. P. 56 *de novo* with no presumption of correctness. ***Blair v. West Town Mall***, 130 S.W.3d 761, 763 (Tenn. 2004). The movant must demonstrate that "there is no genuine issue as to any material fact and that the [movant] is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56. The facts and reasonable inferences from those facts are to be viewed in a light most favorable to the nonmoving party. ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). Summary judgment is appropriate only in those situations where a reasonable individual considering the facts and the reasonable inferences favorable to the nonmovant could reach only one conclusion. ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997). Once the moving party submits a properly supported motion, the burden shifts to the non-movant to come forward with evidence establishing an issue for trial. ***Hannan v. Alltel Publishing Co.***, 270 S.W.3d 1, 5 (Tenn. 2008).

The affidavit of Mr. Bacon, submitted by the Proponents in support of summary judgment, states:

> When Calvin Reinhardt's will was offered for probate, his children, Robert Walter Reinhardt, and Jeanne Reinhardt Hopkins, filed an action to contest the will, Juanita Reinhardt petitioned for her elective share, and her share effectively included the entire estate, due to most of the estate assets having been held as tenants by the entirety. This ended the contest.
>
> Later, I believe in March, 1999, Juanita Reinhardt called me at my office, and informed me that since her late husband's children had sued her, she wished to change her will. She directed me to destroy her will, which I had in my possession; and, to prepare a new one leaving everything to her children. I destroyed her will of March 15, 1994, by tearing it into pieces, and depositing it in the trash. I prepared a new will, which she executed on March 31, 1999. I witnessed the signing of this will. She was aware of her assets, and her mind was sound.
>
> I did not speak with either of her children before , or at the execution of the March 31, 1999, will, concerning that will; and, know of no influence exercised by anyone on Juanita Reinhardt. She was a strong-willed, independent person, and not one to be easily influenced. I do not know of any will she had at the time of her death, other than that of March 31, 1999.

Also before the court at the time it granted summary judgment was the deposition testimony of the Proponents who are accused of influencing the Decedent to change the 1994 will. The trial court made the following observation about their testimony in its order granting partial summary judgment:

> The testator's two daughters live in other cities, apart from their Mother and apart from each other. Though they maintained regular contact with their Mother, they did not have any particular special relationship with her that would put them in a position to override the testator's own desires or will. Testator's daughters knew that she changed her will but were not confidants of the testator in her decision to make a new will. Testator's daughters did not have a power of attorney over her affairs nor were they on any bank accounts as joint account holders. Testator took care of all of her own business and financial affairs to the point of her death.

We have read the Propenents' depositions and would add that though they admitted knowing the Decedent had changed her will in the sense that the Decedent had mentioned it, the Proponents testified that they did not comment and they had not seen the will.

The only facts the Challengers marshal to justify reversal are:

> [The Proponents] knew their elderly and ill in health mother changed the will to write out their step-siblings in 1999, and that this was kept secret from [the Challengers] by [the Proponents]. This changed will was a dramatic change in that it gave the two [Proponents] . . . all the estate, rather than all four children receiving one-fourth as in the 1994 will. In addition, [the Proponents] attempted to restrict access of [Challenger] Hopkins to Juanita Reinhardt by ordering her not to regularly contact [Proponent] Black's mother.

The Challengers then cite us to three cases that supposedly found undue influence on the "same factors" as are present in this case. We do not agree that either the factual or legal argument defeats partial summary judgment.

The first case is ***In re Estate of Park***, No. M2003-00604-COA0R3-CV, 2005 WL 3059443 (Tenn. Ct. App., M.S., Nov. 14, 2005). In ***Park***, an non-relative caregiver actively procured a will that left Ms. Park's sizeable estate to the caregiver to the exclusion of family members. After she was unable to have Ms. Park's longtime attorney change the will, the caregiver hired another attorney who would. The caregiver took over all Ms. Park's personal and business affairs to the point of deciding whom she could contact. Any similarity between the present case and ***Park*** is insignificant in light of the marked differences. ***Park*** is more notable for the guidance it offers on the law of undue influence than for any factual similarity:

> [I]n most cases, parties contesting a will on the ground that it was procured by undue influence must prove the existence of suspicious circumstances warranting the conclusion that the person allegedly influenced did not act freely and independently. ***Kelly v. Johns***, 96

> S.W.3d 189, 195 (Tenn. Ct. App. 2002);***Fell v. Rambo***, 36 S.W.3d [837, 847 (Tenn. Ct. App. 2000)]; ***Mitchell v. Smith***, 779 S.W.2d 384, 388 (Tenn. Ct. App. 1989). Whether the suspicious circumstances relied upon by the contestants are sufficient to invalidate a will should be "decided by the application of sound principles and good sense." ***Halle v. Summerfield***, 199 Tenn. 445, 454, 287 S.W.2d 57, 61 (1956); ***In re Estate of Maddox***, 60 S.W. 3d [84, 88 (Tenn. Ct. App. 2001)].
>
> . . . The suspicious circumstances most frequently relied upon to establish undue influence are: (1) the existence of a confidential relationship between the testator and the beneficiary, (2) the testator's physical or mental deterioration, and (3) the beneficiary's active involvement in procuring the will. ***In re Estate of Elam***, 738 S.W.2d [169, 173 (Tenn. 1987)]; ***Kelly v. Allen***, 558 S.W.2d 845, 848 (Tenn. 1977); ***Estate of Hamilton v. Morris***, 67 S.W.3d 786, 792 (Tenn. Ct. App. 2001). Other circumstances include: (1) secrecy concerning the will's existence, (2) the unjust or unnatural nature of the will's terms, (3) discrepancies between the will and the testator's expressed intentions, and (4) fraud or duress directed toward the testator. ***Kelly v. Johns***, 96 S.W.3d at 196; ***Mitchell v. Smith***, 779 S.W.2d at 388.
>
> Proof of the existence of a confidential relationship, by itself, will not be sufficient to invalidate a will. ***Halle v. Summerfield***, 199 Tenn. at 455, 287 S.W.2d at 61; ***In re Estate of Maddox***, 60 S.W.3d at 89. . . . Proof of the existence of a confidential relationship must be coupled with evidence of one or more other suspicious circumstances that give rise to a presumption of undue influence. ***DeLapp v. Pratt***, 152 S.W.3d 530, 540 (Tenn.Ct. App. 2004).

Id. at 8-9.

The next case is ***In re Estate of Bean***, No. M2003-02029-COA-R3-CV, 2005 WL 3262936 (Tenn. Ct. App. M.S., filed December 1, 2005). While ***Bean*** involved a family member beneficiary, that is the end of any resemblance to the present case. Robert Bean, the son who took everything under his father's new will to the exclusion of all his blood siblings, had a confidential relationship to his father that excluded the siblings. He took dominion and control of his father's property and bank accounts. He intimidated his father physically and mentally. He purposely alienated his father from all the other children. He was actively involved in procuring the new will. And, the new will was inconsistent with the father's stated intentions.

In the present case, the proof is that the final will is in exact accord with the Decedent's stated intent of what she would do if the Challengers contested their father's will. There is no

evidence of tampering by the Proponents with the Decedent's funds or business affairs; in fact, the unrefuted proof is to the contrary.

The only published case cited by the Challengers, ***Parham v. Walker***, 568 S.W.2d 622 (Tenn. Ct. App 1978), also involves far different facts, but furnishes additional useful guidance. In ***Parham*** the Reverend Rowser became the beneficiary and executor of Edna Caulton's entire estate in a will executed while he was her conservator. ***Id***. at 623. The trial court had refused to give a jury instruction concerning the confidential relationship between conservator Rowser and ward Caulton. This court reversed and recognized a distinction between family members and non-family members:

> In [***Kelly v. Allen***, 558 S.W.2d 845 (Tenn. 1977)] the Court held that in order for the presumption of invalidity to rise in transactions between close family members, not only must the natural confidential relationship be present, but there must be an additional showing of the presence of the elements of dominion and control by the stronger over the weaker or other conditions to establish the destruction of the free agency of the donor. The Court then stated that these rules (requiring more than establishment of confidential relationships) "are not applicable in those cases where a fiduciary relationship exists, e.g., guardian and ward, trustee and cestui que trust, or any other relationship where the law prohibits gifts or dealings between the parties."

Id. at 625 (quoted material from ***Kelly***). In contrast, "it is natural to leave one's estate to relatives and it is also natural that a relationship of confidence exists between relatives." ***Id***. at 624.

After looking at all the cases and the evidence argued by the Challengers, we agree with the trial court that there was no genuine issue of material fact to establish that undue influence, coercion or duress was involved in the execution of the 1999 will and the resulting revocation of the 1994 will. We hold the Proponents were entitled to judgment as a matter of law on that aspect of this will contest.

B.

We now consider whether to reverse based on alleged prejudicial comments to the jury by the trial court. We will first quote directly from the Challengers' brief the sum total of the offending material:

> Once the jury was impaneled at trial, the lower Court Judge introduced the Defendant Bacon to the jury as: "of course everybody probably at least has heard his name, because Judge Bacon served for many years, not only as an attorney but as one of your General Sessions Judges here in Hamblen County, and he's the gentleman, the

> distinguished gentleman seated beside Mr. Anderson there." The Judge went on to tell the jurors that: "he'll be a witness, he's also a party . . . you may see Mr. Bacon assisting in his attorney duties as well."

The Challengers argue that Mr. Bacon was not an attorney in this case; therefore the comments were erroneous and created favoritism. We respectfully disagree. He was an attorney, and he was in this case because the Challengers put him in the case. He was entitled to participate to whatever degree he and his attorney saw fit.

The only case we are cited by Challengers is one where the trial judge clearly stated before trial his intention to free the prisoner on a habeas corpus petition regardless of the proof. ***Leighton v. Henderson***, 414 S.W.2d 419, 420 (Tenn. 1967). When he did just as he said, the ruling was reversed because the trial judge was rendered incompetent by his own partiality. ***Id***. at 421. We have been provided no case, and strongly suspect that none exists, where such innocuous statements as in the present case resulted in reversal of a jury verdict.

The trial court accepted the correction and admitted that its statements could have indicated partiality, but, nevertheless denied the motion for new trial:

> It certainly was not the intention of the Court to do so. This inadvertent mistake could have been corrected at the time had plaintiffs objected to these references during the trial.
>
> The Court did instruct the jury, though a transcript of the Court's instructions have not been provided, that they were the sole and exclusive judges of the credibility of the witnesses and also instructed them at the conclusion of the trial that nothing the court had done or said should be taken as an indication that the court has any interest in the outcome of the case.
>
> Further, there were several other witnesses testifying as to the decedent's capacity at the time she executed the will in question. The case did not hinge upon the testimony of Mr. Bacon; and, plaintiffs were able to impeach Mr. Bacon's testimony with his prior deposition statements, as referenced in plaintiffs' Motion.
>
> In addition, it appeared to the Court, and apparently to the jury in light of how quickly they reached a verdict, that the evidence overwhelmingly supported the finding that the decedent did have capacity at the time the will was executed. For all these reasons, the Court believes its inappropriate references to Mr. Bacon were harmless and did not affect the outcome of the trial.

We have not been furnished either a statement of the evidence or a transcript of the proceedings, but we can tell from attachments to the Challengers' motion for new trial that this is one isolated statement which drew no objection from Challengers. The trial court's comments in its order denying a new trial are in complete accord with Tenn. R. App. P. 36 and the cases decided with reference to Rule 36. Accordingly, we find no merit to Challengers' second argument.

C.

We now consider whether the case was lacking the necessary certification as a will contest when it came to circuit court. The only authority we are furnished by Challengers is ***In re Estate of Powers***, 767 S.W.2d 659 (Tenn. Ct. App. 1988). ***Powers*** is properly read to hold that a dispute, once shown to be a will contest, must be transferred from the probate court to the circuit court[1] by some form of written order. ***Id***. at 662. ***Powers*** does not prescribe any particular language or format of order, nor does Tenn. Code Ann § 32-4-101(a) (2007), the statute that regulates the certification of will contests:

> If the validity of any last will or testament, written or nuncupative, is contested, then the court having probate jurisdiction over that last will or testament must enter an order sustaining or denying the contestant's right to contest the will. If the right to contest the will is sustained, then the court must . . . [c]ause a certificate of the contest and the original will to be filed with [the court elected by the contestant] for trial.

Id. The only cases we have found hold that if the will contest makes it to circuit court by whatever procedure, jurisdiction exists and any defects in the form of the order are inconsequential. ***Delaney v. First Peoples Bank***, 380 S.W.2d 65, 69 (Tenn. 1964) (if the substance of the dispute is a will contest, jurisdiction *ipso facto* attaches in circuit court); ***Ball v. Cooter***, 207 S.W.2d 340, 343 (Tenn. 1947) (lack of a certification was not fatal because a suit existed in circuit court and the circuit court had the power, if necessary, to compel certification of the record).

In the present case, however, there is one certification if not two. First, there is an order approved by all counsel purportedly signed by the probate court judge for entry May 22, 2001. It requires the clerk to "certify a complete copy of the proceedings," including the original will admitted to probate, and purports to transfer the case to circuit court "where this cause may be contested." The second order is the order of Judge Wilson, sitting as special probate judge, consolidating all issues for trial in circuit court and ordering that all pleadings be deemed filed in circuit court. According to the order, all parties agreed to the consolidation. The matter was tried before a circuit court jury on instructions that required it to determine the remaining issues as to the validity of the 1999 will, and, consequently, the 1994 will. It would make no sense to require the

[1] Tenn. Code Ann. § 34-4-109 (2007), enacted in 1991, now allows trial of will contests in any "court of record that has probate jurisdiction," at the election of the challenger of the will.

court of record that had all issues consolidated before it for disposition to re-certify the will contest to itself. *See* ***In re Estate of Barnhill***, 62 S.W.3d 139, 143 (Tenn. 2001).

We hold there was certification by the probate court that met the requirements of Tenn. Code Ann. § 32-4-101. Accordingly, we find no error in the alleged lack of certification.

D.

The final issue we address is whether the trial court erred in that part of its judgment that accepted the 1999 will as the decedent's last will and testament. The Challengers argue, "No witness testified at all concerning the validity to establish [the 1999] will." The Proponents point out that there is no transcript or other memorialization of the evidence from which we can conduct a meaningful review. The normal way of handling an appellant's failure to supply an adequate record is to conclusively presume the record would support the result reached in the trial court. ***McDonald v. Onoh***, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989). The trial court addressed the issue straight on in its order on the motion for new trial and still found no error:

> Plaintiffs now assert that the defendants did not prove the validity of the subsequent will. It is the recollection of the undersigned that plaintiff's waived this issue at the beginning of the jury trial. The validity of execution of the subsequent will has never been an issue in the case. After the order granting partial summary judgment the only issue remaining was as to the capacity of the deceased . . . .

There can be no doubt from the trial court's order entered December 6, 2007, that "[t]he only issues remaining are whether the testator had testamentary capacity at the time of revocation of the prior will; and, if not, whether she had testamentary capacity at the time of execution of the probated will." The Challengers furnish no indication that the trial court was incorrect in its observations, or that they challenged the court's statement of the issues remaining open for determination.

Based on the limited review we can conduct, we believe the trial court was correct in finding that any issues beyond those stated by the court and submitted to the jury were waived. But, even if they were not, we will presume there was evidence to support the verdict. We hold the trial court did not err in entering a judgment that the 1999 will was the decedent's last will and testament.

IV.

The judgment of the trial court is affirmed. Cost on appeal are taxed to the appellants Robert Reinhardt and Jeanne Reinhardt Hopkins. The case is remanded, pursuant to applicable law, for collection of costs assessed below.

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CHARLES D. SUSANO, JR., JUDGE