IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

IN RE: ESTATE OF BLANCHE MARIE (BUCKNER) PEERY	)	E1999-02318-COA-R3-CV
CHARLES PERKINS, Petitioner/Appellant	)	Apeal As Of Right From The BLOUNT CO. CIRCUIT COURT
v.	)	HON. W. DALE YOUNG, JUDGE
GLADYS HOWARD SWAFFORD, ET AL, Respondents/Appellees	)	

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For the Appellees:
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AFFIRMED

Swiney, J.

O P I N I O N

Appellant Charles Perkins, Proponent of a holographic will alleged to have been written by the decedent, Blanche Marie (Buckner) Peery, appeals the Trial Court's denial of his Motion for New Trial after a jury found the proffered will to be a forgery. Perkins contends that the

Trial Court should have granted a new trial because the Court erred in excluding the testimony of several of decedent's relatives concerning statements decedent allegedly made to them indicating her testamentary intent. For the reasons herein stated, we affirm the judgment of the Trial Court.

BACKGROUND

Blanche Marie Peery, widowed and with no children, died on Friday, August 4, 1995. Her friend, Charles Perkins, was living at her home and taking care of her at the time of her death. After decedent's funeral, her niece, Lelon Justice, asked Perkins to continue to stay at the home because Justice "did not want to leave the house and her just died. And he lived there with her and so we asked him – my husband, especially, he says, 'Charlie, will you stay on out here and all?'" After the funeral, three of decedent's nieces, Lelon Justice, Mary Jo Matheny and Margie Lender, went to decedent's home to search for insurance documents and a will. Perkins was present in the house periodically while the three women searched, but he did not help them search and, when questioned, he told them that he did not know whether decedent had a will or where she might have put a will. He periodically left and went to a farm he owns while the women were searching through decedent's home, but he returned to stay at the home at night. On Tuesday evening, August 8th, Ms. Lender remembered that her grandfather had left his will in the family Bible, so she decided to look in her Aunt Blanche's family Bible, where she found an envelope containing what she believes to be decedent's will. The document is a small fold-over note card of the type commonly used for social notes. It bears this handwritten, signed and dated statement:

7-20-1995

At My Death My Beloved
Charles is to receive My
Estate. Mary Jo or Lelon
Shall Settle It.
Blanche Peery

Mary Jo Matheny, Lelon Justice and Charles Perkins filed a Petition to Probate the purported will in Blount County General Sessions Court on September 7, 1995. They attached to the Petition a copy of the purported will and a list of decedent's survivors, which includes the names

and addresses of 18 nieces, 10 nephews, 7 great nieces, 9 great-nephews and one great-great nephew. Notice of a hearing on the Petition for Probate was sent to the 45 family members. On October 4, 1995, Gladys Howard Swafford and 16 other nieces and nephews ("Opponents") filed an Answer in which they contested the validity of the document, asserting that it "does not appear to be the handwriting of Blanche Marie Buckner Peery."[1] The General Sessions Court filed an Order Certifying the Will Contest to Circuit Court. Various motions for continuances, discovery motions and motions objecting to expert witnesses followed for nearly two years.

On June 24, 1997, the Opponents filed a Motion in Limine asking the Circuit Court to exclude the testimony of any witness concerning the alleged stated testamentary intent of the decedent. The Opponents argued that since the sole issue in the case is whether the document presented by the Proponents is valid, extrinsic evidence and statements allegedly made by the decedent concerning testamentary intent are irrelevant, prejudicial, would cause confusion of the issues by the jury and constitute inadmissible hearsay.

On the morning of trial, Proponents filed an "Opposition to Motion in Limine" in which they argued that they were required to prove the intent of the testator at trial, and therefore the testimony of witnesses purporting to have knowledge of the decedent's testamentary intent should be admitted and that testimony as to decedent's intent was admissible under the exception to hearsay found in Rule 803(3) of the Tennessee Rules of Evidence. The Court ruled in favor of the Opponents and refused to admit any testimony from decedent's nieces about her alleged stated intent.

At trial, Mary Jo Matheny testified that she was decedent's niece and had known decedent all of her life. She is one of 38 nieces and nephews, and if it is decided that decedent died intestate, she will receive one-thirty-eighth of decedent's estate, or about $11,000. Even though it may be against her pecuniary interest to say so, Ms. Matheny testified that she believes the document at issue is decedent's will because she recognizes the writing as being the handrwiting of her aunt.

[1]The Answer also alleged that decedent was incompetent at the time the document in question was written and, alternatively, that the writing was obtained through undue influence, but those two issues are not before us in this appeal.

Lelon Justice testified that she grew up with decedent and recognized the handrwriting in the purported will as being her aunt's handwriting. She also explained that her aunt's handwriting differed according to whether her arthritis was "acting up." Marjorie Lender, wife of decedent's nephew, Aaron Lender, testified that she had known decedent since 1947 and spent a lot of time with her. While searching decedent's home, she found the purported will, which was in a sealed envelope in decedent's family Bible. She opened the envelope, read the document, then called Charles Perkins, who was outside feeding decedent's pets, to come inside and showed it to him. He seemed surprised by the will.

Dr. Larry Miller, Professor of Criminal Justice at East Tennessee State University, testified for the Proponents as an expert in Questioned Document Analysis that it was his opinion that the document at issue was written by Blanche Peery. He also testified that when he made that determination, he had not been told which result would benefit the clients of the attorney who had asked for his expert opinion. After two other experts testified, he was recalled and testified that this is only the second time he has ever disagreed with other experts about the authenticity of a document, and in each case, the reason for the disagreement was his opinion of arthritis-related changes in an elderly person's handwriting, a subject about which he has conducted research.

Lindell Shaneyfelt testified for the Opponents as an expert Document Examiner that it was his opinion that the document at issue was a forgery. Hans Mayer Gidion testified for the Opponents as a Forensic Document Examiner that it was his expert "unqualified" opinion, i.e., that he could state without any reservations, that the document was, in his expert opinion, a forgery. He also testified that handwriting experts usually agree as to whether a document is a forgery, and that on one occasion when an expert disagreement occurred, he asked the American Board of Forensic Document Examiners to determine "whose logical thinking was wrong, mine or the other person's." After conducting an investigation, the Board withdrew the other person's certification for three years.

Charles Perkins was called by the Opponents and questioned about having probated his mother's will in 1986, apparently to show that he knew a holographic will could be probated in

Tennessee. Counsel for the Opponents and the Proponents disagreed about whether that Will was a holographic Will.

Mary Jo Matheney, Lelon Justice and decedent's cousin, Sarah Deane, then proffered testimony outside the hearing of the jury to the effect that decedent had discussed making a will with them but, being "very tight" with money, decedent did not want to pay a lawyer $150 to draft her will. In this offer of proof, the Witnesses testified that decedent had indicated to Matheny, Justice and Deane, at different times, that she was uncertain about what she wanted to do with her estate, that she wanted Charles Perkins to receive her estate and that she did not want certain relatives to receive any of her estate. They testified that decedent had told them:

> She despised . . . Gladys Swafford and all them. . . .Charles had been good to her, he had taken her places . . . and that she wanted Charles to have her home . . . Keith had lied to her, he has manipulated her, and he owed her money. . . Randy had been so mean to her . . . threw rocks at her . . . she just didn't want anybody to know who she was leaving her things to until her death, you know, she didn't want it publicized.

The jury found that the document at issue was not the will of Blanche Peery. Mary Jo Matheney and Lelon Justice did not appeal the jury verdict. Charles Perkins brings this appeal as the sole remaining will Proponent.

DISCUSSION

Charles Perkins appeals and raises one issue, which we quote:

> Did the Trial Court improperly overrule the Appellant's motion for new trial based upon an erroneous evidentiary ruling of the Trial Court?

The granting or refusal of a new trial rests largely in the discretion of the trial judge. Tenn. R. Civ. P. Rule 59; *Seay v. City of Knoxville,* 654 S.W.2d 397 (Tenn. Ct. App. 1983). Our standard of review of the Trial Court's evidentiary ruling is also whether the Trial Court abused its discretion, as our Supreme Court has held:

> In Tennessee admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude even that evidence which is considered relevant trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of

discretion.

Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). We should not reverse for 'abuse of discretion' a discretionary judgment of a Trial Court unless it affirmatively appears that the Trial Court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining. *Marcus v. Marcus*, 993 S.W.2d 596 (Tenn. 1999).

The evidentiary ruling complained of in this case is the Trial Court's refusal to allow the jury to hear testimony of witnesses who allegedly heard decedent comment at various times about what she wanted to do with her assets upon her death. As stated in *Otis v. Cambridge*, 850 S.W.2d at 442, the fact that evidence is relevant does not require a Trial Court to find it admissible. We will reverse the judgment of the Trial Court and grant a new trial only if the Trial Court's refusal to admit the testimony was "against logic or reasoning and caused an injustice or injury" to Mr. Perkins.

Explaining its rationale for refusing to admit the proffered testimony, the Trial Court stated:

> Prior to the trial of the cause, the Court took under consideration the motion in limine filed by the Opponents of the proffered will of Blanche Marie Peery. Based upon the pleadings in this cause and the judicial admissions of counsel for the Opponents of the proffered will, the court determined that the single issue in the cause is whether or not the proffered will of Blanche Marie Peery is a valid holographic will written and signed by Blanche Marie Peery, and the Court sustained the motion in limine.

According to this explanation, we deem the Trial Court's rationale for exclusion of the proffered testimony to be that it would not assist the trier of fact on the "single issue in the cause . . . whether or not the proffered will . . . is a valid holographic will written and signed by Blanche Marie Peery. . . .." The Opponents had argued to the Trial Court that:

> In Tennessee, declarations of a testator to third persons concerning testamentary intent either before or after the execution of an alleged will not constituting part of the res gestae are inadmissible on the issue of whether or not a purported will is in fact a forgery. *Ricketts v. Ricketts*, 151 Tenn. 525, 267 S.W. 597 (1924); see also *Earp v. Edington*, 107 Tenn. 23, 64 S.W. 40 (1901).
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> Even absent this case law directly on point, the extrinsic evidence

> concerning Blanche Marie Peery's alleged oral statements should be excluded because it is not relevant to the issue at hand.
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> . . . extrinsic statements allegedly made by Mrs. Peery should be excluded because their probative value is slight and is substantially outweighed by the danger of unfair prejudice and confusion of the issues. See, T.R.E. 403. The jury could readily misuse this proof, finding in favor of the document in order to enforce alleged statements of the decedent. However, the Opponents of the Will assert that the document should be judged on its face as to whether or not it is a forgery. Evidence concerning Blanche Marie Peery's alleged statements for the disposition of her estate would only confuse the proper issue to be determined in this proceeding.
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> Additionally, the evidence at issue constitutes inadmissible hearsay.
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> The single issue in this cause is whether or not the proffered will is a valid holographic will written by Blanche Marie Peery. The proffer of any other evidence other than on that singular issue would be irrelevant, prejudicial, and cause confusion as to the issues in this case.

The Opponents argued successfully that the only issue before the Trial Court was the authenticity of the document, and that the only relevant evidence as to its authenticity was whether the handwriting was that of the testator. We agree. Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Tenn. R. Evid. 401. The determination of whether proffered evidence is relevant is left to the discretion of the trial judge, and appellate courts give great deference to a trial judge's decision on relevance issues. *State v. Forbes,* 918 S.W.2d 431 (Tenn. Crim. App. 1995), quoting N. Cohen, D. Paine, and S. Sheppeard, Tennessee Law of Evidence, § 401.5 at 70 (2d ed. 1990).

In this case, the Trial Court accepted the Opponents' argument that the only issue to be decided was whether the handwriting in the proffered will was that of decedent, and the only testimony relevant to that inquiry was testimony about handwriting. This Court has held that it is

within the discretion of the Trial Court to determine how the issues should be framed. *Willliams v. Bridgeford*, 383 S.W.2d 770 (Tenn. Ct. App. 1964). In that case, the Trial Court determined that the primary issue for trial was the validity or invalidity of the later of two purported wills. Based on that decision, the Trial Court permitted counsel for the executor nominated under the later will to open and close presentation of proof and argument before the jury. On appeal, the proponents of an earlier will argued that its validity should have been the issue at trial. We held that the question as to which of said wills should be admitted to probate was to be decided in the Trial Court and it was within the sound discretion of the Trial Court to determine how the issues should be framed.

It is clear from the Judgment entered by the Trial Court that its decision to exclude this testimony was based upon its determination that the testimony was not relevant to the sole issue before it. The proponents of the will argue that Rule 803(3) of the Tennessee Rules of Evidence makes this testimony admissible. Their reliance upon Rule 803(3) is misplaced as Rule 803(3) impacts only whether or not the statements would be excluded as hearsay and is not material to their lack of relevancy. As the Trial Court's determination to exclude this testimony was based upon lack of relevancy and not whether or not it was hearsay, we need not address Rule 803(3) any further.

We have carefully reviewed the proffered testimony of witnesses about the decedent's testamentary intent and find that Trial Court's decision to exclude it is not "against logic or reason." One of the witnesses would have testified that her aunt did not know what to do with her estate and asked the witness for recommendations, but never specifically stated that she had decided what to do. Another witness would have testified that she advised her aunt to seek legal counsel but her aunt did not want to hire a lawyer and sought her advice about what to do with her estate. The witness would also have testified that her aunt expressed a desire to leave her estate to Charles Perkins and a desire not to leave her estate to several relatives. This testimony appears to us to be more confusing than relevant to the sole issue at trial, was the proffered will written and signed by Blanche Marie Peery. There is nowhere offered a definitive statement that decedent said she had made a will leaving her estate to Charles Perkins. Moreover, at the time all of these statements were made, even

if all were true, apparently Blanche Peery had *not* made a will leaving her estate to Charles Perkins. Accordingly, the Trial Court's refusal to allow introduction of the evidence was not against logic or reasoning and did not caused an injustice or injury to Appellant. Since we cannot conclude that it was an abuse of discretion by the Trial Court to exclude this evidence, we hold the Trial Court did not err.

CONCLUSION

For the reasons herein stated, we affirm the judgment of the Trial Court. Costs of this appeal are assessed to the Appellant, Charles Perkins.

D. MICHAEL SWINEY, J.

CONCUR:

HERSCHEL P. FRANKS, J.

CHARLES D. SUSANO, JR., J.