IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

March 30, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

IN RE:	) E1999-01100-COA-R3-CV
	)
ESTATE OF HOMER HASKELL MILLS, Deceased.	)
	)
RONALD DEAN MILLS,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
PEGGY SUE POSEY,	)
	)
Defendant-Appellant,	) APPEAL AS OF RIGHT FROM THE
	) SCOTT COUNTY GENERAL SESSIONS
and	) COURT, PROBATE DIVISION
	)
GLENDA MILLS SPEARS, CHILDREN OF CHARLES HOMER MILLS (DECEASED), AND THE CHILDREN OF ROBERT MILLS (DECEASED),	)
	)
Defendants-Appellees,	)
and	)
	)
BRENDA GAIL FOSTER, formerly known as BRENDA GAIL WENTZ, and A. EILEEN LACKEY,	)
	) HONORABLE JAMES L. COTTON, JR.,
Defendants.	) JUDGE

For Appellant

MAX E. HUFF
Oneida, Tennessee

For Appellees

JOHNNY V. DUNAWAY
LaFollette, Tennessee

VACATED AND REMANDED Susano, J.

This is a will contest case. Ronald Dean Mills ("the Contestant") filed this action contesting the validity of the last will and testament of his father, Homer Haskell Mills ("the Decedent"), on the grounds of incompetency and undue influence. A jury declared the will invalid. Peggy Sue Posey, another of the Decedent's children and one of the proponents of the will, appeals, raising the following issues for our consideration:

> 1. Did the trial court err in relying on the Dead Man's Statute[1] to exclude the testimony of two of the parties to this litigation?
>
> 2. Was Ms. Posey required to make an offer of proof of the testimony excluded by the trial court in order to preserve her claim of error?
>
> 3. Did the trial court err in failing to direct a verdict for Ms. Posey?

Because we find that the trial court erroneously interpreted and, therefore, incorrectly applied the Dead Man's Statute in excluding the testimony of two of the parties to this litigation, we vacate the trial court's judgment entered on the jury's verdict and remand for a new trial.

I.

On January 7, 1998, the Decedent –- who was terminally ill with pancreatic cancer –- executed a will, in which he left the bulk of his estate to two of his

[1]T.C.A. § 24-1-203 (1980).

daughters, Ms. Posey and Brenda Gail Foster.[2] When the Decedent executed the will, the following persons were present: Avery Lackey, A. Eileen Lackey, Ms. Posey, and the attorney who prepared the will, Rebecca Byrd. The will leaves $100 each to the Decedent's third daughter, Glenda Mills Spears, and the Decedent's son, the Contestant, both of whom are appellees in the present appeal. The will further bequeaths two vehicles and a boat to Ms. Posey, with the remainder of the Decedent's estate being divided equally between Ms. Posey and Ms. Foster. The attesting witnesses to the will were Avery Lackey and A. Eileen Lackey. Ms. Posey and Ms. Lackey are named in the will as co-executrixes of the estate.

The Decedent died on January 29, 1998. The will was filed for probate on February 2, 1998. On February 19, 1998, the Contestant filed this action contesting the will, alleging that the Decedent was "not of sound mind" and that but for the undue influence of Ms. Posey and Ms. Foster, the Decedent would have distributed his estate equally among his children *per stirpes*.

A jury trial was held on August 10 and 11, 1998. Relying on the Dead Man's Statute, the trial court ruled as a preliminary matter that all named parties, particularly Ms. Posey and Ms. Lackey, were "prohibited from testifying about statements made by the [D]ecedent or overt conduct exhibited by the [D]ecedent that might rise to testimony"; accordingly, the trial court determined that the named parties could only testify regarding the formalities of the execution of the will.

At the close of the Contestant's proof, Ms. Posey moved for a directed verdict, arguing that the Contestant had not introduced any proof that the Decedent was

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[2]Foster is referred to in the will by her former name, Brenda Gail Wentz.

incompetent at the time he executed the will or that undue influence had been exercised upon him. This motion was denied. After the jury returned its verdict finding the will invalid, Ms. Posey made a motion to set aside the verdict, or in the alternative, for a new trial, contending (1) that the verdict was against the weight of the evidence and (2) that the trial court erred in its interpretation and application of the Dead Man's Statute. The trial court also denied this motion. This appeal followed.

II.

Ms. Posey argues that the trial court erred in its interpretation and application of the Dead Man's Statute and that, because of this error, she and Ms. Lackey -- who were both present when the will was executed –- were prohibited from testifying about the declarations and conduct of the decedent. The Dead Man's Statute provides, in pertinent part, as follows:

> In actions or proceedings by or against executors, administrators, or guardians, 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, intestate, or ward, unless called to testify thereto by the opposite party.

T.C.A. § 24-1-203. In general terms, the Dead Man's Statute applies when two factual scenarios are present: (1) the proposed witness is a party to the suit so that a judgment may be rendered for or against that party; and (2) the subject matter of the testimony concerns a transaction with or a statement by the decedent. *Leffew v. Mayes*, 685 S.W.2d 288, 293 (Tenn.Ct.App. 1984). However, it is well-settled in Tennessee that the Dead Man's Statute does not apply to will contests because such actions are not proceedings in which a judgment may be rendered "for or against" the executor or

administrator of the estate. *Orr v. Cox*, 71 Tenn. 617, 619 (1879); *Beadles v. Alexander*, 68 Tenn. 604, 607 (1877); *Patterson v. Mitchell*, 9 Tenn.App. 662, 665 (1929); *In re Estate of Eden*, C/A No. 01A01-9501-CH-00005, 1995 WL 675842, at *4 (Tenn.Ct.App. M.S., filed November 15, 1995); *In re Estate of Rollins*, 1989 WL 1231, at *1 (Tenn.Ct.App. W.S., filed January 12, 1989). Rather, will contests "are in effect proceedings in rem in which the estate as an entity is not interested because the effect is neither to increase or diminish the assets belonging to it." *Baker v. Baker*, 142 S.W.2d 737, 744 (Tenn.Ct.App. 1940); *see also Petty v. Estate of Nichols*, 569 S.W.2d 840, 845-46 (Tenn.Ct.App. 1977); Neil P. Cohen *et al.*, *Tennessee Law of Evidence* § 601.4 (3d ed. 1995).

In excluding the line of testimony at issue, the trial court noted that it found the Dead Man's Statute was applicable because "the outcome of the verdict will either increase or decrease the size of the estate." We disagree with this predicate finding. The outcome of the will contest in the instant case will only affect the manner in which the Decedent's estate is distributed; it will have no effect on the size of the estate. We therefore find that it was error for the trial court to rely upon the Dead Man's Statute as authority for disallowing the relevant testimony of Ms. Posey and Ms. Lackey.

III.

Having determined that the parties were not precluded by the Dead Man's Statute from testifying as to transactions with or statements by the decedent, we now address the related issues of whether the trial court's ruling was harmless error and whether Ms. Posey was required to make an offer of proof in order to preserve her objection to that ruling.

The Contestant first argues that because two witnesses -- Avery Lackey and the attorney who drafted the will -- were allowed to testify regarding the Decedent's statements and conduct on the day he executed the will, anything that Ms. Posey or Ms. Lackey could have added would have been cumulative; thus, so the argument goes, the exclusion of their testimony did not affect a "substantial right" of the proponents.

We find that a substantial right was affected by the trial court's ruling. The proponents of the will were entitled to present to the jury evidence of the Decedent's competency as well as proof relevant to the issue of undue influence. On the issue of competency, the opinions of lay witnesses are admissible "if they are based on details of conversations, appearances, conduct or other particular facts from which the [decedent's] state of mind may be judged." *In re Estate of Elam*, 738 S.W.2d 169, 172 (Tenn. 1987). Apparently, there were only four witnesses -- the Lackeys, Posey, and Byrd -- who could have testified as to the Decedent's "conversations, appearance[], [and] conduct" on the day the will was executed. Because of the trial court's erroneous ruling, however, the proponents were able to present only the testimony of two of those individuals –- Mr. Lackey and Ms. Byrd. We cannot agree with the conclusion of the Contestant that the excluded testimony would have been merely cumulative on the issue of competency. Presumably, each of the four witnesses had their own opinions and unique observations to present to the jury, and we find that the jury was entitled to hear each of these witnesses' relevant perceptions.

More significantly, however, we find that the erroneous ruling substantially affected the rights of Ms. Posey because she was denied the opportunity to testify on the issue of her alleged undue influence upon the deceased. We do not find such an error to be harmless. *See, e.g., In re Estate of Rollins*, 1989 WL 1231 at *1 ("The

application of the rule to the proponent of the will deprived her of testifying with reference to contentions that went to the heart of her case."). On the contrary, we find that the trial court's error "involv[es] a substantial right [that] more probably than not affected the judgment" below. *See* Rule 36(b), T.R.A.P.

The Contestant next argues that Ms. Posey waived any objection to the trial court's ruling because she failed to make an offer of proof of the excluded testimony. We disagree.

Rule 103(a), Tenn. R. Evid. provides, in pertinent part, as follows:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> * * *
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

The general rule, as expressed in Rule 103(a) is that in order to preserve for appellate review an objection to the exclusion of testimony, an offer of proof of the excluded testimony must be made. The Supreme Court, however, has recognized that this general rule does not apply where a trial court "rules out *an entire line of competent evidence, or refuses to hear an examination thereon* just as it does not apply when [the trial court] holds that witness incompetent and refuses to hear him at all." *City of Nashville v. Drake*, 281 S.W.2d 681, 684 (Tenn. 1955) (emphasis in *City of Nashville*) (applying exception in automobile accident case where trial court excluded testimony pertaining to the joint enterprise of the parties); *see also Morrison v. State*,

397 S.W.2d 826, 830 (Tenn. 1965)(applying exception when trial court excluded all testimony pertaining to criminal defendant's good character); *Strader v. State*, 344 S.W.2d 546, 548 (Tenn. 1961).

The Contestant contends that the trial court did not exclude "an entire line of competent evidence" because Avery Lackey and the attorney who drafted the will were permitted to testify; thus, so the argument goes, an offer of proof was required if Ms. Posey was going to rely upon the exclusion of her testimony and that of Ms. Lackey as error. We disagree. The trial court prevented the proponents of the will from putting on a complete defense to the charges of incompetency and undue influence. By its ruling, the court blocked "an entire line of competent evidence" from parties to this litigation. *See City of Nashville*, 281 S.W.2d at 684. Accordingly, we hold that an offer of proof was not necessary to preserve this issue for appeal. *See Drake*, 281 S.W.2d at 684; *In re Estate of Pritchard*, 735 S.W.2d 446, 448 (Tenn.Ct.App. 1986).

IV.

As to the appellant's final issue, we find no error in the trial court's decision to deny her motion for a directed verdict. *See State Farm General Ins. Co. v. Wood*, 1 S.W.3rd 658, 663 (Tenn.Ct.App. 1999).

V.

For the foregoing reasons, we find that a new trial is warranted. The judgment of the trial court is vacated. Costs on appeal are assessed against the appellees. This case is remanded to the trial court for a new trial, consistent with this opinion.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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D. Michael Swiney, J.