IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Submitted on Briefs April 18, 2002 Session

IN RE: THE ESTATE OF CLARA MASSEY ELY COOK

Appeal from the Chancery Court for Campbell County
No. P-1713 Billy Joe White, Chancellor

FILED MAY 23, 2002

No. E-2001-02062-COA-R3-CV

After the death of Ms. Clara Massey Ely Cook ("Ms. Cook"), a last will and testament was admitted to probate. Subsequently, a Petition for Probate of Holographic Will was filed by Ruthelma Hill ("Petitioner"), one of Ms. Cook's daughters. Petitioner apparently located what she claimed to be a holographic will and sought to have certain property distributed in accordance with the terms of this document. Respondents are the remaining surviving children and a grandson of Ms. Cook, and they collectively opposed the petition. The only issue before the Trial Court was whether the handwritten document which Petitioner sought to have probated contained the necessary testamentary intent to be considered Ms. Cook's last will and testament. The Trial Court held it did not. We affirm.

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

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Timothy P. Webb, Jacksboro, Tennessee, for the Appellant Ruthelma Hill.

Lee Asbury, Jacksboro, Tennessee, for the Appellees Erma Thompson, Lois Clarkston, Carl Massey, Verga Slaughter, and Jeffrey Massey.

OPINION

Background

Petitioner filed a Petition for Probate of Holographic Will after her mother, Ms. Cook, passed away. Petitioner alleged that what was thought to be her mother's last will and testament had been admitted to probate, but she had subsequently located a more recent handwritten will. The handwritten document Petitioner sought to have probated appears to be written on stationery and provides as follows:

> (1) Realestate at Rogers Boat to be devideed beween Ira Massey's children
>
> (2) Bank accounts and CD go to Ruthelma Hull.[1]

Petitioner's mother signed the document, which was dated 3/5/96, and it was witnessed by Roberta Baker and Ruby Hupp. Baker and Hupp supplied virtually identical affidavits stating the document was written and signed by Ms. Cook, and they thought they were witnessing a last will and testament.

Ms. Cook's other surviving children and a grandson opposed the admission of this handwritten document to probate, claiming it did not meet the requirements of a holographic will. Apparently, it is undisputed that the document Petitioner sought to probate is in the handwriting of Ms. Cook, except for the witness' signatures. The only issue the parties litigated was whether it was Ms. Cook's testamentary intent for this document to be considered her last will and testament. Both parties submitted briefs to the Trial Court on this issue. Petitioner argued the proposed will possessed the necessary testamentary intent to be a will based on the language used by Ms. Cook. Petitioner claims Ms. Cook certainly intended to dispose of her property with this document, as evidenced by the specific language used, i.e., "to be divided" and "go to".

The Respondents argued the proposed will lacked the necessary testamentary intent as evidenced by the following, which we quote from their brief filed with the Trial Court:

> The document makes no mention of being a will.
>
> The first word in it has been marked through.
>
> The second paragraph contains the word attorney, totally out of context and also marked through.

[1] After writing "(1)", Ms. Cook wrote the word "Bank", then scratched through this word. After writing "(2) Bank", Ms. Cook wrote the word "attorney", then scratched through this word as well.

> No mention is made of previous wills or intent to revoke previous wills.
>
> A living husband is totally ignored.
>
> The Court judicially knows as a result of case # 14,766 that Petitioner herein, filed a petition on September 10, 1998 alleging incompetency of this alleged testator which after Guardian Ad Litem report resulted in Ms. Hull being appointed Conservator.
>
> Petitioner herein, has therefore been Conservator, proponent of the duly executed will, and now proponent of an alleged holographic will and stands to gain financially if able to repudiate the first will which she propounded.

Counsel for Petitioner then filed a Notice setting this matter for hearing on May 9, 2001. After a hearing, the Trial Court entered an Order which states:

> This cause came to be heard the 9th day of May, 2001, … upon the Petition to Probate Holographic Will, arguments of counsel and the record as a whole, and for good cause shown:
>
> IT IS THEREFORE, ORDERED, ADJUDGED and DECREED as Follows:
>
> 1. That the Instrument referenced in the Petition for Probate of Holographic Will shall not be deemed a holographic will.…

Petitioner filed a motion for a new trial which apparently was heard on July 11, 2001. Based on the "arguments of counsel and the record as a whole", the Trial Court denied the motion. Petitioner appeals, claiming the Trial Court erred in concluding there was insufficient testamentary intent for the holographic will to be probated.

Discussion

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Rule App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). Tennessee law permits a jury to resolve issues in a contested case involving the validity of a will. *See* Tenn. Code Ann. § 32-4-107)(a). It is for the jury or other fact-finder "to determine from all the evidence, intrinsic or extrinsic, whether or not the testator

intended the instrument to operate as his will." *Scott v. Atkins*, 314 S.W.2d 52, 56-57 (Tenn. Ct. App. 1957).

The only issue on appeal is whether the preponderance of the evidence weighs against the Trial Court's factual determination regarding whether the necessary testamentary intent was present for the document at issue to be considered Ms. Cook's last will and testament. As relevant to this appeal, all this Court has been provided is a copy of the Petition, the alleged holographic will, and the arguments in the parties' briefs filed with the Trial Court and this Court. Respondents also note in their brief before this Court that the document, the purported holographic will, makes no mention of death or any other contingency. Respondents also argue this document is as much evidence of Ms. Cook's intent to make a present or future gift as it is to be a will to be effective at her death. We have not been provided a copy of the transcript of the hearing and have no way of knowing if there was any live testimony, what arguments were actually advanced, etc. Accordingly, we cannot ascertain exactly why the Trial Court ruled in the manner in which it did. Likewise, we have not been provided a transcript of the hearing on Petitioner's motion for a new trial. In fact, we cannot even ascertain why Petitioner claimed she was entitled to a new trial.

Petitioner had the duty "to prepare a record which conveys a fair, accurate and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal." *Nickas v. Capadalis*, 954 S.W.2d 735, 742 (Tenn. Ct. App. 1997). In the absence of an adequate record on appeal, this Court will presume the Trial Court's rulings were supported by sufficient evidence. *See, e.g., State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Our review of Petitioner's brief shows the problems resulting from the lack of an adequate record. Petitioner argues that Ms. Cook "attempted to pass to others all property to which she had a right to devise or bequeath . . .", and that all of Ms. Cook's other property was held as tenants by the entirety with her husband. The problem is that Petitioner's brief nowhere references where in the record these facts are to be found. Likewise, we found no evidence in the record showing any such facts. Based on the scant record on appeal, we believe there was evidence to support the arguments of both Petitioner and Respondents. However, we cannot say the evidence preponderates against the conclusion of the Trial Court.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant, Ruthelma Hull, and her surety.

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D. MICHAEL SWINEY, JUDGE