

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

April 24, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

MARJORIE DAVENPORT and ROBERT) C/ A NO. 03A01-9601-CH-00006
(BOB) SUSONG,)
) GREENE CHANCERY
Plaintiffs - Appellees,)
) HON. DENNIS INMAN,
v.) CHANCELLOR
)
MARGARET GODDARD and HERMAN)
GODDARD,)
)
Defendants - Appellants,)
)
And Also Part 2 Defendants)
as follows:)
FOX SUSONG, DAVID SUSONG,)
FREDNA JOHNSON, CHARLES)
SUSONG, BILLIE SUSONG)
JOHNSTON, ELIZABETH SUSONG)
SHANKS, KENNETH SUSONG, HELEN)
SUSONG BROWN, BILL RUSSELL,)
D. E. SUSONG, JR., EVA SUSONG) AFFIRMED
THOMPSON, and LOUISE SUSONG) AND
OSBORNE.) REMANDED

KYLE KING, KING & KING, Greeneville, for Plaintiffs - Appellees.

A. BENJAMIN STRAND, JR., STRAND AND GODDARD, Dandridge, for
Defendants - Appellants.

O P I N I O N

Franks. J.

In this action the Trial Judge determined that Joe and Dell Susong, husband and wife, had contracted to make wills and concluded the reciprocal wills made by Joe and Dell Susong in 1985 were in furtherance of their agreement and Dell Susong subsequently breached the contract by executing another will in conflict with their agreement.

The Trial Judge filed an excellent memorandum opinion and we quote from his findings which essentially are undisputed:

. . . Joe left his entire estate to his wife Dell, if she survived him. If she failed to survive him then his estate was to be reduced to cash and divided into two equal parts, one part to be distributed to his "direct nieces and nephews" and the other part to his wife's "direct nieces and nephews".

Dell Susong executed a mirror image of Joe's will, leaving everything to him if he survived her and, if not, then 50% of her estate to Joe's nieces and nephews and the remaining 50% to her nieces and nephews. Joe and Dell each signed both wills, and the wills were independently witnessed by two other individuals.

Interestingly, on February 19, 1985, [date of the 1985 wills] Mr. and Mrs. Susong executed yet a third document entitled "Personal Will of Dell Arnold Susong and Joseph Susong", which read as follows:

"We, Dell Arnold Susong and Joseph Susong, being of sound mind and body make this our last will and testimony. Both wills are in lock box 30 b at Commerce Union Bank. It states that when one of use [sic] expires all real and personal property will to the survivor. When both have passed away the Administrator, David Clark Susong, will take over and follow the wills to the best of his ability without making a bond, and he will not make a report to Court. He will collect regular fees and serve for the best interest of all concerned according to his thinking.

After all property, etc., has been turned into money it will be put together and divided into two equal parts known as 'Part I' which is Joe's part and 'Part II' which is Dell's part, or 50% of total for each.

It is hoped that the estate should be completely settled within a year.

The items designated to certain ones will be given before all is put into money.?

This document likewise was signed by both Dell and Joseph Susong, and it was witnessed by the same individuals who witnessed their respective wills.

Joe died first and Dell subsequently made several wills, each retaining the language concerning distribution to Joe's heirs and her heirs until her final will wherein she deleted all of these provisions.

The appellants are the residuary legatees under Dell's last will and insist the real estate, which had been owned as tenants by the entirety by the Susongs, ?passed by operation of law? and Dell was not obligated to devise the real estate ?under the alleged reciprocal wills of 1985?. The intent of the parties as to the ultimate disposition of their estates at the time of entering the contract controls, and not the nature and extent of their respective interests in the properties which are subject to their agreement. *See Ashley v. Volz*, 218 Tenn. 420 (1966). At the time of the agreement, the husband and wife each had an expectancy in the property held by entirety, and could mutually agree as to the ultimate devise of their individual and collective interest in the property.

Next, it is argued that the 1985 will of Joseph Susong does not meet the requirements of a holographic will,

since it was in the handwriting of his wife. There is no indication that this will was probated as a holographic will. The record establishes the will was admitted to probate and has the statutorily required witnesses. In any event, the contingent devise became inoperative as a part of that will at Joseph's death, since his wife survived him. This issue is without merit.

Finally, it is contended that the Trial Court was in error in finding the Susongs entered into a contract to make a will.

Whether the parties entered into a contract to make a will is one of fact, not law, to be determined in the light of all of the surrounding circumstances?. *Junot v. Estate of Gillam*, 759 S.W2d 654 (Tenn. 1988), p.657. The Trial Judge concluded there was clear and convincing evidence of the contract to make a will. He explained:

The mere execution of the reciprocal wills does not, in and of itself, evince a contract to make those wills irrevocable. The third document executed by the Susongs, however, filed as Exhibit 2 and quoted above, clearly indicates that the parties had an agreement between themselves that each of them would agree to dispose of their estates in the manner recited in the reciprocal wills.

Further evidence of their agreement was M. Susong's discussion with attorney Russell, when she requested that he prepare new wills for her.

In his testimony attorney Russell testified that Dell had discussed with him on more than one occasion the agreement she had with her late husband Joe as to the ultimate disposition of their estates.

Since the passage of Tennessee Code Annotated

Section 32-3-107, contracts to make a will can only be established as provided by that statute.¹

The surrounding circumstances include that both Susongs signed their respective wills made in 1985 as well as the third document. While inartfully drawn by the parties that document constitutes a memorandum of their agreement. This coupled with the fact that Dell made subsequent wills adhering to the agreement and acknowledged over a period of time to her attorney the contract between her and her late husband all satisfy the requirements of T.C.A. §32-3-107.

We affirm the judgment of the Trial Court at the cost of the appellant, and the cause will be remanded for any other proceedings which may be necessary.

Herschel P. Franks, J.

CONCUR:

¹**Contracts to make or revoke wills.** (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate can be established only by:

- (1) Provisions of a will stating material provisions of the contract;
- (2) An express reference in a will to a contract and extrinsic evidence providing the terms of the contract; or
- (3) A writing signed by the decedent evidencing the contract.

(b) The execution of a joint will or mutual wills does not create a presumption of a contract to make a will, or to refrain from revoking a will.

Don T. Mc Murray, J.

Clifford E. Sanders, Sr. J.