IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 17, 2023 Session

IN RE ESTATE OF WILLIE SEEBER

Appeal from the Probate Court for Loudon County
No. 6428 Rex Alan Dale, Judge

No. E2022-01476-COA-R3-CV

This appeal arises from a dispute over the estate of Mrs. Willie Seeber. Mrs. Seeber left a purported Last Will and Testament executed in 2021, which the personal representative named therein has offered to the Probate Court for Loudon County for solemn form probate. However, various family members and friends of Mrs. Seeber seek to challenge this will and allege Mrs. Seeber lacked testamentary capacity and was unduly influenced to execute the will. The contestants rely upon earlier testamentary documents to establish standing to bring a will contest. The proponent appeals an order of the probate court holding the contestants have standing to bring a will contest. We hold the probate court did not err in its various findings and affirm the judgment of the probate court. This case is remanded for further proceedings.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and JOHN W. MCCLARTY, J., joined.

Loren E. Plemmons, Loudon, Tennessee, for the appellants, Stewart G. Anderson, Individually and as Personal Representative of the Estate of Willie Seeber.

Fiona F. Hill and Tom R. Ramsey, III, Knoxville, Tennessee, for the appellees, Mary Malone, Pace Holmes, Jenny Wiberley, J. Allan Watson, Barbara Watson, Derek Camp, Matthew Kent, Melissa Kent Merrow, and Mary Alison Kent.

OPINION

FACTS AND PROCEDURAL HISTORY[1]

Mrs. Willie Seeber died on August 24, 2021, leaving a sizeable estate. Mrs. Seeber had no issue and was predeceased by her husband, her parents, and her only sibling. Mrs. Seeber's intestate heirs are her nieces and nephews, none of whom are parties to this appeal. On September 7, 2021, the Appellant, Stewart G. Anderson ("Proponent"), filed a petition in the Probate Court of Loudon County, Tennessee ("probate court") for common form testate administration of a will executed by Mrs. Seeber on April 30, 2021 ("2021 Will"). The probate court admitted the 2021 Will for common form probate and named Proponent as Personal Representative of Mrs. Seeber's estate ("Estate"). Letters testamentary were issued to Proponent on September 10, 2021.

On January 31, 2022, Proponent filed a motion to amend his petition for testate administration seeking probate of the 2021 Will in solemn form. In support thereof, Proponent filed an affidavit stating:

> 3. That on September 24, 2021, counsel for the estate mailed copies, as filed and admitted to common form probate, of the decedent's Last Will and Testament to all specific and residuary beneficiaries.
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> 4. That on or about October 25, 2021, I was notified by counsel's office that a specific legatee telephoned to inquire whether the decedent had a prior Last Will and Testament.
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> 5. That on October 29, 2021, counsel received correspondence by facsimile from an attorney who did not identify her client or clients, requesting to receive copies of the decedent's prior testamentary documents.
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> 6. That on or about October 29, 2021, the new owner of the decedent's residence telephoned me to advise an investigator from an attorney's office was asking to come into the residence to look for items.

On March 14, 2022, the initial three contestants, Mary Malone, Pace Holmes, and Jenny Wiberley (collectively, "Initial Contestants"), filed a Verified Notice of Will Contest and Motion for Certificate of Will Contest and a Complaint to Contest Will (collectively,

[1] This appeal arises from a holding by the probate court that Contestants have standing to pursue a will contest; however, there has been no finding of fact made by the probate court as to any other issue. As such, background facts are gleaned from documents that have been filed in the probate court and are included in the record on appeal. Our recitation of these facts does not amount to a determination of their accuracy or evidentiary weight with regard to the merits of any will contest.

"Will Contest Pleadings"). Specifically, Initial Contestants averred that at the time of execution of the 2021 Will, Mrs. Seeber was "of unsound mind, incompetent, and lacked the [requisite] testamentary capacity . . . to make a valid will, and moreover was unduly influenced to do so by [Proponent], the largest beneficiary and devisee thereunder." They further averred Malone and Holmes had been named as beneficiaries of Mrs. Seeber's estate under a prior will executed by Mrs. Seeber on April 27, 2009, and each Initial Contestant was named as a beneficiary of Mrs. Seeber's estate under a later prior will executed by Mrs. Seeber in 2016. They alleged that the 2021 Will "radically altered" Mrs. Seeber's estate plan set forth in the 2009 and 2016 wills. Initial Contestants did not attach a copy of the purported 2009 will or the purported 2016 will to the Will Contest Pleadings. On April 6, 2022, Proponent filed a motion to dismiss and argued that Initial Contestants lacked standing to contest the 2021 Will because they are not intestate heirs of Mrs. Seeber and had not attached the purported 2009 and/or 2016 wills to the Will Contest Pleadings. He also filed an Answer to the Complaint stating he was "without knowledge or information sufficient to form a belief as to" whether Mrs. Seeber had executed the purported 2009 and/or 2016 will(s) and whether Initial Contestants had been named as beneficiaries in such purported wills.

Initial Contestants served a subpoena *duces tecum* upon counsel for Proponent, Attorney Loren Plemmons ("Attorney Plemmons"), who had also served as Mrs. Seeber's estate planning attorney, requiring Attorney Plemmons to produce all wills, codicils and other estate planning instruments of Mrs. Seeber.[2] On April 19, 2022, Attorney Plemmons filed a motion to quash the subpoena and argued that responding to the subpoena would require her to breach the attorney-client privilege, which survived the death of Mrs. Seeber.

At a hearing upon various pending motions, Proponent stipulated that testimony would not be necessary to establish standing for Holmes and Malone if a prior will was in existence naming each of them as a beneficiary. However, he specifically excluded the issue of Wiberley's standing from this stipulation. The probate court denied Proponent's motion to dismiss the will contest, finding Initial Contestants' Will Contest Pleadings were facially sufficient to withstand a motion to dismiss because they stated each Initial Contestant was a named beneficiary under one or more prior wills. However, the probate court did not go so far as to find that Initial Contestants actually had standing. Instead, the probate court found that "the issue of whether the [Initial] Contestants have standing remains for the [probate c]ourt's determination, but that testimony would be unnecessary to determine standing if a prior will(s) is in existence which names Pace Holmes, Mary Malone, and Jenny Wiberley as beneficiaries." To aid the probate court in this determination, the probate court ordered, pursuant to Tennessee Code Annotated section 32-1-113, that Proponent, Initial Contestants, and their attorneys file with the clerk of the court "any document purporting to be a last will and testament[.]" An order memorializing

[2] The subpoena *duces tecum* is not included in the record on appeal.

the probate court's findings of fact and rulings announced at this hearing was entered June 23, 2022 ("June 23 Order").

That same day, Attorney Plemmons filed with the probate court clerk copies of a will executed by Mrs. Seeber on November 4, 2016 ("2016 Will"), an executed First Codicil to the 2016 Will ("2017 Codicil"), and an executed Second Codicil to the 2016 Will ("2020 Codicil"). Each Initial Contestant was named as a beneficiary under the 2016 Will. Holmes and Malone were also named as beneficiaries under the 2017 Codicil and the 2020 Codicil. However, the 2020 Codicil revoked the gift to Wiberley made under the 2016 Will.

On July 6, 2022, Initial Contestants filed a verified petition offering the 2016 Will and 2017 Codicil for probate and presenting the 2020 Codicil to allow them to contest its validity. Copies of the executed 2016 Will, 2017 Codicil, and 2020 Codicil were attached to the verified petition. Contemporaneously therewith, Initial Contestants filed a motion for leave to file an amended verified notice of will contest and amended verified complaint to contest will. Initial Contestants sought to amend their pleadings to add J. Allan Watson and Barbara Watson as contestants and to contest the validity of the 2020 Codicil in addition to the 2021 Will. The proposed amended pleadings averred J. Allan Watson and Barbara Watson were named beneficiaries under the 2016 Will, 2017 Codicil, and 2020 Codicil.

On July 11, 2022, Proponent filed a motion pursuant to Rule 59 of the Tennessee Rules of Civil Procedure seeking to have the probate court alter or amend the June 23 Order. Specifically, Proponent argued:

> 1. The [probate c]ourt's finding that [Initial C]ontestants have standing to bring a will contest sufficient to withstand [Proponent's] Motion to Dismiss for Failure to State a Claim based on the information contained within the four (4) corners of the verified Notice of Will Contest filed by the [Initial C]ontestants is contrary to law.
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> 2. The [probate c]ourt's finding that *Tenn. Code Ann.* §32-1-113 requires any person, including the decedent's attorney, who has possession of a copy of a purported last will and testament must file such with the clerk of the court is contrary to law.
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> 3. The [probate c]ourt's failure to uphold the decedent's attorney-client privilege regarding decedent's prior testamentary documents without inquiry whether the disclosure of such confidential information would promote the testamentary intent of the testatrix is contrary to law.

On July 18, 2022, Initial Contestants filed an amended motion for leave seeking to file revised amended pleadings in the will contest in order to add Derek Camp, Matthew Kent, Melissa Kent Merrow, and Mary Alison Kent as contestants, averring each of these additional potential contestants were also named as beneficiaries under the 2016 Will, 2017 Codicil, and 2020 Codicil.

Following a hearing on the various pending motions, the probate court granted Initial Contestants leave to file their amended will contest pleadings and denied those portions of Proponent's motion to alter or amend the June 23 Order with regard to the issues concerning its application of Tennessee Code Annotated section 32-1-113 and its order that Attorney Plemmons file with the court clerk a copy of any of Mrs. Seeber's prior testamentary documents. However, the probate court held in abeyance that portion of the motion seeking relief based upon Initial Contestants' purported lack of standing pending its consideration of briefs it ordered the parties to file regarding that issue. Initial Contestants, J. Allan Watson, Barbara Watson, Derek Camp, Matthew Kent, Melissa Kent Merrow, and Mary Alison Kent (collectively, "Contestants") filed their amended will contest pleadings on September 14, 2022, which added each of the remaining Contestants as parties ("Amended Will Contest Pleadings").

On October 17, 2022, upon consideration of the parties' briefs and hearing additional arguments from counsel, the probate court entered an order ("October 17 Order") denying Proponent's motion to alter that portion of the June 23 Order based on standing. In the October 17 Order, the probate court found "that within the four (4) corners of Contestants' [Amended Will Contest Pleadings], sufficient standing for all Contestants is established because they have shown that they would be entitled to share in Decedent's estate under the 2016 Will and [2017 Codicil] copies if the 2021 Will and [2020 Codicil] copy were to be set aside." Accordingly, the probate court denied Proponent's motion to alter or amend the June 23 Order as to the standing of Contestants. Proponent filed this appeal seeking review of the October 17 Order.

ISSUES ON APPEAL

Proponent raises the following issues on appeal, which we have consolidated and restated slightly:

1. Whether this Court has jurisdiction to consider this appeal.

2. Whether the probate court erred in holding that Contestants have standing to bring a will contest.

3. Whether the probate court erred in requiring Attorney Plemmons to produce copies of Mrs. Seeber's prior testamentary documents.

Contestants raise the following issue on appeal, which we have restated slightly:

1. Whether Proponent's appeal is frivolous or was taken solely for delay so as to entitle Contestants to an award of their attorney fees, expenses, and costs incurred in defending this appeal.

ANALYSIS

A. Subject Matter Jurisdiction

As a threshold issue, we must determine whether this Court has subject matter jurisdiction over this appeal. "Subject matter jurisdiction relates to a court's authority to adjudicate a particular type of case or controversy brought before it." *In re Estate of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012) (citing *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004)). As orders and judgments entered by courts lacking subject matter jurisdiction are void, "issues regarding a court's subject matter jurisdiction should be considered as a threshold inquiry" and "resolved at the earliest possible opportunity." *Id.* (citing *Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 445 (Tenn. 2012); *Brown v. Brown*, 281 S.W.2d 492, 497 (1955)).

In civil cases, "an appeal as of right may be taken only after the entry of a final judgment." *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (citing Tenn. R. App. P. 3(a)). A final judgment adjudicates all "claims, rights, and liabilities of all the parties," *Discover Bank v. Morgan*, 363 S.W.3d 479, 488 n.17 (Tenn. 2012), and "resolves all the issues in the case, 'leaving nothing else for the trial court to do.'" *Estate of Henderson*, 121 S.W.3d at 645 (quoting *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997)). When an order is nonfinal, this Court lacks subject matter jurisdiction to review it, unless, for example, the appellant pursues an interlocutory appeal, *see* Tenn. R. App. P. 9, or a statute provides the right to an immediate appeal. *See*, *e.g.*, Tenn. Code Ann. § 29-5-319.

In this case, the order appealed from is nonfinal. Contestant's claims giving rise to the will contest, on the record before us, have never been addressed, much less resolved. Because all of the claims, rights, and liabilities of all of the parties have not been adjudicated, the order appealed from is nonfinal. As such, ordinarily this Court would lack subject matter jurisdiction to review this appeal.

Nonetheless, "it has long been held in this state that the right of a contestant to resist the probate of a will is a preliminary matter and presents a separate and distinct issue from the issue of devisavit vel non,[3] and that the order of the probate court sustaining or

[3] *Devisavit vel non* is "[a]n issue directed from a chancery court to a court of law to determine the validity of a will that has been contested, as by an allegation of fraud or testamentary incapacity." *Devisavit Vel Non*, Black's Law Dictionary (11th ed. 2019).

denying the right to contest the will is an appealable order." *Cooper v. Austin*, 837 S.W.2d 606, 610 (Tenn. Ct. App. 1992) (citing *Winters v. Am. Trust Co.*, 14 S.W.2d 740 (Tenn. 1929)).

Based on the foregoing, Proponent argues this Court has subject matter jurisdiction over this appeal. Conversely, Contestants argue that the October 17 Order "essentially only denied the [Proponent's] Motion to Alter or Amend the 06-23-22 order, which in turn, denied the [Proponent's] Motion to Dismiss the original Complaint and Notice of Will Contest, which was based on the issue of standing, *all claims for relief pled by the Contestants are still pending.*" (Emphasis sic). This disregards the fact that "the proceeding in the circuit court on the issue of devisavit vel non after the case is certified from the probate court to the circuit court" – the exact proceeding sought by Contestants in this case – "is in substance an original proceeding to probate the will, separate and distinct from any proceedings held in the probate court." *Cooper*, 837 S.W.2d at 610 (citing *Bearman v. Camatsos*, 385 S.W.2d 91 (Tenn. 1964); *Arnold v. Marcom*, 352 S.W.2d 936 (Tenn. Ct. App. 1961)). As such, the fact that the circuit court has not yet ruled on the issue of *devisavit vel non* has no impact on this Court's subject matter jurisdiction over this appeal.

Similarly, Contestants argue that the October 17 Order is not appealable because it does not actually certify the will contest to circuit court. Instead, the October 17 Order states that "[t]he [probate] court will not enter the proposed certifying order until the bond and Administrator *Pendente lite* issue raised in Contestants' Notice of Will Contest has been decided by hearing or agreement of the parties." Specifically, Contestants prayed in their final Amended Verified Notice of Will Contest:

> 9. **CONTEST BOND OF DEVISEE OR LEGATEE**. Pursuant to Tenn. Code Ann. § 32-4-102(a), Contestants move this Court to require the Legatees and Devisees under the Will to tender a bond of $500.00 conditioned as required by law.
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> 10. **ADMINISTRATOR PENDENTE LITE**. Contestants move this Court to appoint a neutral Administrator Pendente Lite under Tenn. Code Ann. § 30-1-108 . . .

However, the probate court's rulings on these issues will have no impact on its determination of whether Contestants have standing to pursue the will contest at issue in this appeal. Accordingly, such issues have no impact on the appealable nature of the October 17 Order. *See In re Estate of Henderson*, No. E2002-01155-COA-R3-CV, 2003 WL 192154 (Tenn. Ct. App. Jan. 29, 2003), *aff'd*, 121 S.W.3d 643 (Tenn. 2003) (concluding that a later order that "did nothing more than relieve the administrator *ad litem* from his duties and appoint a personal representative of the estate" had no impact on the

appealable nature of an earlier order when the later order did not modify the substantive holding of the earlier order).

Accordingly, we conclude this Court has subject matter jurisdiction over this appeal.

B. Standing
C.

"Whether a contestant has standing to bring a will contest is a threshold question of law separate and apart from the merits of the will contest itself." *In re Estate of Brock*, 536 S.W.3d 409, 413 (Tenn. 2017). "This Court reviews de novo the determination of questions of law and affords no presumption of correctness to lower court rulings." *Id.* (citing *Johnson v. Hopkins*, 432 S.W.3d 840, 844 (Tenn. 2013)).

Standing "ensures that a particular litigant has a sufficiently personal stake in litigation to warrant an adjudication." *Id.* (citing *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006); *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976)). However, "[e]stablishing standing does not require a litigant to show a likelihood of success on the merit[s]' [sic] of the underlying claim." *Id.* (citing *Am. Civil Liberties Union of Tenn.*, 195 S.W.3d at 620). *See Metro. Gov't of Nashville & Davidson Cnty. v. Tennessee Dep't of Educ.*, 645 S.W.3d 141, 149 (Tenn. 2022) (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015)) ("The weakness of a claim on the merits must not be confused with a lack of standing.").

Proponent challenged Contestants' standing to bring the will contest by filing a motion to dismiss the Will Contest Pleadings for failure to state a claim for which relief can be granted pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure. As set forth by the Tennessee Supreme Court:

> A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss "'admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action.'" *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010) (quoting *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005)).
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> In considering a motion to dismiss, courts "'must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.'" *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn. 2007) (quoting *Trau-Med of Am., Inc.*

> *v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)). A trial court should grant a motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

Webb v. Nashville Area Habitat for Human., Inc., 346 S.W.3d 422, 426 (Tenn. 2011) (some internal citations omitted). We review the probate court's legal conclusions regarding the adequacy of the complaint de novo. *Id.* (citing *Brown*, 328 S.W.3d at 855; *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)).

A party establishes standing to bring a will contest if they show either (1) they were named as a beneficiary under another will or codicil, or (2) they would be an heir of the decedent under the laws of intestate succession. *Estate of Brock*, 536 S.W.3d at 414–15 (quoting *In re Estate of Boote*, 198 S.W.3d 699, 714 (Tenn. Ct. App. 2005)). It is undisputed that no Contestant is an intestate heir of Mrs. Seeber. Accordingly, to establish standing, Contestants must each show they were named as a beneficiary under a will or codicil of Mrs. Seeber other than the 2021 Will. In their Verified Notice of Will Contest and Motion for Certificate of Will Contest, Initial Contestants stated:

> 4. **GROUNDS FOR CONTESTANT STANDING**. Contestants have standing to contest the [2021] Will and will show as grounds therefore that each was a named beneficiary of one or more prior wills of the Decedent.

More specifically, Initial Contestants averred in their Complaint to Contest Will:

> **INTRODUCTION**
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> 4. . . . in a Will the Decedent executed on April 27, 2009 . . . . the Decedent left her entire estate to her husband, Lynn Seeber, and in the event that he predeceased[4] her or that they died as the result of a common disaster, she directed that bequests of One Hundred Thousand ($100,000.00) were each to be made to certain individuals consisting of her blood relatives . . . and blood relatives of her husband, namely . . . Mary Malone, and Pace Holmes. . . . The remainder of the Decedent's estate was to be divided into two halves, with one-half to be distributed among her husband's cousins . . . [including] Mary Malone . . . .
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> * * *

[4] The record on appeal establishes that Mr. Seeber predeceased Mrs. Seeber.

8. Upon information and belief, in late 2016, . . . the Seebers' [sic] updated their Wills to add additional beneficiaries to each receive specific monetary bequests of One Hundred Thousand Dollars ($100,000.00) including . . . Jenny Wiberley. . . .

PARTIES, STANDING, JURISDICTION, VENUE, AND STATUTE OF LIMITATIONS

* * *

2. Contestant Mary Malone . . . has standing to contest [the 2021] Will as she was a named beneficiary of two prior Wills of the Decedent.

3. Contestant Pace Holmes . . . has standing to contest [the 2021] Will as he was a named beneficiary of two prior Wills of the Decedent.

4. Contestant Jenny Wiberley . . . has standing to contest [the 2021] Will as she was a named beneficiary of a prior Will of the Decedent.

Similarly, in their Amended Verified Notice of Will Contest, Contestants stated:

4. **GROUNDS FOR CONTESTANT STANDING**. Contestants have standing to contest the [2021] Will . . . and will show as grounds therefore that each was a named beneficiary of one or more prior wills of the Decedent, with Contestants Mary Malone, Pace Holmes, J. Allan Watson, Barbara Watson, Derek Camp, Matthew Kent, Melissa Kent Merrow, and Mary Alison Kent all being named beneficiaries of the 2016 Will, the [2017 Codicil], and the [2020 Codicil], and with Contestant Jenny Wiberley being a named beneficiary of the 2016 Will and the [2017 Codicil]. . . .

More specifically, they averred in their Amended and Verified Complaint to Contest Will:

I. INTRODUCTION

* * *

4. . . . In the 2016 Will, the Decedent left her entire estate to her husband, Lynn Seeber, and in the event that he predeceased her she directed that . . . bequests of One Hundred Thousand Dollars ($100,000.00) each were to be made to certain individuals namely, Pace Holmes, Matthew Kent, Melissa Kent Merrow, Mary Alison Kent, Mary Malone, . . . Jenny Wiberley, . . . [and] Derek Camp . . . . This [2016] Will additionally distributed the residuary of her estate . . . as follows: Fifty percent (50%) in equal shares between . . . Pace Holmes, Melissa Kent Merrow, Matthew Kent, Mary

> Alison Kent, [and] Mary Malone . . . and fifty percent (50%) in equal shares between . . . Derek Camp [among others] . . . .
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> 5. The [2017 Codicil] amended the 2016 Will to . . . devise a parcel of property . . . to . . . J. Allan Watson and his wife, Barbara Watson . . . . The fifty percent (50%) residuary distributions . . . outlined in numbered Paragraph 4 above were also reiterated and republished. All of the other terms and distributions of the 2016 Will not modified by the [2017 Codicil] were ratified, confirmed, and republished.
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> 7. The contested [2020 Codicil] . . . removed Jenny Wiberley as the beneficiary of a specific bequest of One Hundred Thousand Dollars ($100,000.00). The [2020 Codicil] was signed at a time when the Proponent himself had determined that the Decedent lacked sufficient capacity to manage her person and property . . . .

Like in the initial Complaint, the Amended and Verified Complaint also recited that each Contestant has standing to contest the 2021 Will and 2020 Codicil due to their having been named beneficiaries under the 2016 Will, 2017 Codicil, and/or 2020 Codicil.

Proponent urges this Court to disregard these averments as "blunt, conclusive declaration[s] . . . that each [Contestant] has standing" and not as "statement[s] of fact but a hopeful legal conclusion which the [probate c]ourt nor this [C]ourt is obliged to take as true." However, for the purpose of ruling on Proponent's motion to dismiss pursuant to Rule 12.02(6), this Court, like the probate court, is required to construe these averments "'liberally, presuming all factual allegations to be true and giving the [Contestants] the benefit of all reasonable inferences.'" *See Webb*, 346 S.W.3d at 426 (quoting *Tigg*, 232 S.W.3d at 31–32).

While certain of the averments made by Contestants are conclusions of law, Initial Contestants also make specific factual averments in the initial Will Contest Pleadings that Malone and Holmes were named as beneficiaries under the purported 2009 will and the 2016 Will and that Wiberley was named as a beneficiary under the 2016 Will. Similarly, Contestants also make specific factual averments in the Amended Will Contest Pleadings that each of the additional Contestants was named as a beneficiary under the 2016 Will, 2017 Codicil, and/or 2020 Codicil. In light of these averments, it is not apparent from the face of the Will Contest Pleadings or the Amended Will Contest Pleadings that Contestants "'can prove no set of facts in support of the claim that would entitle [them] to relief.'" *See id.* at 438. Accordingly, we conclude the probate court did not err in denying Proponent's motion to dismiss Initial Contestants' Will Contest Pleadings nor in denying Proponent's motion to alter or amend the June 23 Order.

Despite Contestants having pled in their Will Contest Pleadings that they were beneficiaries under other will(s) executed by Mrs. Seeber, Proponent insists Contestants lack standing to contest the 2021 Will because they have not been able to produce the original of any other testamentary document, and they had not initiated lost will proceedings prior to the entry of the order giving rise to this appeal. In making this argument, Proponent relies upon *In re Estate of West*, 729 S.W.2d 676 (Tenn. Ct. App. 1987), wherein this Court concluded:

> . . . before the appellant may go forward with a will contest he must show that he would take a share of the decedent's estate if the probated will were set aside. *Donnelly v. Hendrix*, 49 Tenn. App. 361, 355 S.W.2d 116 (1960). He may satisfy that requirement by showing that he would take under a prior will. *Warmath v. Smith*, 198 Tenn. 257, 279 S.W.2d 257 (1955). Where the prior will cannot be found, the exclusive jurisdiction to show that it has been lost, destroyed or suppressed lies in the chancery court. *Id*.
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> . . . we think the rule is that the lost will must first be established in chancery before a legatee under that will has standing to contest a later probated will. Then both wills may be certified to the circuit court for determination of which is the will of the deceased.

Estate of West, 729 S.W.2d at 677–78. However, as the Tennessee Supreme Court recently emphasized in *Estate of Brock*, "fraud should never be insulated from the reach of the court because the court may have more work to do to detect and correct the fraud." *Estate of Brock*, 536 S.W.3d at 419 (quoting *Estate of Malcolm*, 602 N.E.2d 41, 44 (Ill. App. Ct. 1992)).

Furthermore, *Estate of West* and the precedent it relies upon are factually distinguishable from the case at hand. In *Estate of West*, the testator executed a will providing that, in the event his wife predeceased him, his entire estate would go to his wife's nephew. *Estate of West*, 729 S.W.2d at 677. The testator's wife predeceased him, and in 1984, he executed a new will leaving his entire estate to his niece. *Id.* The same attorney drafted both wills and advised the testator to destroy the 1981 will upon his execution of the 1984 will. *Id*. The testator died, and the 1984 will was admitted to probate. *Id*. The 1981 will could not be found. *Id*. The nephew filed a petition to contest the 1984 will, which the niece moved to dismiss, arguing that the nephew failed to show he had a right to contest the will. *Id*. The nephew amended his petition to allege facts related to the 1981 will and requested permission to offer the 1981 will for probate. *Id*. An unsigned copy of the 1981 will was attached to the amended petition. *Id.*

The trial court denied the motion to dismiss the will contest and allowed the nephew to file a petition "to establish the lost will." *Id*. After a hearing on the lost will petition, the trial court "held that the [nephew] had failed to overcome the presumption that the [1981] will had been destroyed by the testator." *Id*. The trial court then dismissed the will contest, finding that without the 1981 will giving him an interest in the estate, the nephew did not have standing to contest the 1984 will. *Id*.

On appeal, this Court affirmed the judgment of the trial court, concluding that "the lost will must first be established in chancery before a legatee under that will has standing to contest a later probated will." *Id.* at 678. In reaching this conclusion, this Court cited to *Warmath v. Smith*, 279 S.W.2d 257 (Tenn. 1955), *id*., in which the Tennessee Supreme Court had cited to *Wynne v. Spiers*, 26 Tenn. 394 (Tenn. 1846). *See Warmath*, 279 S.W.2d at 258. However, each of these cases is factually distinguishable from the case at hand. Specifically, in *Estate of West*, the only document available to show the contents of the purported prior will was an unsigned copy. *Estate of West*, 729 S.W.2d at 677. Similarly, *Warmath* involved an alleged prior will, but there was not even a draft or copy available to show the contents of the purported will. *Warmath*, 279 S.W.2d at 257–58. Finally, *Wynne* involved a property settlement reached in a divorce that was not finalized prior to the wife's death and a husband, who contested the wife's will, asking the trial court to enforce the property settlement instead. *Wynne*, 26 Tenn. at 405–06.

Conversely, the parties and probate court here have the benefit of executed complete copies of Mrs. Seeber's 2016 Will, 2017 Codicil, and 2020 Codicil. As such, this case is unlike *Estate of West*, *Warmath*, and *Wynne*, wherein the trial court had no proof of the actual contents of the missing instruments. To prove a last will, the party relying upon the will must show:

> (1) the fact that the will was executed in accordance with the forms of law, (2) the substance or contents of the will, and (3) that the will has not been revoked, and that it is lost or destroyed or cannot be found after a due and proper search. However, the fact that a will cannot be found after a due and proper search raises a presumption that the testator himself destroyed the will. Therefore, to overcome the presumption the one seeking to establish a lost will must prove that the testator did not have custody and control of the will after execution, or that he had lost his testamentary capacity for a period before his death and that the will was in existence at the time the loss of competency occurred.

Estate of West, 729 S.W.2d at 678 (internal citations omitted). "[C]ontents of [a] lost or destroyed will or codicil may be proved by a copy kept by the attorney who drew it[.]" *Estate of Boote*, 198 S.W.3d at 726 n.47 (citing 1 Pritchard § 51, at 83). Therefore, the copies of the 2016 Will, 2017 Codicil, and 2020 Codicil can be used to establish the substance or contents of the originals of those instruments. There is no dispute in the record

that the instruments were executed in accordance with the forms of law. Thus, Contestants must overcome the presumption that Mrs. Seeber herself destroyed these instruments in order to revoke them, which will require them to prove either that she did not have custody or control of the instruments after their execution or that she had lost her testamentary capacity for a period before her death and that the instruments were in existence at the time the loss of competency occurred. However, requiring Contestants to prove these facts at this juncture would, in essence, be requiring Contestants to prove the very merits of the will contest itself. The Tennessee Supreme Court has made clear that "a litigant need not establish a likelihood of success on the merits to establish standing." *Estate of Brock*, 536 S.W.3d at 419.

"A will contest allows a court to make a determination, once and for all, about how a decedent's estate should be distributed." *Estate of Brock*, 536 S.W.3d 413–14 (citing *Jones v. Witherspoon*, 187 S.W.2d 788, 791 (Tenn. 1945); *In re Estate of Barnhill*, 62 S.W.3d 139, 143 (Tenn. 2001)). Accordingly, where "the parties dispute which testamentary documents, if any, represent the decedent's last valid will and testament, the competing instruments must all be submitted for adjudication in the will contest." *Id.* at 419 (citing *Bearman*, 385 S.W.2d at 95; *Durell v. Martin*, 110 S.W.2d 316, 318 (Tenn. 1937); *Lillard v. Tolliver*, 285 S.W. 576, 582 (Tenn. 1926); *Estate of Boote*, 198 S.W.3d at 714). However, as Contestants point out, the probate court has yet to enter an order certifying any testamentary instruments to the circuit court, and this Court reaches no conclusion as to which of the testamentary documents at issue in this case should be certified to the circuit court. Instead, this Court concludes only that Contestants have stated facts sufficient to withstand a motion to dismiss with regard to their standing to bring a contest of the 2020 Codicil and/or the 2021 Will.

D. Production of the Wills

Proponent argues the probate court erred when it required Attorney Plemmons to file with the probate court clerk a copy of any of Mrs. Seeber's prior testamentary documents. In this regard, Proponent raises two separate issues. Proponent first argues that copies in the possession of Attorney Plemmons should have been protected from production by the attorney-client privilege.

"As our Supreme Court has elucidated, '[w]e review a trial court's rulings on the application of the attorney-client privilege under an abuse of discretion standard.'" *In re Law Sols. Chicago LLC*, 629 S.W.3d 124, 128 (Tenn. Ct. App. 2021) (quoting *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314, 317–18 (Tenn. 2019)). "A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Id.* (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). "An abuse of discretion can be found only

when the trial court's ruling falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

Contestants served a subpoena *duces tecum* upon Attorney Plemmons seeking the production of all wills, codicils and other estate planning instruments of Mrs. Seeber. "A party seeking discovery is entitled to obtain information about any matter, not privileged, which is relevant to the subject matter involved, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 615 (Tenn. Ct. App. 2006) (citing Tenn. R. Civ. P. 26.02(1); *Reid v. State,* 9 S.W.3d 788, 792 (Tenn. Ct. App. 1999)). "The relevancy requirement is broadly construed to include any matter that bears on, or that reasonably could lead to other matters that could bear on any of the case's issues." *Id.* (citing *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984)). "The rules favor discovery." *Id*.

The attorney-client privilege "serves the administration of justice by encouraging full and frank communication between clients and their attorneys by sheltering these communications from compulsory disclosure." *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002) (citing *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981); *Bryan v. State*, 848 S.W.2d 72, 79 (Tenn. Crim. App. 1992)). This privilege, however, "is not absolute and it does not protect all communications between an attorney and a client." *State ex rel. Flowers*, 209 S.W.3d at 616 (citing *Bryan*, 848 S.W.2d at 80). "The communication must involve the subject matter of the representation and must be made with the intention that the communication will be kept confidential." *Id*. Furthermore, while the attorney-client privilege generally survives the death of the client, "in a suit between the devisees under a will, *statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged*." *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 792 (Tenn. Ct. App. 2001) (quoting *Glover v. Patten*, 165 U.S. 394, 406 (1897)) (emphasis sic).

The policy underlying this exception has perhaps been best stated by the Supreme Court of Connecticut in *Gould, Larson, Bennet, Wells & McDonnell, P.C. v. Panico*, 869 A.2d 653 (Conn. 2005):

> In a will contest, wherein lack of capacity or undue influence has been raised, the court must determine whether the document presented as the last will and testament of such a deceased person is really such. In that instance, it reasonably cannot be contended that the testator had any interest in or desire to conceal his real intentions in such a matter when those intentions are called into question after his death. Clearly, the decedent knew when he had the will prepared that it would have to be made public and established as his will in court before it could become effective. Accordingly, if the will

> does not reflect the decedent's actual intention, but rather that of another who induced him by undue influence to make the will, it cannot be said that the decedent would want such a will established as his own. If the law protected the communications, it would foster that which it abhors, namely, deceit and fraud.

Gould, Larson, Bennet, Wells & McDonnell, P.C., 869 A.2d at 657. *See Jones*, 187 S.W.2d at 790–91 (In a will contest "[t]he parties present, not their own rights, but their interpretation of the rights of the testator as evidenced by the will or *wills*. The paramount question that so embraces all others, is the proper distribution of the estate to carry out the will of the deceased testator.") (emphasis sic); *see also Estate of Hamilton*, 67 S.W.3d at 792 ("The allowance of the exception is to help establish the intent of the testatrix or testator . . . . The testamentary exception should be applied to such disputes concerning all potential beneficiaries.").

Proponent argues that this exception does not apply in this case because the will contest had not yet been certified to circuit court and, as such, Mrs. Seeber's testamentary intent was not yet at issue. However, such a narrow application would thwart the very purpose of the exception by allowing a proponent of a will purportedly obtained by undue influence to avoid the will contest altogether by simply using the attorney-client privilege as a shield to withhold from contestants the documents necessary for them to establish standing to bring the will contest. As such, the probate court's ruling that the attorney-client privilege was not applicable in this case was not outside the spectrum of rulings that might reasonably result from an application of the correct legal standards and was not an abuse of discretion.

Proponent also argues the probate court erred in finding Tennessee Code Annotated section 32-1-113 requires Attorney Plemmons to produce any prior testamentary documents of Mrs. Seeber and file all such documents with the probate court clerk. Section 32-1-113 provides:

> (a) Any person or corporation who has possession of or discovers a written instrument purporting to be the last will and testament of a decedent shall mail or deliver that instrument to the personal representative named in the instrument as soon as the person or corporation has knowledge of the death, and a photographic copy of the instrument shall be mailed or delivered to the clerk of the court having probate jurisdiction in the county of the decedent's residence.
>
> (b)(1) If the personal representative, or the personal representative's address, is not known, is deceased or is not eligible to serve;
>
> (2) If the instrument does not name a personal representative;

(3) If the personal representative declines to serve; or

(4) If it appears that there is no estate that will require administration; then the person having possession of the original instrument shall mail or deliver it to the clerk.

(c) The receipt by the personal representative or the clerk shall relieve the person of further responsibility as to possession of the instrument.

(d) The clerk of the court shall have no responsibility to perform any acts regarding the probate of the will and shall not accept any claims for filing against the estate unless and until the personal representative or other interested party files proper pleadings to initiate such an action.

A lower court's construction of a statute is a question of law, which we review de novo with no presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011) (citing *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009); *Carter v. Quality Outdoor Prods., Inc.*, 303 S.W.3d 265, 267 (Tenn. 2010)). In construing a statute, we must "first look to the plain language of the statute to determine the legislature's intent." *State v. Linville*, 647 S.W.3d 344, 354 (Tenn. 2022) (quoting *Frazier v. State*, 495 S.W.3d 246, 248 (Tenn. 2016)). "We give the statute's words their natural and ordinary meaning." *Id*. "'When those words are clear and unambiguous, we need not consider other sources of information but must simply enforce the statute as written.'" *Id.* (quoting *Frazier*, 495 S.W.3d at 249).

Proponent urges this Court to adopt a construction of section 32-1-113 that would ignore the express language of the statute and instead read into it an exception that does not exist. Specifically, Proponent argues that "photocopies of a client's prior will, known to the holder of such photocopies that the instrument represented by the photocopies has been revoked and replaced by a later will currently under probate and executed in the manner required by Tenn. Code Ann. § 32-1-104(a), should not fall within the purview of" the statute. However, the statute expressly applies to any "written instrument *purporting to be* the last will and testament of a decedent[.]" Tenn. Code Ann. § 32-1-113(a) (emphasis added). When the document at issue purports to be the last will and testament of a decedent, the plain language of the statute requires it be produced. There is no exception for a situation in which the holder, attorney or otherwise, has a subjective belief that the document at issue is not actually the last will and testament of the decedent. Furthermore, had the legislature intended for section 32-1-113(a) to apply only to original instruments, it could have so provided, just as it did in section 32-1-113(b). "[C]ourts 'must be circumspect about adding words to a statute that the General Assembly did not place there.'" *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013) (quoting *Coleman v. State*, 341 S.W.3d 221, 241 (Tenn. 2011)).

As applied to the facts of this case, the plain language of Tennessee Code Annotated section 32-1-113 required Attorney Plemmons to mail or deliver a photographic copy of any written instrument purporting to be the last will and testament of Mrs. Seeber to the probate court clerk. We conclude, therefore, that the probate court did not err in requiring Attorney Plemmons to do so.

E. Fees on Appeal

Finally, we address Contestants' issue regarding whether this appeal should be deemed frivolous such that Contestants should be awarded attorney's fees. "'A frivolous appeal is one that is 'devoid of merit,' or one in which there is little prospect that [an appeal] can ever succeed.'" *Morton v. Morton*, 182 S.W.3d 821, 838 (Tenn. Ct. App. 2005) (quoting *Indus. Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995)). Tennessee Code Annotated section 27-1-122 provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

In the exercise of our discretion, we decline to find this appeal frivolous and further decline to award Contestants' attorney's fees and costs incurred in this appeal.

CONCLUSION

For the aforementioned reasons, we affirm the judgment of the Probate Court for Loudon County, and this case is remanded for proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellant, Stewart G. Anderson, individually and as personal representative of the Estate of Willie Seeber, for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE