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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2101130

Adam Dorough, Rufus Dorough, James Dorough, Patrick Dorough, and Robert Dorough

v.

Denise Scott Ricks

Appeal from Autauga Circuit Court
(CV-09-900165)

BRYAN, Judge.

Adam Dorough, Rufus Dorough, James Dorough, Patrick Dorough, and Robert Dorough (collectively referred to as "the Dorough brothers") appeal from a judgment in favor of Denise

Scott Ricks in a will contest brought by the Dorough brothers. We reverse and remand.

Factual Background and Procedural History

On June 9, 2009, Joseph Paul Dorough ("Joseph") executed a will leaving all his property to Ricks and naming her as his personal representative. Ricks is the daughter of Margaret Farmer, who died in May 2009. Joseph and Farmer had begun dating in approximately 1988 when Ricks was 14 years old, and they had continued dating off and on until Farmer died in May 2009. Ricks testified that, although she was not related by blood or marriage to Joseph, she considered him a surrogate father and that they had had a close relationship. Joseph died on August 22, 2009. The Dorough brothers are Joseph's brothers and next of kin.

On September 8, 2009, Ricks petitioned the Autauga Probate Court to admit Joseph's will to probate. The Autauga Probate Court docketed Ricks's petition as case number 09-151. On September 14, 2009, the Autauga Probate Court set Ricks's petition for hearing on October 13, 2009.

On September 18, 2009, an attorney filed a notice of appearance on behalf of the Dorough brothers. On September 24,

2009, pursuant to a request by the Autauga Probate Court, the Autauga Circuit Court ("the trial court") appointed a local attorney as a special probate judge to preside in case number 09-151. On the morning of October 13, 2009, shortly before the hearing regarding Ricks's petition to admit the will to probate, the Dorough brothers filed an answer to Ricks's petition. The answer denied that the will was valid but did not constitute a complaint asserting a will contest. See Bullen v. Brown, 535 So. 2d 76 (Ala. 1988) (holding that a motion for a continuance stating that "the crucial issue in this case is the validity of the Will" did not constitute a complaint asserting a will contest).

The Autauga Probate Court proceeded with the hearing regarding Ricks's petition on October 13, 2009, and the Dorough brothers and their attorney attended the hearing. On October 15, the Autauga Probate Court entered an order titled "Decree Admitting Self-Proving Will to Probate." The order stated:

> "This matter came before the Court on October 13, 2009, to be heard on the application of Denise Farmer Ricks to admit to probate and record the last will and testament of [Joseph], late an inhabitant of this County, heretofore filed in this Court.

"Present were Denise Farmer Ricks, the proponent, her counsel, Jack Owen, and [the Dorough brothers], next of kin of [Joseph], and Chip Cleveland, their counsel.

"It having been shown to the satisfaction of the Court that proper notice was given to each next of kin as required by law, and that all things have been done pursuant to the laws of this State, and to a former Order of this Court, after receiving testimony and evidence,

"The Court finds that the said instrument was made self-proving at the time of its execution by acknowledgment of [Joseph] and the affidavits of the witnesses, each made before an officer authorized to administer oaths and evidenced by the officer's certificate, under official seal, attached to or following the will in the form required by law; and further finds that there has been no showing of fraud, forgery, undue influence or unsound mind of [Joseph].

"WHEREUPON, the court finds that the aforesaid instrument of writing is the last will and testament of [Joseph], that it was executed, attested and self-proved, and that [Joseph] at the time of signing was of full age and sound mind and disposing memory and understanding.

"Therefore, the Court being satisfied of its jurisdiction herein, it is ordered, adjudged and decreed by the Court that said instrument of writing purporting to be the last will and testament of [Joseph] is hereby declared to be duly self-proved as the last will and testament of [Joseph] and such is admitted to probate, and ordered to be recorded, together with the self-proving statements, and all other papers on file relating to this proceeding."

(Emphasis added.)

Also on October 15, 2009, the Dorough brothers filed a motion titled "Motion to Transfer Proceeding to Circuit Court." The record does not contain a ruling on that motion by the Autauga Probate Court. However, on October 19, 2009, the Dorough brothers filed an amended complaint in an action they had commenced against Ricks in the trial court on August 28, 2009. The complaint commencing that action had asserted claims that are not before us in this appeal; however, the amended complaint filed on October 19, 2009, asserted a will contest challenging the will on the grounds of (1) lack of valid execution, (2) undue influence, (3) fraud, and (4) lack of testamentary capacity. On November 24, 2009, Ricks answered the Dorough brothers' amended complaint and denied the material allegations of their will contest. In response to a motion filed by the Dorough brothers, the trial court, on December 15, 2009, ordered the Autauga Probate Court to transfer case number 09-151 to the trial court. On January 15, 2010, the Autauga Probate Court filed with the trial court certified copies of the filings in case number 09-151.

The trial court held a separate bench trial regarding the will contest on November 16, 2010, and February 28, 2011, and

received evidence ore tenus. The Dorough brothers presented their case-in-chief first, and, during that phase of the trial, they introduced into evidence a copy of the will, which showed that Joseph and the subscribing witnesses had signed affidavits in the form specified by § 43-8-132, Ala. Code 1975, the Code section providing for self-proving wills, and that a notary public, as an officer authorized to administer oaths, had signed a certificate in the form specified by § 43-8-132, but it does not show that the notary public's official seal is affixed to the will as required by § 43-8-132. The only evidence regarding the execution of the will introduced by Ricks was the testimony of the attorney who had drafted the will and, in her capacity as a notary public, had signed the certificate regarding Joseph's and the subscribing witnesses' execution of their affidavits. The attorney testified that Joseph had signed the will in the presence of the two subscribing witnesses and that the attorney, in her capacity as a notary public, had notarized the signatures of Joseph and the two subscribing witnesses. However, she was not asked whether she had affixed her notary public's official seal to the will as required by § 43-8-132. No party introduced the

original will into evidence or called the subscribing witnesses to testify regarding the execution of the will.

At the close of all the evidence, the Dorough brothers orally moved the trial court for a judgment on partial findings[1] pursuant to Rule 52(c), Ala. R. Civ. P. The Dorough brothers asserted that they were entitled to a judgment in their favor because, they said, Ricks had the burden of making a prima facie showing that the will had been validly executed and she had failed to meet that burden. In response, Ricks asserted that she had indeed made a prima facie showing that the will had been validly executed (1) through the testimony of the attorney who drafted the will, which, Ricks said, established that the will was self-proving and (2) through the Autauga Probate Court's order determining that the will was self-proving, which, Ricks said, had become a part of the record in the trial court when the Autauga Probate Court filed a certified copy of the order with the trial court. The trial court did not rule on the Dorough brothers' motion at that

[1]In Lawson v. Harris Culinary Enterprises, LLC, 83 So. 3d 483, 491 (Ala. 2011), the supreme court indicated that a motion for a judgment as a matter of law made at the close of all the evidence in a nonjury trial is properly characterized as a motion for a judgment on partial findings.

time.

On March 25, 2011, the trial court entered an order stating:

> "This cause coming on before this Court ... and testimony being taken ore tenus on November 16, 2010 and February 28, 2011 on the single issue of the contest of the Will, this Court finds as follows:
>
> "1. That [Joseph] executed [the will] on June 9, 2009.
>
> "2. That the same was executed before two witnesses, Shannon Smith and Kimberly Kervin.
>
> "3. That the two witnesses executed the same before a Notary Public, Joy Booth, who testified to the execution of the notary acknowledgment and to making the instrument for [Joseph].
>
> "4. That the execution of this instrument is in compliance with Alabama Code Section 43-8-132, 1975 and subparagraph (c) makes the execution proper without further proof, by a presumption.
>
> "Wherefore, this Court finds the [will] is [Joseph's] Last Will and is properly accepted as his final disposition for his Estate."[2]

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[2]Although its March 25, 2009, order did not specifically address the Dorough brothers' claims of undue influence, fraud, and lack of testamentary capacity, the trial court necessarily rejected those claims by finding that "the [will] is [Joseph's] Last Will and is properly accepted as his final disposition for his Estate." See Dutton v. Chester F. Raines Agency, Inc., 475 So. 2d 545, 547 (Ala. 1985) ("While the trial court may not have specifically addressed Count Four [of the defendant's counterclaim], the court necessarily rejected that claim by rendering a judgment in favor of [the

On April 22, 2011, the Dorough brothers filed a motion to alter, amend, or vacate the trial court's March 25, 2011, order on the ground, among others, that Ricks had failed to meet her burden of making a prima facie showing that the will had been validly executed. That same day, the Dorough brothers filed a separate motion asking the trial court to certify its March 25, 2011, order as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P.

On April 28, 2011, Ricks filed a motion asking the trial court, pursuant to Rule 201, Ala. R. Evid., to take judicial notice of the fact that the Autauga Probate Court had determined that the will was self-proving pursuant to § 43-8-132 as evidenced by the Autauga Probate Court's October 15, 2009, order finding that the will was self-proving and admitting it to probate in case number 09-151, which, Ricks asserted, had been made a part of the record in the trial court when the Autauga Probate Court had filed a certified copy of the order with the trial court on January 15, 2010. On April 29, 2011, the trial court granted Ricks's motion.

On July 25, 2011, the trial court entered an order

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plaintiff].").

denying the Dorough brothers' motion to alter, amend, or vacate its March 25, 2011, order, and, on August 2, 2011, the trial court entered an order certifying its March 25, 2011, order as a final judgment pursuant to Rule 54(b).

On August 22, 2011, the Dorough brothers appealed to this court. Due to lack of jurisdiction, this court transferred the appeal to the supreme court, which transferred the appeal back to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Analysis

The Dorough brothers first argue that the trial court erred because it did not grant their motion for a judgment on partial findings at the close of all the evidence.

> "'The standard of review applicable ... to rulings on motions for a judgment on partial findings by the trial court' is '[o]rdinarily ... the ore tenus standard.' Burkes Mech., Inc. v. Ft. James-Pennington, Inc., 908 So. 2d 905, 910 (Ala. 2004) (citing Loggins v. Robinson, 738 So. 2d 1268, 1270 (Ala. Civ. App. 1999), and Grant v. Bullock County Bd. of Educ., 895 F. Supp. 1506, 1508-09 (M.D. Ala. 1995) (review under Rule 52, Fed. R. Civ. P.)). Under the ore tenus standard of review, findings on disputed facts are presumed correct, and the trial court's judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust. Southside Cmty. Dev. Corp. v. White, 10 So. 3d 990, 991 (Ala. 2008). '"'"The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court

> to sustain its judgment."'"' 10 So.3d at 991-92 (quoting Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 929 (Ala. 2007), quoting in turn Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005), quoting in turn Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985)). See also First Alabama Bank of Montgomery, N.A. v. Coker, 408 So. 2d 510, 512-13 (Ala. 1982) ('The presumption of correctness [attendant to ore tenus findings] is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment. In such instances where the proof at trial fails to support the material allegations on which the suit is based, the judgment rendered cannot be upheld on appeal.'). Additionally, we note that 'the ore tenus standard is inapplicable "where the evidence is undisputed, or where the material facts are established by the undisputed evidence." Salter v. Hamiter, 887 So. 2d 230, 234 (Ala. 2004).' Burkes Mechanical, 908 So. 2d at 910. In such cases, appellate review is de novo. Id. See also Ragsdale v. Ragsdale, 991 So. 2d 770, 772 (Ala. Civ. App. 2008)."

Lawson v. Harris Culinary Enters., LLC, 83 So. 3d 483, 491 (Ala. 2011).

Specifically, the Dorough brothers argue that the trial court should have granted their motion for judgment on partial findings because, they say, Ricks had the burden of making a prima facie showing that the will had been validly executed and she failed to meet that burden. This is so, according to the Dorough brothers, because Ricks failed to make a showing that the will was self-proving because she neither introduced

the original of the will to prove that the official seal of the notary public was affixed to it as required by § 43-8-132 nor introduced the testimony of the two subscribing witnesses to prove that the will was validly executed.

The proponent of a contested will has the burden of making a prima facie showing that the will was validly executed. Burns v. Marshall, 767 So. 2d 347, 351 (Ala. 2000). The requirements for the valid execution of a will are set forth in § 43-8-131, Ala. Code 1975, which provides:

> "Except as provided within section 43-8-135, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."

Section 43-8-132(a) provides that a will may be made self-proving "by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal ...." (Emphasis added.) Section 43-8-132(c) provides that, "[i]f the will is self-proved, as provided in this section, compliance with

signature requirements for execution is conclusively presumed ...."

In Ex parte Helms, 873 So. 2d 1139, 1144 (Ala. 2003), the supreme court held that a will does not comply with the requirements of § 43-8-132(a) unless the official seal of an officer authorized to administer oaths is affixed to the will. Therefore, in order to establish a prima facie case that the will was self-proving under § 43-8-132, and, therefore, that it was entitled to a presumption of valid execution under § 43-8-132(c), Ricks had the burden of making a prima facie showing that the official seal of the notary public who certified the execution of Joseph's and the subscribing witnesses' affidavits was affixed to the will. No seal is visible on the copy of the will introduced by the Dorough brothers. The certified copy of the will filed with the trial court by the Autauga Probate Court shows what may be a circular impression near the notary public's signature, and, if it is indeed a circular impression, it is possible that that circular impression is the notary public's official seal; however, it is not sufficiently clear from the certified copy of the will that what may be a circular impression near the

notary public's signature is indeed the notary public's official seal to meet Ricks's burden of making a prima facie showing that the notary public's official seal is affixed to the will. The original of the will, which would be the best evidence of whether the notary public's official seal is affixed to the will, was not introduced into evidence.

Ricks argues that the October 15, 2009, order of the Autauga Probate Court finding that the will is self-proving and admitting it to probate is sufficient to make a prima facie showing that the will is self-proving. Section 43-8-169 provides that, when the valid execution of a will is proved in the probate court by the testimony of the subscribing witnesses, "the testimony of the witnesses must be reduced to writing by [the probate judge], signed by the witnesses and, with the will, immediately recorded in a book provided and kept for that purpose." Section 43-8-202, Ala. Code 1975, provides:

> "The circuit court may, [when a will contest is commenced in circuit court after the will has been admitted to probate by the probate court], direct an issue to be tried by a jury, and on the trial before the jury, or hearing before the circuit judge, the testimony of the witnesses reduced to writing by the judge of probate, according to section 43-8-169, is evidence to be considered by the judge or jury."

(Emphasis added.) Caselaw decided before the enactment of § 43-8-132 held that, because the predecessor to § 43-8-202 made the testimony of the subscribing witnesses reduced to writing by the probate judge admissible in a will contest in the circuit court, the proponent of a will could make a prima facie showing that the will was validly executed by introducing that written testimony into evidence in the will contest in the circuit court so long as two witnesses had testified regarding the execution of the will in the probate court or one witness had testified regarding the execution of the will and there had been a proper accounting for the absence of the second witness in the probate court. See Ferrell v. Minnifield, 275 Ala. 388, 391, 155 So. 2d 345, 348 (1963). However, in Hancock v. Frazier, 264 Ala. 202, 204, 86 So. 2d 389, 390-91 (1956), the supreme court stated that, although the testimony of the subscribing witnesses reduced to writing by the probate judge is admissible in a will contest in the circuit court, "the judgment in the probate court has no probative value" in the will contest in the circuit court. We have not found any caselaw holding that a different rule applies if the judgment of the probate court found that the

will was self-proving. Accordingly, in the present case, we conclude that the October 15, 2009, order of the Autauga Probate Court finding that the will was self-proving and admitting it to probate had no probative value in the will contest in the trial court and, therefore, that that order did not make a prima facie showing that the will was self-proving.

Because Ricks did not make a prima facie showing that the will is self-proving, she could only meet her burden of making a prima facie showing that the will was validly executed if she made a prima facie showing that satisfied the requirements of § 43-8-167, which provides, in pertinent part:

> "(a) Wills offered for probate, except noncupative wills, must be proved by one or more of the subscribing witnesses, or if they be dead, insane or out of the state or have become incompetent since the attestation, then by the proof of the handwriting of the testator, and that of at least one of the witnesses to the will. Where no contest is filed, the testimony of only one attesting witness is sufficient.
>
> b) If none of the subscribing witnesses to such will are produced, their insanity, death, subsequent incompetency or absence from the state must be satisfactorily shown before proof of the handwriting of the testator, or any of the subscribing witnesses, can be received ...."

(Emphasis added.)

In Ferrell v. Minnifield, 275 Ala. at 391, 155 So. 2d at

348, the supreme court stated:

> "Under [present § 43-8-167, Ala. Code 1975], a will, upon formal contest, must be proved by both subscribing witnesses, or if one is not available, his absence must be accounted for to get in secondary evidence of his attestation, as secondary evidence should be resorted to only in the absence of primary proof of both the subscribing witnesses. Barnett v. Freeman, 197 Ala. 142, 72 So. 395 [(1916)]."

In the present case, Ricks neither introduced the testimony of the subscribing witnesses nor accounted for their absence. Because Ricks did not introduce that primary evidence regarding the execution of the will, the testimony of the attorney who drafted the will regarding its execution, which was secondary evidence, did not meet Ricks's burden of making a prima facie showing that the will had been validly executed pursuant to § 43-8-167. See § 43-8-167 and Ferrell v. Minnifield.

Because Ricks neither made a prima facie showing that the will was self-proving pursuant to § 43-8-132 nor made a prima facie showing that the will had been validly executed by introducing proof meeting the requirements of § 43-8-167, we conclude that she failed to meet her burden of making a prima facie showing that the will had been validly executed and,

therefore, that the trial court erred in failing to grant the Dorough brothers' motion for a judgment on partial findings. Consequently, we reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion. Because we are reversing the judgment of the trial court on the basis of the Dorough brothers' first argument, we do not reach their other arguments.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman, Thomas, and Moore, JJ., concur.