IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 30, 2007 Session

BARBARA RIPPEY WHITLEY
v.
JAMES M. RIPPEY, JR., as Executor of the Estate of Robert English Rippey

An Appeal from the Chancery Court for Maury County
No. P-182-05 Stella L. Hargrove, Judge

No. M2006-01436-COA-R3-CV - Filed on August 3, 2007

This is a will contest. The decedent was an 83-year-old man who had no natural born children. In 1968, the decedent adopted his first wife's two adult daughters, the plaintiff and her sister. In 1970, the decedent's first wife died. After her mother's death, the plaintiff visited the decedent sporadically. The last visit occurred in 1999 or 2000. In April 2002, after meeting with his accountant and his attorney, the decedent executed a will that divided the estate among his nieces and nephews and a friend. The will did not mention or otherwise acknowledge the plaintiff or her sister. Around the time he executed the will, the decedent told both the drafting attorney and his treating physician that he had "no children." Three years later, in 2005, the decedent died, and the will was admitted into probate. The plaintiff then filed a complaint contesting the will, claiming that the decedent lacked testamentary capacity. The executor filed a motion for summary judgment, which the trial court granted. The plaintiff now appeals, arguing that the decedent's statements that he had "no children" were sufficient to establish a genuine issue as to the decedent's lack of testamentary capacity at the time the will was executed. We affirm, finding that the plaintiff failed to set forth sufficient evidence from which the trier of fact could reasonably find that the decedent lacked testamentary capacity to execute the April 2002 will.

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

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and DONALD P. HARRIS, SR. J., joined.

Lauren Paxton Roberts and Bradley A. MacLean, Nashville, Tennessee, for appellant, Barbara Rippey Whitley.

William S. Fleming, Columbia, Tennessee, for appellee, James M. Rippey, Jr., as Executor of the Estate of Robert English Rippey.

OPINION

In 1968, Robert English Rippey ("Decedent") was married to his first wife. His first wife had two daughters, Plaintiff/Appellant Barbara Rippey Whitley ("Whitley") and Joanne Dudley Denney. On March 29, 1968, the Decedent adopted Whitley and her sister; both women were adults at the time of the adoption. Two years later, on February 13, 1970, the Decedent's first wife died of cancer.

Shortly thereafter, the Decedent suffered a stroke. The stroke left the Decedent with residual right-side weakness and expressive aphasia, a medical condition that causes loss or impairment of the use of language. This made it difficult for the Decedent to communicate clearly. However, there is no evidence in the record that the Decedent's mental capacity was affected by the first stroke. The Decedent later remarried, but his second wife died in 1996. The Decedent did not have any children born to him. In 1996, the Decedent executed a will that made no provisions for the adopted daughters, Whitley and her sister, and did not mention them. The introductory paragraph to the Decedent's 1996 will stated: "I have no children."

After her mother died, Whitley sporadically visited the Decedent at his home in Columbia, Tennessee. The record indicates that, between 1990 and 2000, Whitley visited the Decedent on six different occasions, spending a total of 22 days with the Decedent during that time period. After her last visit with the Decedent in 1999 or 2000, Whitley moved to Italy with her husband, who was in the military. Whitley lived in Italy for the next five years and did not visit the Decedent.

Meanwhile, on March 21, 2002, the Decedent met with his certified public accountant and friend of fifty years, Joe Kelley. The Decedent told Kelley that he did not want his property to pass under his 1996 will, and the two discussed in detail how the Decedent wanted to dispose of his property. Kelley suggested that the Decedent retain Barbara Walker, an attorney, to draft a new will. Kelley then contacted Walker and faxed to her a detailed letter, stating how the Decedent wanted his property to pass upon his death.

On March 27, 2002, the Decedent met with Walker to discuss the letter that Kelley had faxed to her. The Decedent confirmed to Walker that he wanted his property to pass as Kelley had described in the letter. In his discussions with Walker, the Decedent told her that he had no children.

After this meeting, Walker drafted a Last Will and Testament and delivered the draft will to Kelley for the Decedent to review. On April 10, 2002, the Decedent executed the will at Kelley's office in the presence of Kelley, Walker, and two attesting witnesses. It is undisputed that the will was executed in accordance with the required statutory formalities.

The April 10, 2002 will provided for a $10,000 bequest to the Decedent's friend, Jane Newton,[1] devised all real estate to the Decedent's nephew, Defendant/Appellee James M. Rippey, Jr. ("Rippey"), appointed Rippey as the executor, and divided the rest and residue of the estate one-half to Rippey and one-half to be divided equally among six of the Decedent's nieces and nephews, "share and share alike." The will specifically excepted two other nieces—the two children of his deceased brother's first marriage—who were to take nothing. In a separate provision, the will placed the share of one niece, Lady Jackson, in trust; it named two co-trustees and included specific instructions as to the management of the trust. The will made no provisions for Whitley or her sister; it neither mentioned nor acknowledged them. Unlike the 1996 will, the Decedent's 2002 will did not affirmatively state that he had no children.

Shortly thereafter, on May 3, 2002, the Decedent was admitted to Maury Regional Hospital with stroke-like symptoms.[2] The Decedent's primary physician, Dr. Shawn Reed, treated the Decedent at the hospital from May 3, 2002 to May 17, 2002. During this time, when asked about his family, the Decedent told Dr. Reed that he had no children. During his stay at the hospital, the Decedent was diagnosed with prostate cancer.

Three years later, suffering from advanced prostate cancer, the Decedent contracted double pneumonia. On September 21, 2005, the Decedent died from respiratory failure caused by the pneumonia and the cancer. He was 83 years old when he died. The Decedent's estate consisted of real property valued at approximately $125,000 and personal property valued at approximately $1,300,000.

Following the Decedent's death, the named executor, Rippey, filed a petition requesting probate of the April 10, 2002 will. The petition was heard on October 3, 2005. The probate court entered an order on October 10, 2005, admitting the will to probate and directing that Letters Testamentary be issued to Rippey.

On October 24, 2005, Whitley filed a complaint contesting the will. In her complaint, Whitley alleged that the Decedent did not have testamentary capacity to execute a will on April 10, 2002, and that the will was procured by undue influence and coercion. Along with the complaint, Whitley filed a motion for temporary injunction, seeking to enjoin a scheduled auction of the Decedent's property. By agreed order entered on October 26, 2005, the motion was dismissed and the auction proceeded; all proceeds from the sale of the Decedent's real and personal property were deposited into designated money market accounts. On October 31, 2005, Rippey filed an answer to the complaint, denying the allegations. Discovery ensued.

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[1] Jane Newton was the sister of the Decedent's second wife.

[2] The parties dispute whether the Decedent suffered a second stroke two years earlier in May 2000, and whether he suffered a third stroke prior to his admission to the hospital in May 2002. Medical records included in the appellate record are not conclusive on this issue. They indicate, however, that the Decedent experienced a number of health problems in his later years and that he had a history of alcohol abuse. The records also indicate that the Decedent lived alone, took care of himself, and continued to drive as late as May 2002.

On April 3, 2006, Rippey filed a motion for summary judgment. In support of the motion, Rippey pointed out Whitley's answers to interrogatories in which she acknowledged that she did not know any persons who had information as to the Decedent's mental capacity on or prior to April 10, 2002. Rippey also filed the Decedent's medical records and the affidavits of Joe Kelley, Barbara Walker, and Dr. Shawn Reed with the motion. In Kelley's affidavit, he testified that the Decedent was "completely aware of what he was doing and the consequence of his actions" on April 10, 2002. In Walker's affidavit, she stated that the Decedent "was of sound mind and memory and competent to make" a will on April 10, 2002, and noted that, despite some difficulty with his speech, she could "understand . . . what he wanted in his will." Dr. Reed opined, based upon a reasonable degree of medical certainty, that the Decedent was mentally competent in March and April 2002, and also noted that the Decedent was "coherent, oriented and alert" during his hospital stay in May 2002. From this, Rippey argued that there was no evidence to support the allegations in the complaint, and ample evidence to establish that the Decedent was competent to make a will on April 10, 2002.

On May 17, 2006, Whitley filed a response to the motion, relying, for the most part, on the affidavits and medical records submitted by Rippey in support of the motion. Whitley acknowledged that she had no personal knowledge of the events leading up to the Decedent's execution of the will or conversations with the Decedent around the time of execution, as she was not present during that time. She argued nonetheless that a genuine dispute remained as to whether the Decedent knew the objects of his bounty, and thus had testamentary capacity, on April 10, 2002, because prior to, during, and after executing the April 10, 2002 will, the Decedent asserted that he had no children, despite having adopted Whitley and her sister in 1968. Whitley pointed out that, in the affidavits of Walker and Dr. Reed, they stated that the Decedent told them that he had no children. The Decedent's medical records included notations by other attending physicians during the Decedent's May 2002 hospital stay indicating that he told the physicians that he had no children. Considering these factors and the fact that the April 10, 2002 will made no mention of the Decedent's adopted daughters, Whitley argued that the record established a genuine issue as to whether the Decedent was laboring under a "morbid delusion" that prevented him from knowing his legal heirs, the objects of his bounty.

After hearing arguments from counsel on May 24, 2006, the trial court entered an order stating:

> 1. The Court finds that Plaintiff has had sufficient time within which to fully respond and to prepare to defend Defendant's Motion for Summary Judgment. In his first statement to the Court, counsel for Plaintiff indicated that he had sufficient pleadings in the record to rebut Defendant's motion. Therefore, pursuant to T.R.C.P. 56.06 the Court will rule on the record before it on the date of hearing.
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> 2. There is no proof in the record of lack of testamentary capacity. There is only speculation and conjecture that [the Decedent] did not know the objects of his bounty in failing to recognize in his April [10], 2002, Last Will and Testament two adult children of a former spouse . . . adopted by him in 1968. The record reflects

> that [the Decedent] claimed no children as well in a prior Last Will and Testament executed November 22, 1996. Line five of that Will . . . states: "I have no children."
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> 3. There is no proof in the record of undue influence or coercion. There are only mere allegations, speculation and innuendo.
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> 4. Plaintiff rests upon the denials of the adverse party's pleadings, including the affidavits submitted in support of their motion for summary judgment. Also Plaintiff rests upon mere allegations in her pleadings that [the Decedent] could have been laboring under a morbid delusion that prevented him from knowing the objects of his bounty. The Court finds that Plaintiff's response fails to set forth specific facts showing that there is a genuine issue for trial, by affidavits or otherwise, pursuant to T.R.C.P. 56.06.
>
> It is accordingly, ORDERED by the Court that Defendant's Motion for Summary Judgment shall be, and is hereby, granted.

Thus, the trial court granted summary judgment in favor of Rippey as executor of the Decedent's estate, finding that the record contained "no proof" of a lack of testamentary capacity, undue influence, or coercion, and that Whitley had failed to set forth specific facts, by affidavit or otherwise, establishing a genuine issue for trial. The order granting the motion was entered on May 30, 2006. From this order, Whitley now appeals.

The sole issue presented to this Court for review is whether there exists a genuine issue of material fact as to whether, on April 10, 2002, the Decedent, Robert English Rippey, was unable to identify the objects of his bounty and therefore not competent to execute a will.

A motion for summary judgment should be granted where the moving party demonstrates that there are no genuine issues of material fact for trial and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; ***Penley v. Honda Motor Co.***, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists for trial. ***Souder v. Health Partners, Inc.***, 997 S.W.2d 140, 144 (Tenn. Ct. App. 1998). Once shown, the non-moving party "must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial." ***Byrd v. Hall***, 847 S.W.2d 208, 211 (Tenn. 1993). The non-moving party can satisfy this burden by:

> (1) pointing to evidence overlooked or ignored by the moving party that establishes a material factual dispute, (2) by rehabilitating the evidence attacked in the moving party's papers, (3) by producing additional evidence showing the existence of a genuine issue for trial, or (4) submitting an affidavit explaining why further discovery is necessary . . . .

Id. at 216 n.6 (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 331-34 (1986)).

The trial court's decision to grant a motion for summary judgment presents a pure question of law. ***Mooney v. Sneed***, 30 S.W.3d 304, 306 (Tenn. 2000). Therefore, we review a summary

judgment decision *de novo* upon the record, according no presumption of correctness to the conclusions of the lower court. ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). In reviewing the record, we "view the evidence in the light most favorable to the nonmoving party and . . . draw all reasonable inferences in the nonmoving party's favor." ***Staples v. CBL & Assocs., Inc.***, 15 S.W.3d 83, 89 (Tenn. 2000). If the "facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion, then summary judgment is appropriate." ***Seavers v. Methodist Med. Ctr.***, 9 S.W.3d 86, 91 (Tenn. 1999); ***see also Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). If, however, "there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." ***Byrd***, 847 S.W.2d at 211; ***see also Poore v. Magnavox Co.***, 666 S.W.2d 48, 49 (Tenn. 1984).

It is well-settled in Tennessee that, in order to have the mental capacity required to make a valid will, the testator's mind "must be sufficiently sound to enable him or her to know and understand the force and consequence of the act of making the will." ***In re Estate of Elam***, 738 S.W.2d 169, 171 (Tenn. 1987). The testator must also be able to comprehend " 'the property being disposed of, the manner of its distribution, and the persons receiving it.' " ***In re Estate of McCord***, No. M2003-00175-COA-R3-CV, 2004 WL 508479, at *6 (Tenn. Ct. App. Mar. 12, 2004) (quoting ***Brewington v. Sanders***, No. 01A-01-9301-CV-00002, 1994 WL 189626, at *4 (Tenn. Ct. App. May 18, 1994)). Thus, "[t]he question is not so much what was the degree of memory possessed by the testator, as this: Had he a disposing mind and memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it and the objects of his bounty?" 1 Jack W. Robinson, Sr. & Jeff Mobley, Pritchard on Wills and Administration of Estates § 101 (5th ed.1994). "The law does not require that persons must be able to dispose of their property with proper judgment and discretion in order to make a will . . . . It is sufficient that they understand what they are [doing]." ***Thomas v. Hamlin***, 404 S.W.2d 569, 574 (Tenn. Ct. App. 1964). Finally, in examining whether a testator possessed the requisite mental capacity, the "time of executing the will is the only point of inquiry; but evidence of mental condition both before and after making the will, if not too remote in point of time, may be received as bearing upon that question.' " ***In re Estate of McCord***, 2004 WL 508479, at *6 (quoting ***Harper v. Watkins***, 670 S.W.2d 611, 628-29 (Tenn. Ct. App. 1984)).

On appeal, Whitley argues that the evidence shows that the Decedent lacked testamentary capacity on April 10, 2002, because he did not recognize either her or her sister as the objects of his bounty and did not include either of them in his will, despite the 1968 adoption. She contends that the statements the Decedent made to the attorney who drafted the will and to his treating physicians, that he had no children, are sufficient to create a genuine issue of material fact as to the Decedent's ability to know his heirs at law,[3] the objects of his bounty, at the time he executed the April 10, 2002 will.

[3]For purposes of intestate succession, an adopted child is considered the same as a natural born child of the adopting parent. ***See*** T.C.A. § 36-1-121 (2005).

In support of her argument, Whitley relies on the case of ***Phillips v. Chitwood***, No. E2004-00116-COA-R3-CV, 2004 WL 2086331 (Tenn. Ct. App. Sept. 20, 2004). In ***Phillips***, the decedent executed a will approximately six months before he died at the age of 93. ***Id.*** at *1. The will bequeathed the entire estate to the decedent's sister and two nieces, making no mention of the decedent's son. ***Id.*** The decedent's will affirmatively stated, "I have no children." ***Id.*** at *3. At the time of the decedent's death, the decedent and his son had essentially no personal relationship. ***Id.*** at *1. The son visited the decedent on only two occasions after the son reached the age of 14 or 15 years old. ***Id.*** The last visit had occurred approximately five years before the decedent died. ***Id.*** After the decedent's death, the will was probated in common form, and the son filed a petition contesting its validity on the basis that the decedent lacked testamentary capacity. ***Id.*** The son argued that the decedent suffered from a delusion that he was childless, based on the affirmative statement in the will that the decedent had "no children." ***Id.*** at *3. The executrix filed a motion for summary judgment, which the trial court granted. ***Id.*** at *1. The court of appeals reversed, finding that the decedent's "denying that an object of his bounty existed, as set forth in his Will, is an adequate basis to raise as a disputed issue of material fact . . . , since the cases are replete in holding that the maker of a will must know the objects of his or her bounty." ***Id.*** at *4.

In the case at bar, Rippey's motion for summary judgment was supported by formidable undisputed evidence that the Decedent was competent to execute a will on April 10, 2002. Three affidavits contained statements to the effect that the Decedent knew what he was doing at and around the time of execution. In addition to the testimony of the Decedent's accountant and long-time friend, as well as the drafting attorney, the Decedent's primary care physician, Dr. Reed, opined that, based upon a reasonable degree of medical certainty, the Decedent was competent in April 2002. The Decedent's medical records also reflect that he was "alert . . . oriented . . . answering appropriately all questions . . . [and] knew exactly what was going on," during a 14-day stay in the hospital less than a month after executing the will at issue.

In addition, the provisions of the will are pertinent to the issue of whether a testator possessed the requisite mental capacity. ***See Hammond v. Union Planters Nat'l Bank***, 222 S.W.2d 377, 380 (Tenn. 1949). The April 10, 2002 will is quite specific, dividing the Decedent's estate among seven named nieces and nephews as well as the sister of the Decedent's second wife, specifically excepting two nieces, creating a trust in the share of one niece, and providing detailed instructions to two co-trustees. The care and detail in the provisions of the April 10, 2002 will are a further indication that the Decedent knew what he was doing at the time of execution.

In response, Whitley did not dispute the testimony or medical proof submitted in support of the motion for summary judgment, nor did she seek further discovery. It is undisputed that Whitley and her sister were adopted as adults, and that after her mother's death two years later, Whitley's contacts with the Decedent can only be described as sporadic. Moreover, the Decedent's 1996 will affirmatively stated that he had no children. Some of Whitley's occasional visits with the Decedent occurred after the Decedent's execution of the 1996 will; nevertheless, Whitley does not assert that the Decedent was delusional or incompetent when she saw him. Instead, Whitley relies solely on her status as an heir at law to the Decedent, and the statements made by the Decedent to his attorney

and his physicians that he had "no children." While there are factual similarities between this case and the ***Phillips*** case cited by Whitley, considering all of the facts in this case, we must conclude that the evidence on which Whitley relies is insufficient for a reasonable trier of fact to conclude that the Decedent lacked testamentary capacity on April 10, 2002.

Therefore, we find that, in response to Rippey's motion for summary judgment, Whitley failed to set forth specific facts, by affidavits or other discovery materials, sufficient to establish a genuine issue for trial regarding whether the Decedent did not know the objects of his bounty, and thus lacked testamentary capacity, at the time he executed the April 10, 2002 will. Accordingly, we find no error in the trial court's grant of summary judgment in favor of Rippey.

The decision of the trial court is affirmed. Costs of this appeal are to be taxed against Plaintiff/Appellant Barbara Rippey Whitley, and her surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE