Rel: November 20, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190888

Tomeka McElroy and Marlon McElroy

v.

Tracy McElroy, as personal representative of the Estate of Clifton McElroy, Jr., deceased

Appeal from Jefferson Probate Court
(No. 208001)

SELLERS, Justice.

Tomeka McElroy and Marlon McElroy (hereinafter referred to collectively as "the contestants") appeal from a judgment entered in a will

contest by the Jefferson Probate Court in favor of Tracy McElroy, as personal representative of the estate of Clifton McElroy, Jr., deceased.[1] We affirm.

Facts and Procedural History

Clifton McElroy, Jr., a resident of Jefferson County, died on April 11, 2010, leaving a will that was purportedly executed by him on October 15, 2008. On April 14, 2010, Tracy petitioned the probate court to admit the will to probate, averring that the will was self-proving in accordance with the requirements of § 43-8-132, Ala. Code 1975. On that same day, the probate court admitted the will to probate and issued letters testamentary to Tracy.

On September 16, 2010, the contestants filed a will contest in the probate court challenging the validity of the will. They specifically alleged that Clifton's signature on the will was forged and that, therefore, the will was not properly executed. The administration of the estate, including the

[1]The contestants and Tracy are siblings; Clifton McElroy, Jr., was their father, and they are beneficiaries under his will.

will contest, was removed to the Jefferson Circuit Court pursuant to § 12-11-41, Ala. Code 1975.

After discovery delays, multiple continuances, and a failed summary-judgment motion filed by the contestants, the circuit court conducted a three-day bench trial on the will contest. After hearing the evidence, the circuit court entered a judgment finding that, although the will did not meet the requirements of a self-proving will under § 43-8-132, it was properly executed and witnessed and was, therefore, valid under § 43-8-131, Ala. Code 1975. The contestants appealed. This Court dismissed their appeal because the administration of the estate had not been properly removed from the probate court; thus, the circuit court never obtained subject-matter jurisdiction over the estate administration or the will contest.[2] McElroy v. McElroy, 254 So. 3d 872 (Ala. 2017).

After this Court dismissed the contestants' appeal, the probate court held a status conference and ordered a new trial to determine the validity

[2]This Court specifically noted that there was no indication in the record that any party filed a petition for removal in the circuit court or that the circuit court ever entered an order removing the administration of the estate from the probate court as required by § 12-11-41.

of the will, specifically whether the will had been properly executed and proved as required by Alabama statutory law. The contestants moved for a summary judgment or, alternatively, for a judgment on partial findings. Tracy opposed the motion and filed a cross-motion for a summary judgment. The parties thereafter agreed that, in lieu of another bench trial, the probate court would base its ruling regarding the validity of the will on written materials, including the transcript of the bench trial in the circuit court.

The circuit-court transcript upon which the probate court relied indicates, among other things, that the will, dated October 15, 2008, was not personally signed by Clifton but, rather, was signed by Tracy. Specifically, Tracy testified that she signed Clifton's name on the will at Clifton's direction and in his presence. She stated that, after she signed Clifton's name on the will, she never saw the will again until after he died. Tracy admitted that Clifton had no physical impairment that would have prevented him from personally signing the will. She testified, however, that Clifton had routinely requested and/or told her to sign his name on various documents. Tracy finally testified that she never told anyone that

she had signed Clifton's name on the will until after the contestants filed the will contest and hired a handwriting expert who opined that Clifton's signature on the will was a forgery. Tomeka testified that she was surprised to learn that Clifton had a will because, she said, in the months leading up to his death, she heard Clifton say that he did not have a will and that he wanted his estate divided evenly among his four children. Tomeka further testified that, after Clifton's funeral, she compared the signature on the will to other documents Clifton had signed and determined that the signature on the will was not Clifton's signature. Tomeka stated that she hired attorneys to file a will contest, which required a handwriting expert to prove that the signature on the will was a forgery. Tomeka further stated that, after the handwriting expert conducted his review of the signature and his identity and findings were disclosed in the discovery process, she learned that Tracy, not Clifton, had signed Clifton's name to the will.

Willie Jackson, one of the subscribing witnesses, testified that he had known Clifton for over 40 years and that, while he was at Clifton's house on one occasion, Clifton handed him a document and stated: "I need

you to witness this."[3] Jackson testified that he signed the document in Clifton's presence but that he could not recall if Clifton's signature was on the document when he signed it. Jackson also testified that he assumed the document Clifton had asked him to witness was a will. He clarified, however, that he read the paragraph above his signature line, which stated that the document was Clifton's will:

> "Q. [Attorney reading paragraph above signature lines for witnesses indicating that the document was Clifton's last will].
>
> "....
>
> "Q. All right. And [Clifton] was present and asked you to sign this document?
>
> "A. Yes.
>
> "Q. And on the last page, it clearly states that this was his last will and testament?
>
> "A. Yes.
>
> "Q. And you say you read that?
>
> "A. Right.

[3]At the time of the bench trial in the circuit court, Angela Lewis, the second subscribing witness, was deceased, and her death certificate was entered as evidence of that fact.

"Q. And as a result of that, you signed this document?

"A. Right."

Juandalynn Givan, a licensed attorney, testified that she prepared Clifton's will in accordance with Clifton's instructions; that she delivered the will to Clifton; and that she told Clifton that the will needed to be signed, notarized, and witnessed. Givan stated that she later received an executed copy of the will, which she kept in her files. Gloria J. Patrick, a notary public, testified that, at Clifton's request, she went to his house and notarized the will. Patrick stated that, before notarizing the will, she specifically asked Clifton if the signature on the will was his and that he replied that it was. After considering the testimony, which, again, included testimony in the transcript from the circuit-court bench trial, the probate court entered a judgment declaring that the will was valid and ordering that it be admitted to probate. The contestants appealed.

Standard of Review

The circuit court that conducted the bench trial in the will contest never obtained subject-matter jurisdiction over the contest; thus, its judgment was void and can be accorded no weight. McElroy, supra. By

agreement of the parties, the probate court tried the will contest solely on written materials, including the transcript of the bench trial in the circuit court, and entered a judgment declaring the will to be valid. In these circumstances, the ore tenus rule does not apply, and this Court weighs and considers the evidence de novo, without according any presumption of correctness to the probate court's findings of fact. See § 12-2-7(1), Ala. Code 1975 ("[I]n deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the Supreme Court shall weigh the evidence and give judgment as it deems just."); see also Ex parte Sacred Heart Health Sys., Inc., 155 So. 3d 980, 985 (Ala. 2012)(citing § 12-2-7(1) and stating that, in a case in which a trial court has not heard live testimony, the reviewing court will not apply a presumption of correctness to a trial court's findings of fact; rather, the reviewing court reviews the evidence de novo); and Dombrowski Living Tr. v. Morgantown Prop. Owners Ass'n, Inc., 229 So. 3d 239 (Ala. Civ. App. 2016).

Discussion

The contestants argue that Clifton's will is not valid because, they say, it was not properly executed pursuant to § 43-8-131 and it was not proved by the method set forth in § 43-8-167, Ala. Code 1975. Section 43-8-131 governs the formal requirements for the execution of a will:

> "Except as provided within section 43–8–135, [Ala. Code 1975,] 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."

(Emphasis added.)

The contestants argue that the will was not properly executed under § 43-8-131 because, they say, Clifton failed to acknowledge to a witness, either orally or through a written notation on the will, that he had directed Tracy to sign his name on the will. The contestants claim that the purpose for requiring such an acknowledgment is to avoid fraudulent wills from being admitted to probate. The contestants, however, do not cite any legal authority to support their assertion, and our research reveals no law requiring a testator to make any representation to a witness other than

to indicate the document is his or her will and to ask the witness to sign it.

As a threshold for a will to be admitted to probate, § 43-8-131 requires (1) that the will be in writing and (2) that it be signed by the testator or by someone in the testator's presence and at his direction. See generally Pickens v. Estate of Fenn, 251 So. 3d 34 (Ala. 2017). In this case, it is undisputed that the will is in writing, and Tracy testified that, at Clifton's direction, she signed his name on the will while she was in his presence. Therefore, the first two requirements of the statute were satisfied; contrary to the contestants' assertion, the statute does not require that Clifton acknowledge, either orally or through a notation on the will, that he directed Tracy to sign his name on the will. The statute then requires (3) that a will be signed by at least two persons who witnessed the testator performing one of three acts: signing the will, acknowledging the document as his will, or acknowledging his signature on the will. Id. In other words, it is the attestation of the subscribing witnesses that gives effect to the instrument as a valid will. See Culver v. King, 362 So. 2d 221, 222 (Ala. 1978)(noting that the purpose of

requiring the signature of two witnesses "is to remove uncertainty as to the execution of wills and safeguard testators against frauds and impositions").

In this regard, § 43-8-167 sets forth the requirements for proving the proper execution of a will that is not a self-proved will. That section provides, in relevant part:

> "(a) Wills offered for probate, except nuncupative 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."

In the present case, it is undisputed that Jackson, a subscribing witness, did not witness the signing of the will, nor could he recall if Clifton's signature was on the will when he signed it. Nonetheless, the will would be valid, provided Clifton acknowledged to Jackson that the document Jackson was witnessing was his will. As indicated, Jackson testified that Clifton handed him a document and asked him to "witness" it. Jackson testified that, before signing the document, he read the paragraph above his signature line, which indicated to him that the

document was Clifton's will. The contestants do not argue that Jackson's testimony was insufficient to satisfy the statutory requirement that a testator acknowledge a document as his or her will. And, although it may have been the better practice for Clifton to expressly acknowledge to Jackson that the document was testamentary in nature, the mere fact that he did not make such an express statement is insufficient to defeat the admission of the will to probate. Recognizing that the intent of § 43-8-131 is to provide minimum statutory formalities for a valid will, we conclude that Jackson's testimony, i.e., acknowledging that the page he signed was clearly marked as Clifton's will, satisfies the statutory requirements of §§ 43-8-131 and 43-8-167.[4] Our conclusion is further bolstered by the additional evidence surrounding the execution of the will

[4]The contestants make no argument on appeal regarding the second witness to the will, who is undisputedly deceased as demonstrated by a death certificate submitted during the circuit-court bench trial. They do not argue that Tracy was required, and failed, to produce any additional evidence regarding the deceased witness to support a judgment that the will as valid. Rather, as indicated, they argue that the will was not validly executed or proved because, they say, Clifton did not acknowledge to a witness, either orally or through a written notation on the will, that he had directed Tracy to sign his name on the will.

and, specifically, the fact that the will was prepared by Clifton's attorney at Clifton's request and in accordance with his instructions and the fact that the will was acknowledged by a notary public, which is sufficient to meet the statutory requirements of a witness. Pickens, supra. The totality of these circumstances strongly suggest that the will was validly executed and was not procured by fraud.[5] To conclude otherwise would frustrate, rather than further, the intent of § 43-8-131, which provides the minimum formalities for a valid will. Our holding is also consistent with the public policy of this State in carrying out the intent of the testator and adhering to the presumption that Clifton, who possessed a will, did not intend to die intestate. See Roberts v. Cleveland, 222 Ala. 256, 259, 132 So. 314, 316 (1931)(noting that it is presumed that, "when a testator undertakes to make a will of all his property, he [does] not intend to die intestate as to

[5]The contestants also assert that the will also does not comply with the requirements of § 43-8-131 because, they say, the notarization was fraudulent insofar as Clifton represented to the notary that the signature on the will was his signature when, in fact, he did not personally sign the will. This argument is without merit because the statute does not require that the signatures of the testator or the witnesses be notarized. See Pickens, supra.

any of it or during any period of time"); see also Barnewall v. Murrell, 108 Ala. 366, 388, 18 So. 831, 841 (1895) (noting that, when the validity of a will is being challenged, "[i]nstead of indulging suspicion or conjecture to destroy the validity of wills, the courts are bound to support them against mere suspicion or conjecture; bound to support them, when any theory or hypothesis maintaining them, is as probable as that which is suggested to defeat them").

Conclusion

Based on the foregoing, we conclude that Clifton's will was properly executed pursuant to § 43-8-131 and that it was properly proved pursuant to § 43-8-167. Accordingly, the judgment in favor of Tracy is affirmed.

AFFIRMED.

Wise and Stewart, JJ., concur.

Parker, C.J., and Bolin, J., concur in the result.