IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 14, 2007 Session

IN RE ESTATE OF MARY FRANCES BOYE

Appeal from the Chancery Court for Washington County
No. P42-165-06 G. Richard Johnson, Chancellor

No. E2006-01441-COA-R3-CV - FILED OCTOBER 26, 2007

This appeal involves a dispute regarding the estate of Mary Frances Boye. The granddaughter of Mrs. Boye filed a petition to probate in solemn form a document purporting to be her grandmother's will. Mrs. Boye's son contends that the trial court erred in admitting the will at issue to probate. He asserts that the will is invalid because it was not properly executed and that suspicious circumstances surround its execution. We conclude that the trial court erred in proceeding with the in solemn form probate proceeding once the court was made aware of the fact that Mrs. Boye's son was contesting the validity of the purported will of his mother. Accordingly, we vacate the judgment of the trial court admitting the subject document to probate in solemn form and remand for further proceedings.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

M. Stanley Givens, Johnson City, Tennessee, for the appellant, Harry George Boye, Jr.

J. Wesley Edens, Bristol, Tennessee, for the appellee, Lisa Ann Weaver McGlamery, executrix of the Estate of Mary Frances Boye.

OPINION

I.

Mary Frances Boye was 84 years old at the time of her death on November 26, 2005. She left behind what purports to be a will dated September 17, 1997.[1] Mrs. Boye was survived by three adult children: Harriett Anne Boye Weaver, Mary Elizabeth Boye Stuart, and Harry George Boye, Jr. ("the Objecting Son"). Lisa Ann Weaver McGlamery ("the Proponent") is the daughter of Mrs. Weaver and the granddaughter of Mrs. Boye. The Proponent was designated as executrix in the 1997 will, and, as such, filed a petition to probate the 1997 will in solemn form.

Prior to Mrs. Boye's death, her children and granddaughter had become embroiled in an acrimonious conservatorship action. In that proceeding, the Objecting Son filed a petition seeking to be appointed conservator for his mother. Evidence presented at that time portrayed Mrs. Boye as suffering from the effects of dementia. The various parties were aware of the existence of the 1997 will at the time of the conservatorship proceeding. The Proponent had admitted that she, not her grandmother, had written out the document in longhand. She said that she wrote as her grandmother dictated. As a part of the conservatorship proceeding, the deposition testimony of the two witnesses to the will, Priscilla Jamerson and Melissa Renee Carrier Vincill, and that of the notary, Wanda Sue Honeycutt, was taken. After Mrs. Boye's death, counsel for the Proponent obtained affidavits from Ms. Jamerson, Ms. Vincill, and Ms. Honeycutt, in which they opined that the writing had been acknowledged in accordance with the relevant statutory provisions. These affidavits, however, were not executed contemporaneously with the will. Rather, the affidavits were prepared by counsel for the Proponent and presented to the witnesses eight years after Mrs. Boye signed the document at issue.

The 1997 will, which did not contain an attestation clause,[2] is as follows:

> Johnson City, Tennessee
> Sept. 17, 1997
>
> I, Mary Frances Boye, being of sound mind, do make this my last will and testament, hereby revoking previous wills.
>
> (Item 1) I appoint my granddaughter, Lisa Anne Weaver McGlamery, to be the sole Executor of my estate without bond; and with full authority and power to sell any part of my estate as she deems necessary without any court order. She will inherit my bank accounts where she is listed as payable on death on each account; my personal property such as a car, jewelry, and all household goods.

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1 The parties refer in their briefs to a 1976 will. That document is not in the record.

2 An attestation clause is a provision at the end of a typical will that is signed by the witnesses and recites the formalities required by the applicable statute. Such a clause strengthens the presumption that the statutory requirements for executing the will have been satisfied. *See* ***In re Estate of Guy***, No. M2001-02644-COA-R3-CV, 2002 WL 31890908, at *1 n. 1 (Tenn. Ct. App. M.S., filed December 31, 2002).

(Item 2) I desire to be buried where Lisa Anne Weaver McGlamery decides. Burial will be simple and paid from my savings.

s/ Mary Frances Boye
_________________________s/ Mrs. Harry Boye
Date: September 17, 1997
Notary: s/ Wanda Sue Honeycutt
Comm. Expires: Oct. 26, 1998
Witness: s/ Priscilla Jamerson
Witness: s/ Melissa Carrier

(Parenthesis and underlining in original). At the time of Mrs. Boye's death, her estate was estimated to have a gross value of $850,000.

Following a hearing on May 16, 2006, the trial court found the proffered writing to be Mrs. Boye's Last Will and Testament. The order admitting the will to probate in solemn form was entered on May 17, 2006. The Objecting Son has timely appealed.

II.

This case turns on an unraised issue – the power of the trial court, under the circumstances of this case, to admit Mrs. Boye's will to probate in solemn form. While, as a general rule, this court's scope of review is limited to issues raised by the parties in their briefs, *see* Tenn. R. App. P. 13(b), we are directed to "also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." ***Id***. We also have general discretion to consider an issue which has not been presented for review. ***Id.*** *See* ***State v. Goins***, 705 S.W.2d 648, 650 (Tenn. 1986). We have determined that the trial court was without power, *i.e.*, jurisdiction, to admit the will to solemn form probate. We vacate the trial court's judgment and pretermit the issues raised by the Objecting Son.[3]

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3 His issues are as follows:

1. Whether the affidavits of attesting witnesses to a will should be disregarded if the testimony of those witnesses at trial or in depositions contradicts the affidavits.

2. Whether the credible testimony of all living witnesses is necessary to prove a will pursuant to [T.C.A.], Section 32-2-104.

3. Whether the existence of two separate and different signatures on a writing can create a question about whether or not the writing was altered after the fact.

4. Whether suspicious circumstances surrounding the execution of a writing can invalidate that Will.

Probate in solemn form is a more formal affair than common form probate. All interested parties are entitled to receive notice of the proceedings and of their right to participate in those proceedings. T.C.A. § 30-1-117(b). There must be a judicial hearing at which the will is formally offered for probate. T.C.A. § 16-16-201(b). At the hearing, the proponent of the will must produce, for examination, all living witnesses who attested to its execution. ***In re Estate of King***, 760 S.W.2d 208, 210 (Tenn. 1988). Prior to the entry of an order admitting a will to probate in solemn form, the will can be challenged by means of a will contest. ***In re Estate of Boote***, 198 S.W.3d 699, 713 (Tenn. Ct. App. 2005).

The critical issue before us is whether the objection and response to the probate petition by the Objecting Son amounts, in substance, to a notice of contest. If it does, the probate court, based on the record before us, had no authority to enter the May 17, 2006 order admitting the 1997 will to probate in solemn form. *See* ***Boote***, 198 S.W.3d at 715. "Determining whether the course of proceedings in the trial court amounted to the initiation of a will contest is a question of law which this court reviews de novo." ***Id.*** (citing ***In re Will of Ambrister***, 330 S.W.2d 330, 333-35 (Tenn. 1959) and ***Jenkins v. Jenkins***, 77 S.W.2d 805, 806 (Tenn. 1935)).

The primary question to be decided in a will contest is whether or not the decedent left a valid will. ***In re Estate of Barnhill***, 62 S.W.3d 139, 140 n.1 (Tenn. 2001). Will contests typically involve factual questions which are submitted to a jury, while will constructions involve matters of law for the court. It is important for trial courts to "determine initially whether a particular controversy involves issues of contest or construction or both." ***In re Estate of Eden***, 99 S.W.3d 82, 87 (Tenn. Ct. App. 1995). In ***Eden***, a panel of this court instructed as follows:

> A will contest is a proceeding brought for the purpose of having a will declared void because the testator lacked the requisite mental capacity to make a will or because the will was procured by undue influence or fraud. It is an in rem proceeding, that is intended to test only the external validity of the will. All persons claiming an interest in a will may become parties to the proceeding, and the decision in a will contest is conclusive upon all the world.

99 S.W.3d at 87 (citations omitted). The purpose of a will construction suit is

> to ascertain and give effect to the testator's intention. Construction suits recognize the testator's right to direct the disposition of his or her property and thus, limit a court to ascertaining and enforcing the testator's directions.

Id. (citations omitted). When presented in the same case, "[t]rial courts should decide contest and construction issues separately." ***Id.*** As noted in ***Eden***,

> [t]he better procedure is to first submit the contest to a jury who will decide the factual issues affecting the validity of the will. If the jury

> decides against the will, then the case is at an end, and the trial court should enter judgment accordingly. If the jury decides in favor of the will, then the trial court itself should decide the issues of construction since they are questions of law.

Id. (citing ***Presley v. Hanks***, 782 S.W.2d 482, 487 (Tenn. Ct. App. 1989)).

In this case, the Objecting Son challenged the probate of the 1997 will on the following grounds: undue influence, improper execution, lack of testamentary capacity, and invalidity of the paper offered for probate purporting to be Mrs. Boye's will. The Objecting Son denied that the proffered writing was his mother's will and took the position that the document was not executed in accordance with T.C.A. § 32-1-104. The Objecting Son further noted as follows:

> The Deceased was a Phi Beta Kappa graduate of Furman University who taught English and Latin for twenty years. She wrote several of her own wills during her lifetime. There is simply no logical reason why she would have suddenly chosen to "dictate" such a document to her twenty-eight-year-old granddaughter who, just coincidentally and conveniently, was the sole beneficiary of this "new" will.

The Objecting Son stated that it was "ironic"[4] that, despite the fact that the alleged will was written by the granddaughter "at the kitchen table, on notebook paper, with an ink pen," there was not "a single spelling, grammar or punctuation error or strikeover anywhere in the document." ***Id.***

The Objecting Son additionally contended that the will provision instructing that Mrs. Boye "be buried where Lisa Anne Weaver McGlamery decides" could not have been the product of his mother's free will, as it had been his mother's "most heartfelt desire and most often-repeated wish" that she be buried with her late husband at the Veterans Administration Cemetery at Mountain Home, Tennessee. He noted that in 2002, subsequent to the preparation of the will at issue, Mrs. Boye had paid in advance for just those arrangements. He further represented to the trial court that he possessed a copy of Mrs. Boye's 1976 handwritten will that divided her estate equally among her three children.

This court's opinion in ***Boote*** instructs that the initiation of a will contest temporarily divests the probate court of its authority to enter an order admitting a will to probate in solemn form. ***Boote***, 198 S.W.3d at 714. As noted in ***Boote***,

> [a]s soon as the probate court is made aware of a contest, it must halt the in solemn form probate proceedings and determine whether the person seeking to contest the will has standing to pursue a will contest. Standing to pursue a will contest is limited to those who would benefit under the terms of another will or

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4 He probably meant to say "suspicious."

> codicil or the laws of intestate succession if the will contest is successful.

Id. (citations omitted). If the probate court sustains the contestant's right to pursue a will contest, "it must require the contestant" to comply with T.C.A. § 32-4-101. That statute provides, in part, as follows:

> If the validity of any last will or testament, written or nuncupative, is contested, then the court having probate jurisdiction over such last will or testament must enter an order sustaining or denying the contestant's right to contest the will. If the right to contest the will is sustained, then the court must:
>
> (1) Require the contestant to enter into bond, with surety, in the penal sum of five hundred dollars ($500), payable to the executor mentioned in the will, conditioned for the faithful prosecution of the suit, and in case of failure therein, to pay all costs that may accrue thereon; and
>
> (2) Cause a certificate of the contest and the original will to be filed with the appropriate court for trial.

T.C.A. 32-4-101 (Supp. 2006). Only if the probate court determines that the contestant lacks standing to pursue a will contest can it resume the probate proceedings and enter an order admitting the will to probate in solemn form. ***Boote***, 198 S.W.3d at 714. "If the probate court ignores an inchoate will contest and proceeds with the entry of an order admitting the will that was originally offered for probate in solemn form, the court's order is void and must be reversed on appeal." ***Id.***, 198 S.W.3d at 714-15. *See* ***Ambrister***, 330 S.W.2d at 335.

There are no formal requirements for the initiation of a will contest. See ***Boote***, 198 S.W.3d at 715. The Supreme Court has related that a "person desiring to contest a will need do no more than make that fact known" to the court. ***King***, 760 S.W.2d at 210. Thus, while the son's pleading was not styled as a formal notice of contest, we conclude that it was, substantively, such a notice. Significantly, in its opinion, the trial court indicated as follows:

> [I]t is alleged by the Respondent son that Ms. Boye in about 1976 had prepared a Last Will and Testament. It is alleged that this 1976 Last Will and Testament left her estate to her children. That's one of the reasons that the Respondent *contests* this matter today, pointing out the differences between . . . alleged 1976 Last Will and Testament and the document that is presented today as the Last Will and Testament of the decedent.

Court's Opinion (emphasis added).

The trial court should have brought the in solemn form proceedings to an immediate halt and conducted an inquiry into whether the Objecting Son had standing to pursue a will contest.

Without conducting this inquiry, the court possessed no authority to enter the May 17, 2006 order. Only if the trial court determines that the Objecting Son lacks standing to pursue a will contest can it resume the probate proceedings and enter an order admitting the will to probate in solemn form. Accordingly, we find that the trial court's failure to inquire into the Objecting Son's standing to pursue a will contest was reversible error. *See* ***Boote***, 198 S.W.3d at 718. In making this determination, we are mindful that proceedings to admit a will to probate are designed not to advance the interests of the living parties but rather to vindicate the right of the decedent to dispose of his or her property as he or she sees fit. ***Id.***

III.

We find that the May 17, 2006 order admitting the will to probate in solemn form should be vacated and the case remanded to the trial court. The trial court is instructed to conduct proceedings preliminary to a will contest. If the trial court determines that the Objecting Son has standing to contest the will, the court must enter an order sustaining that right, require him to enter into a statutory bond, and cause a certificate of the contest and the 1997 will to be filed in the court elected by the Objecting Son for the trial of the will contest. If it results that "a will contest is to be tried in the same court that has been presiding over the probate proceedings, the court should draw a clear distinction, both in the record and in its dealings with the parties, between its function as a court of probate and its function as the trial court of record in the will contest." ***Boote***, 198 S.W.3d at 715 n. 24. Costs on appeal are taxed to Lisa Ann Weaver McGlamery, in her capacity as the executrix of the Estate of Mary Frances Boye.

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CHARLES D. SUSANO, JR., JUDGE