IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

IN RE: ESTATE OF ROBERT E. YATES, DECEASED,

FRED MAYO, JR.,

Plaintiff-Appellant,

Vs.

Davidson Probate No. 94P1218
C.A. No. 01A01-9603-PB-00093

ARCHIE N. SPAIN, NATIONSBANK, INC., Executor of the Estate of Robert E. Yates, Deceased, and TREVECCA NAZARENE COLLEGE, INC.,

Defendants-Appellees.

FROM THE PROBATE COURT OF DAVIDSON COUNTY
THE HONORABLE JAMES R. EVERETT, JR., JUDGE

V. Michael Fox; Bruce, Weathers, Corley, Dughman & Lyle
of Nashville, for Appellant

J. Robin McKinney, Jr. and Thomas T. Overton
of Nashville, for Appellee, Spain

T. Richard Travis; Manier, Herod, Hollabaugh & Smith
of Nashville, for Appellee, Nationsbank

VACATED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,

PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This appeal involves a dispute concerning the purported wills of Robert E. Yates, deceased. The record on appeal, which consists only of the technical record, reflects a most bizarre series of proceedings.

The record indicates that Robert E. Yates died on July 22, 1994. On August 11, 1994, Nationsbank filed a petition in the Probate Court of Davidson County to probate the will of the decedent, dated July 13, 1994, in common form, and to be appointed executor of the estate as designated in the will. An order was entered on August 11, 1994, signed by R. H. Bradshaw, Jr., Probate Master, that admits said will to probate and appoints Nationsbank as executor of the estate.

On December 6, 1994, Fred Mayo, Jr., filed a "Petition for Will Contest" in the probate court in which he alleges that he is a beneficiary under two previous wills of the decedent, and that the will dated July 13, 1994, probated in this cause, was the result of undue influence at a time when the decedent lacked proper mental capacity to execute a will. On the same date, December 6, 1994, Fred Mayo, Jr., filed a "Petition for Probate of Will in Solemn Form and Granting of Letters Testamentary" in the same cause. The petition alleges, *inter alia*, that the petitioner has filed a will contest concerning the July 13, 1994 will, and that the petitioner presents for probate in solemn form the will of the decedent dated August 21, 1992. A cursory review of the petition and supporting documents indicates that the petitioner has complied with the procedure for probate in solemn form. ***See generally*** **Pritchard on Wills and Administration of Estates**, 5th ed., § 341, *et seq.*. On January 5, 1995, Archie N. Spain, a beneficiary under the 1992 will and the 1994 will, filed an "Objection to Petition for Probate of Will in Solemn Form" in which he alleges that the petition to probate the 1992 will is premature because there has been no adjudication on the merits of the will contest to the 1994 will. The objection further avers that the will shown as an exhibit to the petition is not the original and that "void" is handwritten across the face of the will. Nationsbank, the executor named in the 1994 will, is also the executor named in the 1992 will. On January 18, 1995, Nationsbank filed a answer to the petition for the will contest, which in general joined issue on the allegations therein. Another beneficiary under the 1992 and 1994 wills, Trevecca Nazarene College, Inc., filed an answer to the petition for will contest on January 19, 1995, in which it joined issue on the material allegations of the petition. Archie Spain, a beneficiary under the 1994 will and also the 1992 will, filed an answer to the petition for will contest on January 20, 1995, also joining issue on the material allegations. Additionally, Spain's answer avers that the

1992 will exhibited with the petition for probate in solemn form was not the original will and demands strict proof of the existence of the original will. Subsequently, on January 15, 1995, both Archie Spain and Nationsbank joined in filing a motion to dismiss the will contest petition for lack of capacity to sue. The motion alleges that the plaintiff, Mayo, is not an heir at law of the decedent, and that he has not established a prior will in which he would take a share of the decedent's estate if the probated will were set aside.

An agreed order was entered on April 12, 1995, setting a trial date of April 18, 1995, for the proceeding to probate the 1992 will in solemn form. The next order to appear in the record was entered August 17, 1995, and states as follows:

> This cause came to be heard on the 28th day of April, 1995, before the Honorable James R. Everett, Jr., Judge of the Probate Court for Davidson County, Tennessee, upon the defendants Nationsbank, Inc. and Archie N. Spain's Motion to Dismiss for Lack of Capacity to Sue. After due consideration of the Memorandums of Law filed herein and upon argument of Counsel, it appears to the Court that the Motion is well taken.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause of action be dismissed with prejudice for lack of plaintiff's capacity to sue.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the attorney for defendant Nationsbank, Inc., T. Richard Travis, is entitled to attorney's fees and expenses of $4,318.00, and the attorney for defendant Archie N. Spain, James S. Bramell, is entitled to attorney's fees and expenses of $4,291.65, and that all costs of this action shall be assessed against the plaintiff, [for] all of which execution may issue if necessary.
>
> ENTER this the 15th day of August, 1995.

On September 6, 1995, Mr. Mayo filed a motion to set aside the above order of dismissal. The motion states that the parties agreed on April 28, 1995, that if either of the earlier dated wills of the decedent are admitted to probate, then defendants' motion to dismiss Mayo's petition to contest the will would be denied, but that if neither of the prior dated wills are admitted to probate, Mayo would have no standing to contest the probate of the 1994 will. The motion advises the court that a trial date for the petition to probate in solemn form is set for September 13, 1995.[1]

[1]The record reflects that a later trial date of October 4, 1995, was set.

Nationsbank filed a response to the motion to set aside the order of dismissal which purports to outline the procedural history of the proceedings. The response avers that the petition to probate the 1992 will "was heard before Special Judge Butler who, having heard the evidence and argument on the petition, took the matter under advisement." The response alleges that the parties advised the special judge that the motion to dismiss the will contest was scheduled for a hearing in ten days and that they had agreed that if Special Judge Butler denied probate of the 1992 will that the motion to dismiss the will contest should be granted. The response then goes on to aver that when Judge Butler had not ruled by April 28, 1995, "Counsel for the Contestant appeared at Court and advised Your Honor of the pending ruling by Special Judge Butler and that an adverse holding by Judge Butler would resolve the standing issue, whereupon the Court agreed to withhold ruling on the matter pending Special Judge Butler's Ruling." The response further avers that:

> 7. On June 8, 1995 Special Judge Butler advised the parties that he would be unable to render a decision in the matter and directed that the matter be placed back on the Court's docket. The Contestant did not Respond.
>
> 8. On July 10, 1995, Counsel for the Primary Beneficiary requested that the Petition be placed back on the Docket. The Contestant did not respond.
>
> 9. On August 1, 1995 the Proponent and Archie Spain, through counsel submitted the Order originally prepared for the April 28th hearing to the Clerk of this Court and to the Contestant by letter advising of this action in order to get the matter moving. The contestant did not respond.
>
> 10. On August 17, 1995 the Court entered the Order which the Contestant now moves to set aside.

Despite the averments of counsel, there is nothing in the record to reflect that a special judge was appointed to consider any part of the proceedings, nor is there anything in the record to indicate that a special judge heard any proof, took anything under advisement or, incredibly, asked that the matter be placed back on the court's docket because he could not reach a decision.

By order entered October 2, 1995, Mayo's motion to set aside the order of dismissal was denied, and this appeal ensued. The appellant, Mayo, presents one issue for review which, as stated in his brief, is:

> Whether the trial court erred as a matter of law in granting

> Defendants/Appellees' motion to dismiss Plaintiff/Appellant's will contest action prior to the determination of Plaintiff/Appellant's standing to challenge the will of Robert E. Yates that was admitted to probate on August 11, 1994.

Appellant is apparently asserting that he was denied the right to a hearing to establish his standing or capacity to contest the 1994 will.

It is well settled that "only such persons as would be entitled to share in the real and personal estate of decedent, if there were no will, or if the will was set aside, are entitled to impeach its validity. **Pritchard on Wills**, Sec. 339; ***Wynne v. Spiers***, 26 Tenn. 394." ***Warmath v. Smith***, 198 Tenn. (2 McCanless) 257, 259, 279 S.W.2d 257, 258 (1955). Thus, since the plaintiff, as a former brother-in-law of the decedent, would not take under the laws of intestate succession should the decedent's will be declared invalid, T.C.A. § 31-2-104 (1984), he only has capacity to contest the probated will if he proves the existence of a valid will under which he is a beneficiary. ***Warmath***, 198 Tenn. at 259, 279 S.W.2d at 258. If the contestant is not able to produce the will, he or she must establish the lost will by proving:

> (1) that the testator made and executed a valid will in accordance with the forms of law and the death of the testator; (2) that the will had not been revoked and is lost or destroyed or cannot be found after due and proper search; and (3) the substance and contents of the will. Vol.1, Phillips' Pritchard Law of Wills, Sec. 50; ***Morris v. Swaney***, 54 Tenn. 591 [(1872)]; ***Moore et al. v. Williams et al.***, 30 Tenn. App. 479, 207 S.W.2d 590 [(1947)]; ***Haven v. Wrinkle***, 29 Tenn. App. 195, 195 S.W.2d 787 [(1945)].

Shrum v. Powell, 604 S.W.2d 869, 871 (Tenn. App. 1980). Whether a lost will existed must be established by "clear, cogent and convincing proof." ***Id***. (citing ***Wolfe v. Williams***, 1 Tenn. App. 441, 450 (1925)).

In ***In re Estate of West***, 729 S.W.2d 676 (Tenn. App. 1987), the testator executed two wills, one on December 8, 1981, and a second on February 1, 1984. Appellant, who would have been a beneficiary under the 1981 will but not under the 1984 will, filed a petition to contest the later will on the grounds of incompetency and undue influence. ***Id***., 729 S.W.2d at 677. After appellee filed a motion to dismiss the will contest for lack of standing, appellant amended his petition to show the existence of the former will, attaching an unsigned copy of the former will to the amended petition. The court denied appellee's motion to dismiss and heard proof on appellant's petition. After the evidentiary hearing, the trial court dismissed appellant's will

contest, holding that appellant failed to overcome the presumption that the testator destroyed the 1981 will and thus, without proof that he had an interest in the estate under that will, appellant did not have standing to contest the 1984 will. ***Id***., 729 S.W.2d at 677.

On appeal, appellant argued that he did not have to prove all of the elements of a lost will; rather, that he only had to *commence* an action to establish the lost or destroyed instrument. ***Id***., 729 S.W.2d at 678. The Middle Section of this Court found to the contrary, holding as follows:

> [W]e 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.

Id., 729 S.W.2d at 678.[2]

It appears from the record before us that appellant was not afforded a hearing in which he could produce the will. If he is unable to produce the will for probate, he may seek to amend his pleading in order to establish a lost will, which motion to amend may or may not be allowed. In any event, the status of the case as reflected by the record indicates an order of probate for the 1994 will, the will contest of the 1994 will, and a petition to probate a 1992 will. If appellant is a beneficiary in a will executed prior to the 1994 will, he has standing to contest the 1994 will. An evidentiary hearing is necessary to make this determination.

Accordingly, the order of the trial court appealed herein is vacated, and this case is remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed one-half to the appellant and one-half to the appellee.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

[2]Since 1991, proceedings to establish a lost will can be maintained in a court of record having probate jurisdiction. T.C.A. § 32-3-109 (1995 Supp.) This applies to the Davidson County Probate Court.