IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-00542-SCT

IN THE MATTER OF THE ESTATE OF LELA W. HOLMES, DECEASED: DOROTHY WILKINS, WALTER HOLMES, OLLIE MAE PICKETT, RUTH GREER, BARBARA HOLMES, RONALD HOLMES, ERICA HOLMES, DOMINIQUE HOLMES, NATASHA HOLMES, ROBERT HOLMES, KAREN HOLMES, VYRON HOLMES, WILLIE JAMES HOLMES, DENNIS HOLMES, SHIRLEY HOLMES BROWN, WILLIE BELL PHILLIPS, DOUGLAS EARL BENNETT, CHRISTINE LOWE, DIANE PHILLIPS, LARRY BENNETT, MILTON BENNETT, PATRICIA KELLY, FREDDIE BENNETT, CAROLYN BENNETT, GWENDOLYN BENNETT, TYRONE HOLMES, EUGENE HOLMES, LUCILLE HOLMES AND SHANNON BENNETT

v.

BERTHA HOLMES PRICE AND KENNY HOLMES

DATE OF JUDGMENT:	08/11/2010
TRIAL JUDGE:	HON. CYNTHIA L. BREWER
COURT FROM WHICH APPEALED:	MADISON COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANTS:	SORIE S. TARAWALLY JOHNNY CLYDE PARKER
ATTORNEYS FOR APPELLEES:	VERNON H. CHADWICK STANLEY F. STATER, III
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	REVERSED AND RENDERED -11/29/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE DICKINSON, P.J., CHANDLER AND KING, JJ.

DICKINSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. The two subscribing witnesses to Lela W. Holmes's will testified that they did not know they were witnessing a will; that Lela did not request they witness a will; and that they did nothing to satisfy themselves that Lela was of sound and disposing mind when she executed the will. Still, the chancellor admitted the will to probate, and the contestants appealed, raising numerous issues. But, because the two subscribing witnesses did not satisfy the legal requirements of "attesting" witnesses, we reverse the chancery court's ruling, limiting and focusing our factual recitation and analysis to that issue.

BACKGROUND FACTS AND PROCEDURE

¶2. Lela W. Holmes made three wills: one in 2003, which this Court nullified; one in 2002, which a chancery court nullified; and one in 2001 (the "Will"), which is before us now.

¶3. After Lela died, one of her grandchildren – Bertha Holmes-Price – filed a petition to probate her Will in solemn form. Bertha notified all interested parties of the hearing date, and two of Lela's children – Walter Lee Holmes Sr. and Ollie Pickett, together with several other family members ("Contestants") – contested the Will, claiming that the two witnesses – Sue Chawla and Jennifer Delaney – did not meet the statutory requirements for attesting witnesses.

Sue Chawla's testimony

¶4. Sue Chawla identified her signature on the Will and the signature of the other subscribing witness, Jennifer Delaney. She testified that she had signed a proof of will proclaiming that Lela "was then of sound and disposing mind and memory" and that the subscribing witnesses attested the Will "at the special instance and request and in the presence of [Lela]," but she admitted that she signed the proof of will ten years after the Will

was executed. And when questioned about the will, she admitted that Lela never had asked her to witness the Will; instead, it was the other witness, Delaney, who had asked her to sign.

¶5. Chawla also admitted that she had never spoken to Lela before the day she signed the will, and she did not actually speak to her when she signed the Will. When asked whether she knew the document she was witnessing was a will, Chawla responded: "just by looking at it. You know, I just thought it was some important paper." But then, Chawla admitted she "did not think [she] knew it was a will." Chawla acknowledged that the Will had five different handwriting patterns, and she could not identify who wrote the date, "20th June."

Jennifer Delaney's testimony

¶6. The second witness to the Will, Jennifer Delaney, identified her own signature, Chawla's signature, and Lela's signature on the Will. She testified that she believed the notary – as opposed to Lela – had asked her to witness the Will. At first, she testified that she, Chawla, and Lela had signed the Will in each other's presence, but later admitted that she could not "recollect if Ms. Holmes signed [the Will]."

¶7. Delaney admitted that she did not know Lela before that day, that she had no opportunity to observe whether Lela had the ability to understand and appreciate the "effects of her act" of signing the will, and that she did nothing to assure herself that Lela was of sound mind and memory.

¶8. The chancellor admitted the Will to probate in solemn form, and the Contestants appealed, raising numerous issues, including their claim that the Will's witnesses did not meet the statutory requirements for attesting witnesses. Because we find this issue dispositive, we decline to address the others.

ANALYSIS

¶9. When reviewing a chancellor's decision to admit a will to probate, we will disturb a chancellor's findings of fact only if they are manifestly wrong, clearly erroneous, or unsupported by substantial credible evidence.[1]

The witnesses to the Will failed to meet the statutory and legal requirements.

¶10. Mississippi law empowers "[e]very person eighteen (18) years of age or older, being of sound and disposing mind" to make a will which, if not "wholly written and subscribed" by the testator, must be "***attested*** by two (2) or more credible witnesses in the presence of the testator or testatrix.[2] The attesting witnesses must meet four requirements: First, the testator must request them to attest the will;[3] second, they must see the testator sign the will;[4] third, they must know that the document is the testator's last will and testament;[5] and finally, they must satisfy themselves that the testator is of sound and disposing mind and capable of making a will.[6]

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[1] ***In re Estate of Holmes***, 961 So. 2d 674, 679 (Miss. 2007).

[2] Miss. Code Ann. § 91-5-1 (Rev. 2004) (emphasis added).

[3] ***Green v. Pearson***, 145 Miss. 23, 110 So. 862, 864 (1927).

[4] ***Matter of Jefferson's Will***, 349 So. 3d 1032, 1036 (Miss. 1977).

[5] ***Estate of Griffith v. Griffith***, 20 So. 2d 1190, 1194 (Miss. 2010).

[6] ***Matter of Jefferson's Will***, 349 So. 3d at 1036 (Miss. 1977).

¶11. These formalities associated with attesting a will are important, not only as safeguards against fraud by substitution of a different will than the one signed by the testator, but also to make sure a person executing a will is of sound and disposing mind.[7]

¶12. Here, there was sufficient evidence for the chancellor to find that Chawla and Delaney were present while Lela signed the document in their presence. So the document satisfied the requirement that the witnesses see the testator sign the will. But the record does not support a finding that the witnesses satisfied the other three requirements.

¶13. Both Chawla and Delaney testified that Lela did not ask them to witness the Will, and that they did nothing to determine whether Lela was of sound and disposing mind. Chawla's testimony at trial soundly contradicted the proof of will she was asked to sign ten years after the Will's execution.

¶14. Delaney asserted that she would not have signed the Will had she thought Lela did not understand what she was doing. While that may be true, it does not cure her failure actually to form an opinion about Lela's competency, which she testified – unequivocally – she did not do. And her failure to form an opinion – standing alone – is enough to invalidate the will because, as an attesting witness, she was required to satisfy herself that Lela possessed sound mind when she executed the Will. One may not witness a will in ignorance.

¶15. In summary, the subscribing witnesses, by their own admissions, failed to satisfy the statutory requirements for attesting witnesses, and the chancellor abused his discretion in finding otherwise.

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[7] ***Id.*** at 1036.

¶16. The dissent says each witness knew she was witnessing a will. We disagree. Although Chawla answered "correct" when asked whether she knew it was a will, she later clarified that she thought the documents were only "some important papers."

¶17. The dissent also places importance on Chawla's recognition of the proof of will she signed ten years after the Will's execution. Her testimony, however, falls short of the requirement that she form an opinion – when she signed the Will – on Lela's soundness of mind. Instead, she testified that she ***did nothing*** to determine whether Lela possessed sound mind. In fact, she testified ***she never spoke to Lela*** – before, during, or after she signed the Will.

¶18. Both Chawla and Delaney had the duty to observe Lela and to take the necessary steps to form opinions as to whether she was of sound mind. Both testified, under oath, that they did not do so.

¶19. Neither Chawla nor Delaney was acquainted with Lela – a circumstance we addressed in ***Webster v. Kennebrew***.[8] Although no attorney was involved here, we again set out our admonition for the benefit of the bench and bar:

> [I]t is our hope that subscribing witnesses be advised by counsel of their corresponding duty to that testator. A witness to a will ***should be*** some person ***acquainted with the testator***, and having no interest, direct or indirect, as a beneficiary. He should be impressed with the necessity of specifically observing the testator and other person sign the will. He should be impressed with the necessity of being ***satisfied that the testator understands it is a will***, and that it expresses the wishes of the testator. Finally, the will should be signed in privacy, with no other persons present than the testator, his attorney and the witnesses, unless required by unusual and compelling circumstances. The presence of some persons who would cast a cloud or suspicion on the solemn occasion should be scrupulously avoided. In most of the will contest

[8] ***Webster v. Kennebrew***, 443 So. 2d 850, 859 (Miss. 1983).

cases which come before this Court, we find one or more of these simple precautions have been ignored.[9]

CONCLUSION

¶20. Because the subscribing witnesses were not "attesting" witnesses as required by statute, the chancellor erred by admitting the Will to probate. We therefore reverse the chancellor's decision and render a decision in favor of the Contestants.

¶21. **REVERSED AND RENDERED**.

CARLSON, P.J., RANDOLPH, LAMAR, CHANDLER AND KING, JJ., CONCUR. PIERCE, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY WALLER, C.J., AND KITCHENS, J.

PIERCE, JUSTICE, DISSENTING:

¶22. Respectfully, I must dissent from the majority's finding that the chancellor erred by admitting Lela W. Holmes's will to probate. Based on my review of the record in this case, there is sufficient evidence to support the chancellor's finding that Lela's will was duly executed and witnessed by two attesting witnesses in compliance with Mississippi Code Section 91-5-1 (Rev. 2004).

¶23. In ***Estate of Griffith v. Griffith***, 30 So. 3d 1190, 1199 (Miss. 2010), I expressed my concern that this Court was jeopardizing countless wills in this state by its failure to take into consideration witnesses who are unable to recall the manner by which a purported will was subscribed and attested. There, a majority of this Court affirmed the chancery court's order rejecting the probate of a will, where the will's two purported attesting witnesses testified later at trial that they were unaware that the document they had signed was a will. ***Id***. at

[9]***Id.*** (emphasis added). *See, e.g.,* ***Griffith***, 30 So. 3d at 1194.

1196. I dissented from the majority's opinion because the evidence showed that both witnesses, contrary to their testimony at trial, knew and understood that the testator had desired them to attest his last will and testament at the time of its execution. ***Id***. at 1199. Citing ***Warren v. Sidney's Estate***, 183 Miss. 669, 184 So. 806, 809 (1938), I reiterated this Court's longstanding view that, "[i]t is not the policy of the law to permit the defeat of probate of a will because of the failure of the memory of an attesting witness[;]" keeping in mind that, "testimony of attesting witnesses denying or impeaching the execution of the will is . . . to be viewed with caution . . . ." ***Id***. at 1196 (quoting ***Warren***, 184 So. at 809).

¶24. Here, Sue Chawla and Jennifer Delaney were tasked with having to recall an event that had occurred nine years prior, and both repeatedly made clear in their respective testimonies that they had difficulty remembering that distant event. Despite this, both Chawla and Delaney, unlike the witnesses in ***Griffith***, provided testimony that they knew the instrument they had signed was Lela's Last Will and Testament and that Lela had signed the will in their presence. When asked on direct examination whether she had satisfied herself that Lela was of sound mind, Chawla could not remember. At that point in the proceedings, counsel for the proponents was permitted to refresh Chawla's memory with a sworn affidavit, dated April 21, 2010, and titled "Proof of Will," and which was thereafter entered into evidence, without objection from the contestants. The affidavit contains the following statement:

> Sue Chawla . . . deposes and states on oath that she is one of the subscribing witnesses to that certain instrument of writing purporting to be the last Will and Testament of Lela Holmes; that the said Lela W. Holmes signed, published, and declared said instrument to be her Last Will and Testament on the 20 day of June, 2001 in the presence of this Affiant and the other

> subscribing witness to said instrument; and that said Testatrix was then of sound and disposing mind and memory and over the age of eighteen years; that this Affiant and the other subscribing witness subscribed and attested said instrument as witnesses to the signature and publication thereof at the special instance and request and in the presence of said Testatrix and in the presence of each other.

¶25. Delaney, too, was unable to remember specifically, when asked during her direct examination, whether, from her observations, Lela knew and understood what she was doing by signing the will. Delaney did, however, testify that she would not have signed Lela's will had she believed that Lela did not understand what she was doing.

¶26. True, each witness gave conflicting testimony in this case. As the majority points out, both witnesses said on cross-examination that Lela did not, in her own voice and words, ask them to sign the will. Chawla, when asked on cross-examination whether she had "engage[d] in any conduct designed to ascertain whether [Lela] was of sound and disposing mind at the time she signed the will[,]" responded, "No[.]" And when pressed by the Contestants' counsel as to whether she knew the instrument she was signing was a will, Chawla said "she did not think she knew it was a will." Also, Delaney, when asked, "do you know if [Lela] understood that she was – that you were witnessing her[,]" replied, "No."

¶27. These differing accounts, however, along with the significant fact that these witnesses had difficulty recalling the circumstances in connection with the purported will, merely presented an issue for the chancellor, sitting as fact finder in the case, to resolve in her determination on the ultimate question of whether Lela's will was validly executed.

¶28. In ***Smith v. Smith***, 185 Miss. 702, 188 So. 305, 306-07 (1939), this Court found a jury issue regarding attestation where "[t]here was no testimony that the alleged testator in any

manner personally declared to [the witness] that the instrument was his will at the time of its execution or that he ever requested him to attest it as such." ***Id***. at 307. The ***Smith*** Court also found a jury question as to whether or not the alleged testator possessed sufficient testamentary capacity to execute a valid last will and testament, noting that: "We would not reverse the case on the finding of the jury as to [this issue] . . . even though the great preponderance of the evidence seems to us to establish the contrary." ***Id***. at 306.

¶29. In the instant matter, while Lola, herself, may not have asked Chawla and Delaney to witness her will, the evidence presented shows that enough was said and done in Lela's presence and with her knowledge and understanding to make the two witnesses understand that she desired them to know that the paper was her will, and they were to be witnesses thereto. ***Green v. Pearson***, 145 Miss. 23, 110 So. 862, 864 (1927). Thus, at the very least, there was constructive publication of Lela's will. Accordingly, I would affirm the chancery court's decision to admit the will to probate.

WALLER, C.J., AND KITCHENS, J., JOIN THIS OPINION.