IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00484 COA

IN THE MATTER OF THE ESTATE OF VIRGINIA WILLIAMS ADAMS, DECEASED: MAE BAGLEY

APPELLANT

v.

FRANKIE J. TATTIS, EXECUTRIX OF THE ESTATE OF ANTHONY TATTIS WHO PREVIOUSLY SERVED AS EXECUTOR OF THE ESTATE OF MABLE KEEFE AND THE ESTATE OF VIRGINIA WILLIAMS ADAMS

APPELLEES

TRIAL JUDGE: HON. WILLIAM JOSEPH LUTZ

COURT FROM WHICH APPEALED: MADISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

STEPHEN NICK

ATTORNEY FOR APPELLEES:

DANNY L. CROTWELL

NATURE OF THE CASE: WILLS

TRIAL COURT DISPOSITION: DENIAL OF RULE 60(b) MOTION

BEFORE FRAISER, C.J., BARBER, COLEMAN, AND MCMILLIN, JJ.

FRAISER,C. J., FOR THE COURT:

Appellant, Mae Bagley (Bagley), appeals the decision of the Madison County Chancery Court denying her Rule 60(b) motion filed December 29, 1994 to set aside the June 6, 1991 judgment interpreting the "Last Will and Testament of Virginia Adams," which was appealed to and subsequently affirmed by the Mississippi Supreme Court. *See Estate of Adams v. Keefe*, 634 So. 2d 88, 88 (Miss. 1994) (Where the Mississippi Supreme Court affirmed judgments in two cases consolidated on appeal and denied both petitions for rehearing). Bagley attempted to have the judgment set aside based on newly discovered evidence. The newly discovered evidence was simply the testimony of Douglas Raspberry, alternate executor of Virginia Adams's will, who could have been called at trial. Raspberry testified at the Rule 60(b) motion hearing that Virginia Adams never discussed the terms of her will with him. The chancellor denied the motion, stating: "[T]he motion you have filed is about a hair's breadth away from a violation of the litigation responsibility act." On appeal, Bagley presents the following issue:

> I. THE CHANCELLOR ERRED WHEN HE DID NOT SET ASIDE THE JUDGMENT OF JUNE 6, 1991 AND INTERPRET THE LAST WILL AND TESTAMENT OF VIRGINIA ADAMS PURSUANT TO ITS TERMS AND SCHEMES. IT WAS ERROR TO USE THE TESTIMONY OF ANTHONY TATTIS, EXECUTOR OF THE ESTATE AS SHOWN BY THE TESTIMONY OF DOUGLAS RASPBERRY, THE ALTERNATE EXECUTOR.

Finding no error, we affirm.

FACTS AND DISCUSSION

The "Last Will and Testament of Virginia Williams Adams" was entered for probate on January 19, 1990 in the Madison County Chancery Court. Declaratory judgment was filed in the case on June 6, 1991. The declaratory judgment was affirmed by the Mississippi Supreme Court. Three and a half years later, on December 29, 1994, Bagley filed a Rule 60(b) motion to reopen the cause and vacate the June 6, 1991 judgment based on newly discovered evidence. Bagley claimed that the trial court erred in allowing the executor, Anthony Tattis, to testify about certain terms in Adams's will. At the hearing on her motion, Bagley presented Douglas Raspberry, Adams's alternate executor, to testify that Adams never discussed the terms of her will with him. Bagley's reasoning in presenting Raspberry was that if Adams did not confide in her alternate executor as to the meaning of certain terms in the will, then she probably did not confide in Tattis, her executor and long-time attorney, about the meaning of certain terms. According to Bagley, based on that reasoning, the trial court should not have let Tattis testify as to what Adams told him. This was the newly discovered evidence upon which Bagley based her Rule 60(b) motion. Rule 60(b) of the Mississippi Rules of Civil Procedure defines newly discovered evidence as "evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." M.R.C.P. 60 (b). Bagley did not offer anything new at the hearing, but simply attempted to relitigate the entire matter, much to the chagrin of the chancellor. The chancellor found that Bagley did no more than demonstrate that

Adams confided more in her executor and attorney than she did in her alternate executor. In ruling adversely to Bagley on her Rule 60(b) motion the chancellor addressed the issue of the propriety and admissibility of the testimony of Anthony Tattis, executor, during the original trial and stated:

> You objected to it as you should have. It was in the record. Had the Supreme Court thought there was any merit to it, they [sic] would have given you relief on it. The fact that there was no opinion. . . published, they [sic] found no merit in your argument. They [sic] do that frequently, as you well know. Quite frankly. . . I took this testimony this morning because I wanted to give you--I wanted you to get to put your proof on so you can appeal my decision. I think that this, quite frankly, the Motion you have filed is about a hair's breadth away from a violation of the litigation responsibility act, which would have you paying the other side. I think you are here trying to relitigate.

Moreover, Rule 60(b) states that such motions must be made within a reasonable time, "not more than six months after the judgment, order, or proceeding was entered or taken." Bagley did not file her Rule 60(b) motion until three and a half years after the entry of the declaratory judgment. This Court will not reverse the decision of the chancellor unless he was manifestly wrong, clearly

erroneous, or applied an erroneous legal standard. *See Estate of Pannell v. Guess*, 671 So. 2d 1310, 1313 (Miss. 1996). Finding no error, we affirm.

THE JUDGMENT OF THE MADISON COUNTY CHANCERY COURT DENYING BAGLEY'S RULE 60(b) MOTION IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, MCMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.