

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00393 COA

**THE LAST WILL AND TESTAMENT OF MORRIS G. CALE, DECEASED: JENNIE
CALE ADDINGTON**

APPELLANT

v.

GLINDA ELIZABETH CALE

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GLENN BARLOW

COURT FROM WHICH APPEALED: GEORGE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WILLIAMS S. MURPHY

ATTORNEY FOR APPELLEE:

W. HARVEY BARTON

NATURE OF THE CASE: WILL CONTEST

TRIAL COURT DISPOSITION: HOLOGRAPHIC WILL WAS FOUND TO BE A FORGERY

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

STATEMENT OF THE CASE

On October 30, 1985, a petition to open the estate of Morris Glennon Cale was filed by Rae Bell Cale, his mother now deceased who was also the paternal grandmother of Glinda Elizabeth Cale. Glinda was Morris Glennon Cale's only child.

An original holographic document was attached to the petition purporting to be the last will and testament of the decedent, Morris Glennon Cale, who died on October 5, 1985. An order was never entered allowing the last will and testament of the decedent to be admitted into probate.

At the time of Cale's death, he owned two parcels of real property in George County, Mississippi, the titles of which were solely in his name. The conveyances of the two parcels to Mr. Cale were represented by warranty deeds and were recorded in Book 115 and in Book 164, pages 507-08, land deed records of George County, Mississippi. On October 7, 1985, the property listed in Book 164, pages 507-08, was conveyed by Rae Bell Cale to Jennie Cale Addington. This conveyance by warranty deed is recorded in Book 168, pages 201-02, land deed records of George County Mississippi. The records show that on June 6, 1989, Rae Bell Cale quitclaimed the same property listed above to Jennie Cale Addington, that deed is recorded in Book 191, pages 218-19.

Glinda Elizabeth Cale is the sole heir at law of Morris Glennon Cale. She argues that she should be placed in sole possession of her father's real property because the holographic document attached to the 1985 petition was fraudulent in that it was not written in the hand of Morris Glennon Cale and was not signed by him. After a hearing on the matter, the chancellor found that the purported holographic will of Morris Glennon Cale was not written entirely in his hand and was a forgery.

Feeling aggrieved by that decision, Jennie Addington appeals raising the following issues for our consideration:

I. DID THE LOWER COURT COMMIT REVERSIBLE ERROR IN NOT REQUIRING APPELLEE TO RETURN BENEFITS ACCEPTED THROUGH THE WILL, AS A CONDITION PREREQUISITE TO CONTEST THE VALIDITY OF THE WILL?

II. DID THE CHANCELLOR ERR IN FINDING AS A FACT AND DECREERING LT. RAYMOND L. FULTON OF PASCAGOULA POLICE DEPARTMENT, A HANDWRITING EXPERT?

III. DID THE LOWER COURT ERR IN ITS REFUSAL TO APPLY THE TWO-YEAR STATUTE OF LIMITATIONS TO THIS CASE?

IV. DID THE COURT ERR IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE INSTRUMENT IN QUESTION WAS A FORGERY?

ANALYSIS

I. DID THE LOWER COURT COMMIT REVERSIBLE ERROR IN NOT REQUIRING APPELLEE TO RETURN BENEFITS ACCEPTED THROUGH THE WILL, AS A CONDITION PREREQUISITE TO CONTEST THE VALIDITY OF THE WILL?

Jennie Addington (Jennie) argues that Glinda received all of the money from insurance which had been collected from the death of Morris Glennon Cale, that she received social security benefits, and an automobile in accordance with the will, which she never tendered or attempted to return before institution of this suit. Jennie claims that Glinda is required to do so before renouncing the will as a forgery, citing *Kuhne v. Miller*, 387 So. 2d 729, 731 (Miss. 1980) as authority for her proposition.

We find, however, as did the chancellor, that there is no direct evidence that Glinda ever accepted any benefit under the will which would prevent her from contesting the authenticity of the will. Instead, the facts support the conclusion that the life insurance proceeds she received were as a named beneficiary of the life insurance policy. As such, these proceeds would not pass through the will.

The lower court also found that, while Glinda did receive use of the vehicle which was left to her under the will, there is no evidence indicating that title to this vehicle was ever transferred to Glinda and the mere use of the vehicle is not such a benefit received as must be tendered to the court to enable a legatee to contest the will. We agree with the reasoning of the chancellor on this issue and therefore find that this assertion of error is without merit.

II. DID THE CHANCELLOR ERR IN FINDING AS A FACT AND DECREERING LT. RAYMOND L. FULTON OF PASCAGOULA POLICE DEPARTMENT, A HANDWRITING EXPERT?

"Once it is determined that expert testimony will assist the trier of fact, the expert must be adjudged qualified in his field. The adjudication of whether a witness is legitimately qualified as an expert is left to the sound discretion of the trial judge." *Couch v. City of D'Iberville*, 656 So. 2d 146, 152 (Miss. 1995).

Lt. Fulton testified that he attended courses in handwriting analysis which were given by the United States Secret Service, and that he is the document examiner for the Pascagoula Police Department. In that capacity, he has worked on cases involving forged documents of all types. Fulton further testified that he had worked on approximately two hundred cases involving forgeries during his tenure as a detective with the Pascagoula Police Department. Given Fulton's training and experience in the area of handwriting analysis, we find that the chancellor did not err in qualifying him as an expert in this field.

III. DID THE LOWER COURT ERR IN ITS REFUSAL TO APPLY THE TWO-YEAR STATUTE OF LIMITATIONS TO THIS CASE?

Section 91-7-23 of the Mississippi Code reads as follows:

Any person interested may, at any time within two years, by petition or bill, contest the validity of the will probated without notice; and an issue shall be made up and tried as other issues to determine whether the writing produced be the will of the testator or not. If some person does not appear within two years to contest the will, the probate shall be final and forever binding, saving to infants and persons of unsound mind the period of two years to contest the will after the removal of their respective disabilities. *In case of concealed fraud, the limitation shall commence to run at, and not before, the time which such fraud shall be, or with reasonable diligence might have been, first known or discovered.*

Miss. Code Ann. § 91-7-23 (1972) (emphasis added).

The chancellor found that the statute of limitations had not run in this case because the petitioner proved by clear and convincing evidence that the will was a forgery and that this fact had been fraudulently concealed from her.

After thoroughly reviewing the record, we conclude that the chancellor did not err in this finding. As such, this assertion of error is without merit.

IV. DID THE COURT ERR IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE INSTRUMENT IN QUESTION WAS A FORGERY?

The chancellor found that based upon the testimony of Lt. Fulton, who was accepted as an expert witness, the holographic will purportedly signed by Cale was, in fact, a forgery. The chancellor based his opinion, in part, on the testimony of Lt. Fulton, who testified that he was certain that the signature on the will was not that of Cale after having compared that signature with several known handwriting samples. Furthermore, Fulton testified that in his expert opinion, the signature on the will was written by Rae Bell Cale. Fulton also testified that the body of the will itself had certain distinctive handwriting characteristics that were made by the same person who listed several creditors of the estate of Morris Glennon Cale, including the cost of the funeral home, florist, and headstone. This document was produced from the file of Gerald Dickerson, the initial attorney for the estate, and could have only been written after the death of Morris Glen Cale. The chancellor found that, on this basis, the person who wrote the will in question also prepared this document after the death of Mr. Cale.

The chancellor also considered the testimony of Gerald Dickerson that Rae Bell Cale had admitted to him that the holographic will was not written by Morris Glennon Cale and that was the reason why he had not pursued the probate of the will at that time. Finally, the chancellor stated that, after viewing the document, he also noticed certain unexplained discrepancies, such as the misspelling of Glinda's

(his own child) name, which led the court to the conclusion that the will was a forgery.

Given the foregoing, we find that the chancellor was well within his discretion in holding that the will was shown to be a forgery by clear and convincing evidence. This final assertion of error is also without merit.

**THE JUDGMENT OF THE GEORGE COUNTY CHANCERY COURT IS AFFIRMED.
COSTS ARE ASSESSED AGAINST THE APPELLANT.**

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