IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 15, 2005 Session

ELIZABETH LANIER v. STEPHEN L. RAINS and JO ANN RAINS, CO-EXECUTORS, ESTATE OF DEXTER LYNDON RAINS

Direct Appeal from the Chancery Court for Fentress County, Probate Division
No. P-04-30 Hon. Billy Joe White, Chancellor

No. M2005-00128-COA-R3-CV - Filed January 11, 2005

Petitioner sought to inherit from decedent by being legitimized after decedent's death and then sharing in decedent's Estate as a pretermitted child by virtue of Tenn. Code Ann. § 32-3-103. The Trial Court dismissed the Petition. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

Rachel C. Nelley and Keith C. Dennen, Nashville, Tennessee, for Appellants.

Phillips M. Smalling, Byrdstown, Tennessee, and Amy V. Hollars, Livingston, Tennessee, for Appellees.

OPINION

Petitioner seeks to share in the Estate of Dexter Lyndon Rains, under the provisions of Tenn. Code Ann. § 32-3-103 which provides:

(a) A child born after the making of a will, either before or after the death of the

> testator, inclusive of a mother-testator, not provided for nor disinherited, but only pretermitted, in such will, and not provided for by settlement made by the testator in the testator's lifetime, shall succeed to the same portion of the testator's estate as if the testator had died intestate.
>
> (b) Toward raising the portion of such child, the devisees and legatees and other heirs shall contribute out of the parts devised, or bequeathed to, or settled upon them by the testator, in the proportion borne by their respective devises, legacies, or settlements to the whole estate of the testator.

After the decedent's will was admitted to probate, which made no mention of or provisions for petitioner, petitioner petitioned to establish paternity and filed a claim against the Estate for one-third of decedent's estate.

The petitioner recited that petitioner was born on December 23, 1961 and that the deceased was her biological father. Petitioner prayed that the Court determine that deceased was the biological father of petitioner and that petitioner was a pretermitted child and entitled to inherit pursuant to Tenn. Code Ann. § 32-3-103 and 31-2-105(a)(2)(B).

After hearing arguments, the Trial Court dismissed the Petition and petitioner has appealed. Petitioner relies on *Rose v. Stalcup*, 1988 WL 69501 (Tenn. Ct. App. July 8, 1988), which held that a child who is physically born before the execution of a will but not legitimated until after the execution of a will is considered to have been pretermitted under the statute. The *Rose* Court relied on *Scales v. Scales*, 564 S.W.2d 667 (Tenn. Ct. App. 1977), which did not involve the application of the pretermitted child statute. The *Scales* Court held that a child legitimated after the death of a testator would qualify as a member of a class under a provision in the will of a bequest "to the children" of the testator. The *Scales* Court held that the legitimation of Robert Lee Scales essentially made him a member of the class under the terms of the will.

We reject the rationale of *Rose v. Stalcup*. First, *Rose* is an unpublished opinion, and while it is considered "persuasive authority," it is not "controlling authority" under Rule 4 of the Tennessee Supreme Court. Moreover, petitioner is simply not "a child born after the making of" the will. Tenn. Code Ann. § 32-3-103. The purpose of the statute is to protect after born children from inadvertent disinheritance, because at the time a testator drafted the will a child falling within the ambit of this provision was not born. We decline to follow *Rose* by virtue of the wording of the statute and its misplaced reliance on *Scales*. Other jurisdictions are in accord. *See, e.g., J.E.W. v. Estate of John Doe*, 443 S.2d 249 (FL. Dist. Ct. App. 1984).

Finally, petitioner argues that she is entitled to inherit because the will neither expressly, nor by implication disinherited her. The Trial Court ruled against her on this issue, and we agree. As our Supreme Court noted in *Bowerman v. Burris*, 197 S.W. 490 (Tenn. 1917), a child may be properly pretermitted, even though the child is not mentioned in the will. The opinion noted that the only exception to this rule is an unborn child who comes within the protection

provided in Tenn. Code Ann. § 32-3-103, which we hold is not applicable to the facts of this case.

For the foregoing reasons, we affirm the Trial Court on all issues and remand, with the cost of the appeal assessed to Elizabeth Lanier.

_____

HERSCHEL PICKENS FRANKS, P.J.