

Cooper v austin essay



**ASSIGN
BUSTER**

* This is a will contest case involving a codicil to the Last Will and Testament of Wheelock A. Bisson, M. D., deceased. * Dr. Bisson's will, which is not contested, was executed June 18, 1982.

Prior Proceedings:

* Dr. Bisson died in 1985, and shortly thereafter Greer filed a petition in probate court to admit the June 18, 1982, will and two codicils thereto dated August 20, 1984, and August 6, 1985, respectively, to probate as and for the Last Will and Testament of Wheelock A. Bisson, M. D. By order entered November 26, 1985, the probate court admitted the paper writings to probate as the Last Will and Testament of Dr. Bisson. * On May 20, 1986, Austin filed a petition in probate court to contest the two codicils, and, after answer to the petition by Greer, the probate court certified the contest to circuit court by order entered August 13, 1986.

* No action was taken in circuit court until the administrator pendente lite filed a " Complaint to Establish Will and Codicil" on November 9, 1988. Austin's answer to the complaint, inter alia, denied that either codicil had been properly executed by the decedent or properly witnessed and further denied that the codicils had any legal validity or effect. * Greer filed a motion for summary judgment in October, 1990, seeking to have Austin's case dismissed on the grounds that it was barred by T. C. A. § 32-4-108 (1986), because it was brought more than two years from the entry of the order admitting the will to probate. The trial court denied this motion.

* On March 26, 1991, a jury trial was held on the issue of devisavit vel non as to the 1984 codicil. The 1982 will was introduced into evidence by

stipulation, and Greer offered the 1984 codicil through the attesting witnesses. * Following the testimony of the witnesses, counsel for Austin moved the court to disallow submission of the codicil to the jury on the grounds that the codicil's proponent, Mrs. Greer, had not met her burden of proof pursuant to T. C. A. § 32-1-104, regarding the manner in which a will must be executed.

* The trial court granted Austin's motion and directed a verdict on the grounds that Ms. Greer had not proved the proper execution of the codicil. * Accordingly, judgment was entered declaring that the last will and testament of Wheelock A. Bisson dated June 18, 1982, be admitted to probate without any codicils.

Issue:

1. The first issue is whether the trial court erred in denying Greer's motion for summary judgment on the grounds that Mr. Austin's will contest was barred by T. C. A. § 32-4-108 (Supp. 1991).

2. The second issue for review is whether the trial court erred in directing a verdict for the contestant Austin by refusing to allow the 1984 codicil to be submitted to the jury.

Holding:

The rule for determining a motion for directed verdict requires the trial judge and the reviewing court on appeal to look to all of the evidence, taking the strongest legitimate view of it in favor of the opponent of the motion and allowing all reasonable inferences from it in his favor. The court must discard

all countervailing evidence, and if there is then any dispute as to any material determinative evidence or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied.

Tennessee Farmers Mut. Ins. Co. v. Hinson, 651 S. W. 2d 235 (Tenn. App. 1983). The court should not direct a verdict if there is any material evidence in the record that would support a verdict for the plaintiff under any of the theories he has advanced. See Wharton Transport Corp. v. Bridges, 606 S. W. 2d 521 (Tenn. 1980). The formal requirements for the execution of a will are set out in T. C. A. § 32-1-104 (1984), which provides: Will other than holographic or nuncupative. § 32-1-104. The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:(1) The testator shall signify to the attesting witnesses that the instrument is his will and either:(A) Himself sign; (B) Acknowledge his signature already made; or(C) At his direction and in his presence have someone else sign his name for him; and(D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.(2) The attesting witnesses must sign:(A) In the presence of the testator; and(B) In the presence of each other.

Outcome:

An examination of the witness' testimony indicates that there is uncontroverted affirmative proof that Dr. Bisson did not signify to at least one attesting witness that the instrument to be witnessed was his will or a codicil thereto. Therefore, the trial court correctly directed a verdict against the admission of the will.