

In the Supreme Court of Mississippi

TRACY FRANKLIN WILLIAMS

Appellant,

vs.

LAWRENCE DANIEL WILLIAMS

Appellee

On Appeal from the Chancery Court of DeSoto
County, Mississippi
No. 05-04-0670

**BRIEF OF APPELLANT,
TRACY FRANKLIN WILLIAMS**

Eduardo A. Flechas, MSB # [REDACTED]
Attorney for Appellant, Tracy Franklin Williams
Flechas & Associates, P.A.
318 South State Street
Jackson, Mississippi 39201
Tel: (601) 981-9221

ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Tracy Franklin Williams, requests oral argument in this cause so as to have the opportunity to clarify and further explain the issues, facts, and relevant law involved in this appeal.

IN THE SUPREME COURT OF MISSISSIPPI

TRACY FRANKLIN WILLIAMS

APPELLANT

VS.

CAUSE NO. 2009-TS-00551

LAWRENCE DANIEL WILLIAMS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Tracy Franklin Williams, Appellant
2. Eduardo A. Flechas, Attorney for Appellant
3. Lawrence Daniel Williams, Appellee
4. Florence Ann Jermyn, Interested Party
5. Gary P. Snyder, Attorney for Appellee



EDUARDO A. FLECHAS
Attorney for Appellant

TABLE OF CONTENTS

I	CERTIFICATE OF INTERESTED PERSONS	iii
II	TABLE OF AUTHORITIES	v
III	STATEMENT OF ISSUES	1
IV	STATEMENT OF THE CASE	2-4
V	SUMMARY OF THE ARGUMENT	5
VI	ARGUMENT	6
	(I) Standard of Review	6
	(II) Examination of the Last Will and Testament Of Dorothy Ann Williams Reveals That It is Ambiguous on Its Face	7-8
	(III) Consideration of Extrinsic Evidence and Application Of the Rules of Construction are the Appropriate Means by Which a Court Can Determine the Testator's Intent	9-11
VII	CONCLUSION	12

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page(s):</u>
<u>Brown v. Credit Ctr., Inc.</u> , 444 So. 2d 358 (Miss. 1984)	6
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986)	6
<u>Estate of Blount v. Papps</u> , 611 So. 2d 862 (Miss. Ct. App. 1992)	9
<u>Estate of Williams v. Johnson</u> , 672 So. 2d 1173 (Miss. 1996)	9
<u>Hibernia Nat'l Bank v. Carner</u> , 997 F.2d 94 (5 th Cir. 1993)	6
<u>In re Estate of Hollaway</u> , 631 So. 2d 127 (Miss. 1993)	10
<u>In re Grandberry's Estate</u> , 310 So. 2d 708 (Miss. 1975)	7
<u>In re Will of Roland</u> , 920 So. 2d 539 (Miss. Ct. App. 2006)	7
<u>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</u> , 475 U.S. 574 (1986)	6
<u>Reid v. State Farm Mut. Auto. Ins. Co.</u> , 784 F.2d 577 (5 th Cir. 1986)	6
<u>Seal v. Seal</u> , 312 So. 2d 19 (Miss. 1975)	7
<u>Stovall v. Stovall</u> , 360 So. 2d 679 (Miss. 1978)	7
<u>Tinnin v. First United Bank of Mississippi</u> , 502 So. 2d 659 (Miss. 1987)	7
<u>Vannerson v. Culbertson</u> , 18 Miss. 150 (Miss. 1848)	7
<u>Willingham v. Mississippi Transp. Comm'n</u> , 944 So. 2d 949 (Miss. Ct. App. 2006)	6
 <u>Other Authorities:</u>	
Robert A. Weems, <u>Wills & Admin. of Estates in Miss.</u> , §§ 3:2, 9:10 (2008)	8,9

STATEMENT OF ISSUES

1. Whether the Chancery Court of DeSoto County, Mississippi erred in granting the Appellee's Motion for Partial Summary Judgment and determining that Article III of the last will and testament of Dorothy Ann Williams contained an unenforceable and merely precatory statement of the testatrix's desire.

2. Whether the Chancery Court of DeSoto County, Mississippi erred in granting to the Appellee attorney's fees incurred in the defense of the Appellant's challenge to the Appellee's interpretation of Article III of the last will and testament of Dorothy Ann Williams.

STATEMENT OF THE CASE

On March 22, 1999, Dorothy Ann Williams (also referred to as "Dorothy") executed her Last Will and Testament. (R 8-9) Such testamentary instrument provided that, upon the death of the testatrix, Lawrence Daniel Williams (also referred to as "Dan"), Tracy Franklin Williams (also referred to as "Tracy"), and Florence Ann Jermyn (also referred to as "Chip") would share equally in the value of the decedent's estate. In addition, said testamentary instrument, pursuant to Article III, provided that the testatrix's granddaughter, Kate Ida Williams, (also referred to as "Kate") was to be "taken care of" as the testatrix did during her lifetime.

On April 2, 2005, Dorothy Ann Williams departed this life. Subsequently, a Petition for Probate of Will and Letters Testamentary was filed with this Court, on April 19, 2005. (R 5-7) Thereafter, Letters Testamentary were issued to Dan Williams on April 27, 2005. (R 15)

Initially following the death of the testatrix, the family members amicably met and began to make decisions on division of some of the personal effects of the deceased. An issue arose a few months later when Tracy inquired as to how the Article III provision of Dorothy's will was to be handled in terms of providing for Dorothy's mentally and physically challenged granddaughter, Kate, who resides in a special needs facility. During her lifetime, Dorothy had covered the costs of Kate's tuition at the Baddour Center, with payments received from a self-financed home purchase with the Beaver family (also referred to as "Beaver Note").

In March of 2007, after several months of negotiation among the parties, a tentative agreement was reached, whereby a trust would be established for the benefit of Kate, with Dan Williams to serve as "Trustee", and Tracy Williams as "Successor Trustee." As of April of that same year, there was no decision as to the type, amount, and source of property which would be used to fund the trust. On June 4, 2007, Tracy filed a Petition to Obtain an Accounting and Inventory, and the parties agreed to a Consent Order, in which Dan, as Executor, was to file an inventory and accounting of the assets of the estate. (R 19-20) By August 2, 2007, an Inventory and First and Final Accounting were completed. (R 27-35)

By October 4, 2007, communications had deteriorated between the parties, and Dan decided not to follow through with creation of a trust. Dan seemed to agree that he would continue to pay to The Baddour Center, as his mother Dorothy had, with the monies received from the Beaver Note. That same month, Tracy inquired into several assets of the estate, for which he did not feel there had been a proper accounting.

Tracy has always maintained that it was his mother's intention to provide for Kate's care, even after her own death. It is likewise apparent that Dan was also aware of this intention, as he continued to make the payments to The Baddour Center after Dorothy's death, using funds derived from the very same source that Dorothy had used. As of mid-2007, the parties had agreed to fund a trust for Kate's benefit, but Dan made it clear that his agreement to funding said trust was contingent upon Tracy's simultaneous signing of a Petition to Discharge the Executor and close the estate. Only after Tracy's refusal to sign the aforementioned Petition, as well as his inquiry into the disposition of several assets of the estate, did Dan withdraw his offer.

As over two years had lapsed since his mother's death with no resolution of issues regarding the estate, Tracy filed a Petition for Accounting, Discharge of Executor, Surcharge Against Executor, and for Injunctive and Other Relief on November 28, 2007. (R 36-39) In that Petition, the relief Tracy specifically sought was for a court-issued injunction requiring the creation of a healthcare fund or irrevocable trust for the benefit of his daughter, Kate. Depositions were held and discovery was conducted throughout the first part of 2008.

In March of 2008, a Motion for Partial Summary Judgment was filed on behalf of Dan Williams, Executor. (R 55-56) In this motion, Dan argued that Article III of the subject will was unenforceable and merely a precatory expression of the testatrix's desire. In response, Tracy argued that Article III contained a proper statement of the testatrix's wishes and was not merely a precatory statement. Subsequently, an Order Granting Motion for Partial Summary Judgment was entered on February 2, 2009. (R 145-146)

The Appellant filed a Petition for Interlocutory Appeal by Permission, on February 23, 2009. Subsequently, an Order denying the Appellant's petition for interlocutory appeal was entered on March 18, 2009. (R 157)

On February 18, 2009, the Appellee filed a Motion to Dismiss and for Other Relief, seeking, among other things, an award of attorney's fees. (R 147-151) On March 23, 2009, an Order was entered granting the Appellee's request for an award of attorney's fees in the amount of \$38,093.80. (R 175-176)

On April 6, 2009, the Appellant filed a Notice of Appeal, thereby perfecting his appeal in this matter. (R 177-178)

SUMMARY OF ARGUMENT

The Chancery Court of DeSoto County, Mississippi erred in granting the Appellee's request for partial summary judgment in that Article III of the last will and testament of Dorothy Ann Williams was not merely precatory. This is so in that the words used by the testatrix were in the nature of a command. In addition, it is clear from the facts and circumstances surrounding the testatrix's execution of her last will and testament that she intended for her granddaughter to be cared for as she had during her lifetime, by and through the proceeds of her estate.

ARGUMENT

I. Standard of Review

This Court applies a *de novo* standard of review to a trial court's grant of summary judgment. Willingham v. Miss. Transp. Comm'n, 944 So. 2d 949 (Miss. Ct. App. 2006). Summary judgment lies only where there is no genuine issue of material fact; when there is doubt as to the existence of a fact issue, the non-moving party is the beneficiary of that doubt. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1984). All evidentiary matters are examined in the light most favorable to the non-movant. See Hibernia Nat'l Bank v. Carner, 997 F.2d 94 (5th Cir. 1993); Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577 (5th Cir. 1986). If there is error at the trial level, it should be in denying summary judgment in favor of a trial on the merits. Brown, 444 So. 2d at 363. In addition, the movant has the burden of persuasion to establish that there exists no genuine issue of material fact. Celotex Corp., 477 U.S. at 319.

A material fact is considered a "genuine issue" in four instances: 1) diametrically opposed facts or testimony, 2) multiple interpretations of undisputed testimony, 3) where materially differing, but nevertheless reasonable inferences may be drawn from the uncontradicted evidentiary facts, or 4) where purported establishment of the facts has been sufficiently incomplete or inadequate so that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

II. Examination of the Last Will and Testament of Dorothy Ann Williams Reveals That It is Ambiguous on its Face.

In Mississippi, the most fundamental rule of construction of a will is to ascertain the intent of the testator. Tinnin v. First United Bank of Mississippi, 502 So. 2d 659 (Miss. 1987). To determine the intent, a court must first look to the will itself, and the words utilized are "to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another, can be collected." Vannerson v. Culbertson, 18 Miss. 150 (Miss. 1848). In making this determination, a court is limited to 'the four corners of the instrument,' but also with due consideration of the circumstances surrounding the testator at the time the will was written. In re Granberry's Estate, 310 So. 2d 708 (Miss. 1975).

If after making this examination, a court decides that the intent of the testator is clear, the inquiry ends there. In re Will of Roland, 920 So. 2d 539 (Miss. Ct. App. 2006); Stovall v. Stovall, 360 So. 2d 679 (Miss. 1978). However, when a court is unable to discern a testator's intent, the will is deemed to be ambiguous. Ambiguity may be characterized as either "patent" or "latent", but in either event, the court must resort to the consideration of extrinsic evidence and application of the rules of construction to determine the testator's true intent. Seal v. Seal, 312 So. 2d 19 (Miss. 1975).

In the instant case, the Last Will and Testament of Dorothy Ann Williams contains only four sparse articles. (R 8-9) Article I and Article IV deal with paying the testatrix's debts and naming of her Executor. Therefore, Article II and III are the only provisions which require analysis of the testatrix's intent. While the language employed

in Article II seems to handle disposition of her estate, there still remains a question then, as to why Mrs. Williams would have required that the Article III provision regarding continuing care of Kate be inserted, had she not intended for it to be an enforceable obligation of her estate.

It has, however, been stated, that use of words such as "give", "devise", or "bequeath" are indicative of the testamentary nature of a writing, but it has also been held that such "signal" words are not necessarily essential. "Words of desire, such as "want" or other similar expressions, are considered to be testamentary and dispositive when used for the purpose of declaring the manner of the disposition of the testator's property after his or her death." Robert A. Weems, Wills & Admin. of Estates in Miss., §3:2 (2008). Mrs. Williams specifically used such words of desire, and at the time her will was drafted, she and her husband were covering the costs of Kate's care at the Baddour Center with the monthly proceeds from the Beaver note. So, when considering the circumstances surrounding the testator at the time of execution of her will, it is evident that she intended that such care continue to be provided to Kate following her death and in the same manner as it had been provided during her own lifetime. .

After consideration of the words employed, the circumstances surrounding the time of execution, and the conduct of the testatrix, this Court should determine that it was the intent of Dorothy Williams to require that the same degree of care and manner of care continue to be provided to her granddaughter, Kate, following her death. At most, however, with the above factors in mind, this Court should determine that the provision in Article III is ambiguous.

III. Consideration of Extrinsic Evidence and Application of the Rules of Construction are the Appropriate Means by Which a Court Can Determine the Testator's Intent.

When a preliminary finding of ambiguity has been made, the next step for a court is to review extrinsic evidence to aid in the process of will construction. A finding of ambiguity provides a court with a broader means by which to analyze and determine what a testator's intention truly was. The admission of extrinsic evidence though does pose a risk of compromising the integrity of the writing, but it is equally true that intention of a testator can often not be determined without its use. Robert A. Weems, Wills and Admin. of Estates in Miss., § 9:10 (2008).

"The fundamental rule governing the construction of a will is to ascertain the intent of the testator. It has been said that in construing a will the most solemn obligation that any court can have is to see that the true intent of the testator is carried out." Estate of Blount v. Papps, 611 So. 2d 862 (Miss. Ct. App. 1992) (citing Matter of Estate v. Vick, 557 So. 2d 760 (Miss. 1989)). Where the language of a will is susceptible to more than one construction, it is the duty of the reviewing court to "adopt that construction which is most consistent with the intent of the testat [rix]." Estate of Williams v. Johnson, 672 So. 2d 1173 (Miss. 1996).

The first piece of extrinsic evidence which is insightful as to Mrs. Williams' intent is provided in the Affidavit of Annie Mae McNeil. (R 74-75) Ms. McNeil's affidavit carries substantial weight with it, as it is the only evidence offered by an individual who is in no way an interested party in this case and stands to gain nothing from this Court's decision. Ms. McNeil swears to the nature of her long-standing relationship with Mrs.

Williams, and that it was her sincere understanding through conversation with and interaction with her that Mrs. Williams' primary concern following her own death was to be certain that Kate was always provided for. It is also of mention that Mrs. Williams was unsure that Kate would outlive her, as she had experienced some severe medical complications over the years. This makes Mrs. Williams' specific inclusion of Article III in her Will of greater significance, as there was a substantial chance that Kate would predecease her.

Also of note is the pattern of conduct exhibited by Dan Williams, Executor, from the time of his appointment. Since April of 2005, Dan has continued to make payments to the Baddour Center on Kate's behalf from the estate, utilizing the very same funds that Dorothy had earmarked for Kate's care during her life. Although he contests the legal enforceability of Article III at present, it is apparent that he was well aware of his mother's intentions from his continued payment of this money. While this conduct is not binding on a Court, it does offer insight into what the true intention of the testatrix was. (R 77-82)

Furthermore, it is argued by defense counsel that Dan Williams made these payments to the Baddour Center, and that these payments made at his discretion as Executor, were not mandatory due to the precatory language contained in Article III. However, at the time that Dan took his oath as Executor, he swore that this instrument was the Last Will and Testament of Dorothy Ann Williams, and that he would well and truly execute it, and discharge the duties which were imposed on him by law. As an Executor, Dan then stands in the role of a fiduciary to the Estate and to its beneficiaries. In re Estate of Hollaway, 631 So. 2d 127 (Miss. 1993). Therefore, through this imposed

fiduciary duty, one of Dan's obligations is to not mismanage or misappropriate funds of the estate. Under this line of reasoning then, and upon a finding that the language of Article III was precatory in nature, Dan would be liable to the Estate for all funds disbursed to the Baddour Center since April of 2005. The only means by which he could avoid the imposition of liability would be to assert that he did not violate his duty to the estate in making the payments to the Baddour Center, but was rather discharging his duties as directed by the testatrix's will.

The fundamental rule of will construction is for a court to determine the intent of the testator (testatrix) and to see that such intent is carried out. As case law dictates and the evidence offered to this court establishes, it was Mrs. Williams' intent in including Article III in her will that her granddaughter Kate be financially provided for by her estate.

Based on the aforementioned argument, the Appellant asserts that the trial court erred in granting the Appellee's Motion for Partial Summary Judgment, and erred in awarding to the Appellee attorney's fees incurred in defending this action.

CONCLUSION

The Chancery Court of DeSoto County, Mississippi erred in granting the Appellee's request for partial summary judgment. In that Article III of the last will and testament of Dorothy Ann Williams was not merely precatory, partial summary judgment was erroneously granted by the trial court. The words used by the testatrix were in the nature of a command and were not advisory. In addition, it is clear from the facts and circumstances surrounding the testatrix's execution of her last will and testament that she intended for her granddaughter to be cared for as she had during her lifetime, by and through the proceeds of her estate.

Respectfully submitted,

Tracy Franklin Williams

BY: 
EDUARDO A. FLECHAS

Eduardo A. Flechas, MSB [REDACTED]
FLECHAS & ASSOCIATES, P.A.
318 South State Street
Jackson, Mississippi 39201
(601) 981-9221

CERTIFICATE OF SERVICE

I, Eduardo A. Flechas, do hereby certify that I have this day served, via first-class United States mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief, to:

Gary P. Snyder, Esq.
Watkins, Ludlam, Winter & Stennis
Post Office Box 1456
Olive Branch, Mississippi 38654

Honorable Vicki B. Cobb
DeSoto County Chancery Court
Post Office Box 1104
Batesville, Mississippi 38606

SO CERTIFIED, this, the 23rd day of September, 2009.



EDUARDO A. FLECHAS