2010-CA-01438 T

ATTORNEYS FOR THE APPELLANT
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below have an interest in the outcome of this case. These representations are made in order that the justices of the Court may evaluate possible disqualification or recusal.

1. The Estate of Samuel A. Farr, Deceased, Appellant;
2. Ramona Walls, CPA, Executrix of the Last Will and Testament of Samuel A. Farr, Deceased;
3. John P. Fox, Attorney for the Estate of Samuel A. Farr, Deceased, Appellant;
4. Mark N. Halbert, Attorney for the Estate of Samuel A. Farr, Deceased, Appellant;
5. Nancy Wirick, Appellee; and,
6. Stephen T. Bailey, Attorney for Appellee.

SO CERTIFIED, this the 21st day of January, 2011.

MARK N. HALBERT, MS Bar No. [redacted]
Attorney for Appellant

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INTRODUCTION

This case comes before this Court on an adverse ruling by the Chancery Court of Chickasaw County granting summary judgment to Nancy Wirick[1] and thus invalidating a will and codicil executed by her father, Samuel A. Farr, Deceased. The will and codicil at issue identify one witness as an "attesting witness" and also contain a certification by a notary public. The issue on this appeal involves whether summary judgment invalidating a will is appropriate where genuine issues of material fact exist concerning the number of witnesses who attested to the will and codicil. The Chancellor relied on the form of the will; however, the evidence shows that at least two witnesses may have been present when the will and codicil were executed and signed the documents in the presence of the testator. Under Mississippi law, only two credible witnesses are required to attest to the validity of a will. Whether or not both witnesses sign in a space provided for attesting witnesses or elsewhere on the will or codicil should not be determinative of compliance with state law. This is the question before the Court.

STATEMENT OF THE ISSUES

(1) Whether summary judgment was proper where the will and codicil were signed by two (2) witnesses.

(2) Whether the Chancery Court's determination that Nancy Wirick is the sole heir at law should be set aside.

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[1] Appellant inadvertently misspelled the last name of Nancy Farr Wirick in the Notice of Appeal. "Wyrick" is incorrect, and the Appellee should be referred to as "Nancy Farr Wirick."

STATEMENT OF THE CASE

I. The Will and Codicil of Samuel A. Farr

Samuel A. Farr died of natural causes on December 29, 2009. Samuel A. Farr died having only one child, Nancy Farr Wirick ("Wirick"). Prior to his death, Samuel A. Farr executed a Last Will and Testament dated April 1, 2009 ("the will") which created a private trust. 1:6-8. According to the will, Samuel A. Farr devised and bequeathed all of his property to his Executrix or Executor "in Trust for the use and benefit of my child, Nancy." 1:6. The will appointed Ramona Walls, a certified public accountant in Houston, Mississippi, as the Executrix. *Id.* The will further directed the Executrix to pay to Wirick the sum of $2,000 per month, subject to annual cost of living increases. *Id.* The Executrix was given complete authority to manage the trust property at her sole discretion. 1:6-7.

The will consists of two (2) pages and an "Affidavit of Witnesses." 1:6-8. The first two pages contain the will and an attestation clause. 1:6-7. Both of these pages are signed by Samuel A. Farr indicating that he signed the will on April 1, 2009. *Id.* The first two pages also contain the signature of Roger McGrew as a witness to the will. On the second page, the will contains an "Attestation Clause" which states as follows:

> The foregoing instrument was, on the day of the year therein set forth, published and declared by Samuel A. Farr to be his Last Will and Testament in our presence and we, at his request, have subscribed our names as witnesses in his presence and in the presence of each other.

1:7. The "Attestation Clause" is signed only by one witness, Roger McGrew. Roger McGrew also is the only witness who signed the "Affidavit of Witnesses," which contains the following language:

> This day personally appeared before me, the undersigned authority in and for said State and County, Chickasaw and Mississippi, respectively, whose names appear as subscribing witnesses to the foregoing and attached instrument of writing, who after having been duly sworn, say on oath that on the 1st day of April, 2009, in their

> presence, Samuel A. Farr signed his name thereto, and in their presence described the same to be his Last Will and Testament; that at his request, in their presence, and in the presence of each other, the said affiants subscribed their names thereto as witnesses to its execution and publication; that the said Samuel A. Farr, on the 1st day of April, 2009, was of lawful age, was of sound and disposing mind and memory, and there was no evidence of undue influence.

1:8. The "Affidavit of Witnesses" also contains the signature of a certified notary public, Carolyn Davis, whose signature is dated the same day as the execution of the will. *Id.*

On April 23, 2009, Samuel A. Farr executed a Codicil to Last Will and Testament of Samuel A. Farr ("the codicil"). 1:9-10. The codicil provides for any funds remaining in trust following the death of Nancy Wirick to be divided equally between Prospect Methodist Church and Prospect Methodist Church Cemetery Fund. 1:9. The codicil also states that the will was executed "in the presence of Roger McGrew, who signed the Will and Testament as witness . . . ." *Id.* Otherwise, the codicil is in similar form to the will in that it contains an "Attestation Clause" and "Affidavit of Witnesses" nearly identical to the will. 1:9-10. However, on this occasion, the "Attestation Clause" and "Affidavit of Witnesses" are both signed by John P. Fox, Samuel A. Farr's attorney. *Id.* The "Affidavit of Witnesses" to the codicil is also signed by a certified notary public, Carmen O. Booth, and dated on the same day as the execution of the codicil. 1:10.

II. Course of the Proceedings

On January 13, 2010, a Petition for Probate of Will and for Letters Testamentary was filed on behalf of the Estate of Samuel A. Farr, Deceased ("the Estate"), along with a copy of the will and codicil. 1:15-19. The petition states that the will was executed by Samuel A. Farr in the presence of Roger McGrew, and the codicil was executed by Samuel A. Farr in the presence of John P. Fox. 1:15. On the same date, the Chancery Clerk issued an Order of Probate which states that the will and codicil were properly witnessed, 1:11, along with Letters Testamentary, 1:13.

On January 22, 2010, Nancy Farr Wirick filed her Petition to Contest Last Will and Testament and Codicil of Samuel A. Farr, for Declaratory Judgment, for Determination of Heirs and for Other Relief. 1:20. In her petition, Wirick argued that both the will and codicil were only attested to by one witness and, therefore, the will and codicil did not comply with Mississippi Code Section 91-5-1, which requires that the will and codicil be attested to by two (2) credible witnesses. 1:21-22. Wirick also alleged that her father lacked testamentary capacity and the will and codicil were the subject of undue influence. 1:23.

The parties thereafter engaged in various pretrial activities including the propounding of discovery. On February 22, 2010, Wirick propounded interrogatories, requests for production of documents, and request for admission to the Estate of Samuel A. Farr, Deceased. 1:39-48. On March 10, 2010, the Estate responded to Wirick's requests for admissions. 1:51-53. The following requests and responses are pertinent to this appeal:

> Request for Admission No. 1: Please admit that there was only one attesting witness to the Last Will and Testament of Samuel A. Farr, deceased.
>
> Response: Denied.
>
> Request for Admission No. 2: Please admit that there was only one attesting witness to the Codicil to the Last Will and Testament of Samuel A. Farr, deceased.
>
> Response: Denied.
>
> Request for Admission No. 3: Please admit that the Last Will and Testament of Samuel A. Farr, deceased, does not meet the statutory requirements of 91-5-1 of the Mississippi Code Annotated.
>
> Response: Denied.
>
> Request for Admission No. 4: Please admit that the Codicil to the Last Will and Testament of Samuel A. Farr, deceased, does not meet the statutory requirements of 91-5-1 of the Mississippi Code Annotated.
>
> Response: Denied.

* * *

> Request for Admission No. 9: Please admit that § 91-5-1 of the Mississippi Code Annotated requires two attesting witnesses in order for any will or codicil to be valid.
>
> Response: Denied (there was more than one witness).

1:51-52.

Also, on March 10, 2010, the Estate filed a Response to Petition to Contest Will. 1:55-57. In its response, the Estate asserted that the will and codicil were notarized and that the notaries were also witnesses. 1:56.

On February 12, 2010, the Chancellor conducted a telephonic conference with all counsel concerning Wirick's request for a trial date and a temporary restraining order to preserve Estate assets. 1:49. Pursuant to that conference, the Chancellor entered an Order Setting Cause for Hearing, Enjoining Disposal of Estate Assets and Granting Other Relief. 1:49-50. Pertinent to the issues on this appeal, the order set a return date for Wirick's petition contesting the will and codicil for April 21, 2010. 1:49 (¶ II). The order directed that process be issued by Wirick to all interested parties returnable to April 21, 2010. *Id.* The order explained the purpose of the April 21st setting as follows:

> This return date is set for the purpose of having all necessary parties before the Court. Trial on the merits will not be held on April 21, 2010 and counsel shall not be required to be present for said hearing if it is not convenient for them. The Court will, on April 21, 2010, enter an order resetting the matter for a hearing on the merits at a later date and time.

1:50. Thereafter, Wirick perfected service on Prospect Methodist Church and provided service on any unknown heirs by publication.

On April 21, 2010, the Chancellor entered an order, prepared and presented by counsel for Wirick, stating that the case was before the court on Wirick's Petition to Contest Last Will and

Testament and Codicil of Samuel A. Farr, For Declaratory Judgment and For Other Relief. 1:60-61. Pursuant to the Chancellor's prior order, counsel for the Estate was not present on April 21, 2010. Nevertheless, the Chancellor entered an order finding that service of process was made on all necessary parties, service of process by publication was made for the unknown heirs at law, and Prospect Methodist Church, a beneficiary of the will and codicil, was served with process and failed to file an answer to the petition or appear on April 21, 2010. 1:60 (¶¶ I and II). In the same order, the Chancellor declared that all persons other than Wirick were precluded from making a claim to the Estate and that Wirick was the sole heir at law of Samuel A. Farr, deceased. 1:60-61 (¶ III). The order also set a hearing on all motions for July 16, 2010, and a hearing on the merits for August 12, 2010. 1:61 (¶¶ IV and V).

Thereafter, a dispute arose between the parties concerning the Chancellor's order determining Wirick to be the sole heir at law. Counsel for the Estate filed a Motion to Set Aside Order Dated April 21, 2010. 1:67-68. In this motion, the Estate asserted that the April 21, 2010 order was entered without any notice to him and that he would have appeared on behalf of Prospect Methodist Church as a beneficiary of the will and codicil. 1:67. Wirick responded to the Estate's motion by stating that attempts were made to contact counsel for the Estate prior to the entry of any order, but such attempts were unsuccessful. 1:81. Wirick contended that an order was necessary to continue the case to another date and preserve process on all necessary parties. 1:82.

On June 28, 2010, Wirick filed a Consolidated Motion for Summary Judgment and Memorandum Brief in Support of Motion for Summary Judgment. 1:88-96. Relying on the will and codicil alone, Wirick argued that the will and codicil were not attested by two (2) or more credible witnesses in the presence of the testator, as required by Mississippi Code Section 91-5-1, and that both documents were invalid as a result of this defect. 1:92-94.

On July 16, 2010, the Chancery Court heard oral argument as to Wirick's summary judgment motion. At the hearing, the attorney for the Estate argued that the notaries public for both the will and the codicil also acted as subscribing and attesting witnesses. 3:11. The Estate also submitted certificates from each of the notaries public to the will and the codicil stating that they acted in the capacity of a notary public and a subscribing witness to the will and the codicil. 3:10-11. The certificates were filed with the chancery clerk as Exhibit P-1. With regard to the will, the certificate stated as follows:

> I, Carolyn A. Davis, do hereby certify that I witnessed the signature of Samuel A. Farr to his Last Will and Testament on April 1, 2009, at his express instances and request, in his presence, and in the presence of Roger McGrew as a subscribing witness.

Exhibit P-1. The certificate was signed by Carolyn A. Davis. A second certificate referred to the codicil and stated:

> I, Carmen O. Booth, do hereby certify that I witnessed the signature of Samuel A. Farr to a Codicil to his Last Will and Testament on April 23, 2009, at his express instance and request, in his presence, and in the presence of John P. Fox as a subscribing witness.

Exhibit P-1. This certificate was signed by Carmen O. Booth, but not notarized. After a discussion concerning whether or not the certificates were timely filed with the court, the Chancellor ordered that the certificates be marked as a composite exhibit for identification. 3:13-15.

At the close of the hearing, the chancellor ordered that Wirick was entitled to summary judgment based on his finding that the will was invalid and Samuel A. Farr died intestate. 3:15-16. On July 21, 2010, a Judgment was entered in favor of Wirick. 2:159. The Judgment stated that the will and codicil are "invalid as a matter of law for failure to comply with the statutory requirements of § 91-5-1." 2:159-160. The Judgment also contains a finding that Samuel A. Farr died intestate and the Chancellor affirmed the prior order entered on April 21, 2010 declaring that Wirick is the

sole heir at law. 2:160. On July 27, 2010, the Estate filed a motion for reconsideration, 2:161, which was denied, 2:164. Thereafter, the Estate timely filed its Notice of Appeal. 2:165.

SUMMARY OF THE ARGUMENT

Based on the pleadings and oral argument, the Chancery Court of Chickasaw County held that the will and codicil of Samuel A. Farr was not duly executed in compliance with Mississippi Code Section 91-5-1. The will and codicil contain signatures of one "attesting" witness and a notary public. The Chancellor found that the will and codicil was not attested to by at least two (2) credible witnesses. However, the record establishes the existence of a genuine issue of material fact as to due execution. A trial on the merits should have proceeded as to whether the notaries public witnessed the signature of Samuel A. Farr and signed the documents in his presence.

After finding that the will and codicil were not duly executed, the Chancellor ordered that Samuel A. Farr died intestate and that Wirick was the sole heir. Should the Court reverse and remand this matter for trial, the trial court's determination of heirs based on intestacy should likewise be set aside for further proceedings in the court below.

ARGUMENT

I. Standard of Review

This matter comes to the Court on an order granting summary judgment to Nancy Wirick which invalidates a will and codicil signed by Samuel A. Farr, deceased. Under Mississippi Rule of Civil Procedure 56(c), summary judgment may be awarded "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." On appeal regarding a grant or denial of summary judgment under Rule 56(c), this Court applies a *de novo* standard and examines the evidentiary materials on record with the lower court. *Estate of Thomas*, 962 So.2d 141, 142 (Miss. Ct. App. 2007)(citing *McMillan v. Rodriguez*, 823 So.2d 1173, 1176-77 (Miss. 2002)). Consistent with Rule 56, the record evidence "must be viewed in the light most favorable to the party against whom the motion has been made." *McMillan*, 823 So. 2d at 1177. If there are genuine issues of material fact necessitating a trial of the matter, such as when one party swears to one version of facts which are controverted by the other party, the reversal of summary judgment is required. *Id.* A *de novo* standard of review similarly applies to legal issues in a will contest. *Estate of Griffith*, 30 So.3d 1190, 1193 (Miss. 2010)(citing *In re Last Will & Testament of Carney*, 758 So.2d 1017, 1020 (Miss. 2000)).

II. The Chancellor Erred in Granting Summary Judgment as to the Validity of the Will and Codicil.

The Chancellor's decision to grant summary judgment to Wirick and invalidate the will and codicil was predicated on the absence of a dispute concerning the existence of a second subscribing witness. However, the record demonstrates that a classic issue of fact existed concerning the attesting witnesses. The documents are sufficient alone to create a genuine issue of material fact

concerning whether the will and the codicil comply with Mississippi Code Section 91-5-1. The will and the codicil, which constituted the only evidence presented by Wirick in support of her motion, contain the signatures of two witnesses. The chancery court's decision to choose one interpretation of the documents and find that the notary public was not an attesting witness chooses one interpretation of the documents over another alternative and conflicting interpretation. Based on the only evidence presented in support of summary judgment, the chancery court erred in granting summary judgment. Instead, this matter should have been set for a hearing on the merits.

A. Evidence that two witnesses signed the will and codicil is sufficient to create a genuine issue of material fact.

There is no question that Mississippi law requires non-holographic wills and codicils to be signed by the testator, or by some other person in his presence and by his express direction, and such documents "shall be attested by two (2) or more credible witnesses in the presence of the testator." Miss. Code Ann. § 91-5-1 (Rev. 2004). Therefore, if two witnesses signed the will and codicil at issue in this case, then a genuine issue of material fact exists as to compliance with the statute.

Most recently, in *Estate of Griffith*, 30 So.3d 1190 (Miss. 2010), the Mississippi Supreme Court considered the requirements of § 91-5-1. The precise issue in *Estate of Griffith* was the knowledge held by the subscribing witnesses and whether such knowledge was sufficient to satisfy the requirement of attestation. While the Judgment entered in this case does not turn on the knowledge of the subscribing witnesses, the Mississippi Supreme Court's discussion in *Estate of Griffith* is helpful.

To determine the meaning of "attested" in § 91-5-1, the Mississippi Supreme Court turned to *Batchelor v. Estate of Powers*, 348 So.2d 776, 777 (Miss. 1977). *See Estate of Griffith*, 30 So.3d at 1193-94. In *Batchelor*, in considering the argument that an attesting witness need not actually sign

the will, the Mississippi Supreme Court reviewed various definitions regarding attestation.

> [T]he word "attest" is defined in Webster's New International Dictionary (2d ed. 1950) as (1) to bear witness to; to certify; to affirm to be true or genuine; specif., to witness and authenticate by signing as a witness. The word "attestation" is defined as the formal authentication of an act or instrument by a subscribing witness or an official.
>
> Ballentine's Law Dictionary (2d ed. 1948) gives the following definitions of the term "attest":
>
> Attestation. The act of witnessing the actual execution of a paper and signing one's name as a witness to that fact.
>
> Attesting witness. A person who signs his name on a document as a witness to the act of another in affixing his signature to the document.
>
> Moreover, it appears to be the general rule although there is some authority to the contrary, that the word "attestation" includes no only the mental act of observation, but also the manual one of subscription.
>
> Attested. The usual meaning of the word includes not only the mere mental act of the witness in observing the execution of the instrument, but also his manual subscription of his name as a witness thereto.

Id. at 776-77 (citations omitted). All this is to say that an "attesting" witnesses must observe the testator and sign the document. *Estate of Griffith*, 30 So.3d at 1193. The *Batchelor* court recited this simple statement: "It is sufficient, if it appear that they signed their names as witnesses to its execution, and that they be able to state, when called to prove the will, that the requisites of the statute were observed." 348 So.2d at 777 (citing *Fatheree v. Lawrence*, 33 Misc. 585 (1857)).

> The purpose of "attestation" has been explained as follows:
>
> The word "attested" is broader in meaning than the word "subscribed," and it was the purpose of the statute in requiring two witnesses to attest the will to have more than the mere signatures of two persons to the will. It was the duty of the attesting witnesses, under the statute, to observe and see that the will was executed by the testator, and that he had capacity to make a will . . . . Witnesses are not only to identify the paper which has been signed by the testator, but they are to prove the execution of the will . . . .

Estate of Griffith, 30 So.3d at 1194 (citing *Maxwell v. Lake*, 88 So. 326, 328 (1921)). Accordingly, the mere act of signing a will is only part of the duty fulfilled by an attesting witness, but it is the simplest one.

Where a will was not attested by two (2) or more credible witnesses, Mississippi courts have invalidated the will. In *Batchelor*, the court declined to admit a will to probate where it was signed only by the testatrix and a notary, thus failing to satisfy the attestation requirement of Mississippi Code Section 91-5-1. *Batchelor*, 348 So.2d at 778. In *Estate of Thomas*, this Court upheld summary judgment and set aside an order admitting a will to probate where the will was signed only by the testatrix and a notary public. 962 So.2d at 145. Similarly, in *Estate of McDevitt*, 755 So.2d 1125, 1126 (Miss. Ct. App. 1999), this Court upheld a grant of summary judgment where one of the two "attesting" witnesses admitted that he was not present when the testator signed the will and he did not attest the will in the presence of the testator. In all three cases, however, it was undisputed that there was only one subscribing witness to the will and, therefore, the wills were invalid as a matter of law.

Here, unlike in *Batchelor*, *Estate of Thomas*, and *Estate of McDevitt*, the only evidence consists of the will and the codicil, and both documents contain two signatures in addition to the signature of the testator. The contestant has presented no evidence that a second witness did not observe the execution of the will by the testator and sign the will in his presence. Accordingly, there are genuine issues of material fact as to whether or not the notary public satisfied the requirement of a second subscribing and attesting witness to the will and codicil.

B. Issues of fact existed as to whether the notary public was a second subscribing witness.

1. The will and the codicil are sufficient to create issues of fact as to due execution of the will.

The will and codicil at issue in this case are in substantially the same form. Both documents contain the signature of the testator, Samuel A. Farr. This fact is not disputed. Both documents also contain a section called the "Attestation Clause," which contains the signature of one witness who affirms that the documents were published and declared by Samuel A. Farr in the presence of the witness and that the documents were signed by the witness in the presence of Samuel A. Farr. 1:7, 9. Attached to both documents is an "Affidavit of Witnesses." 1:8, 10. The affidavits are signed by the same witness who signed the "Attestation Clause," and also contain the signatures of a notary public. *Id.* The affidavits are signed and dated on the same day as the will and the codicil. 1:7-8, 9-10. These documents are the only evidentiary materials offered by Wirick in support of her motion for summary judgment.

As such, this case is dissimilar to *Batchelor* and *Estate of Thomas*, and summary judgment cannot be supported by the evidentiary record. The will and codicil were signed by an "attesting witness" and a notary public, with both signatures and the signature of Samuel A. Farr dated on the same day. There is no evidence that Samuel A. Farr's signature is not in his own hand and the will and codicil were not signed in the presence of two witnesses. There also is no evidence that the "attesting witness" and the notary public did not sign the will or the "Affidavit of Witnesses" in the presence of Samuel A. Farr. Mississippi law does not require attesting witnesses to place their signatures in a particular "Attestation Clause" or sign an affidavit attached to a will or codicil. Robert E. Williford, MISSISSIPPI PROBATE AND ADMINISTRATION, § 21:14. As explained above, Mississippi Code Section 91-5-1 merely requires attestation of a will or codicil by two (2) or more

credible witnesses in the presence of the testator. This requires the witnesses to observe the execution of the will or codicil and sign the document. *See Estate of Griffith*, 30 So.3d at 1193; *Batchelor*, 348 So.2d at 776-77.

Accordingly, whether or not the notary public who signed the will and the codicil witnessed the execution of the will and signed also as an attesting witness is, at the very least, an issue of fact requiring additional factual development.[2] Summary judgment cannot be affirmed based on the documents alone where the role of the notary public is in dispute and the documents contain two signatures.

2. The chancery court improperly chose one interpretation of a document over another.

Instead of requiring greater factual development, summary judgment appears to be based on the fact only one witness signed in a space provided under the "Attestation Clause" and that the "Affidavit of Witnesses" is on a separate unnumbered page attached to the will and codicil. This was Wirick's argument to the chancery court. Wirick's position that only one witness"attested" to the will is based solely upon her unsubstantiated view that a notary public was not present for the execution of the will and codicil and the affidavit was not included as part of the will. Wirick presented no testimony from the "attesting" witnesses or the notary public as to whether the execution of the will and codicil complied with Mississippi Code Section 91-5-1. Granting summary

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Had the chancery court recognized that a material factual dispute existed and proceeded to a trial on the merits, which was scheduled for less than one month after the summary judgment hearing, the court would have heard testimony from all of the witnesses who signed the documents at issue, and each of the notaries public who signed the documents would have testified that they witnessed the signatures of Samuel A. Farr and signed the documents at the request of Samuel A. Farr and in the presence of the other attesting witnesses. *See* P-1, Certificate of Subscribing Witness, Carolyn Davis, and Certificate of Subscribing Witness, Carmen Booth. Having affixed their signatures to the will and codicil, along with their seal, there was no need for the notaries public to sign a second time.

judgment on such a scant record and Wirick's own interpretation of the will and codicil was error.

The rules governing summary judgment under Rule 56(c) of the Mississippi Rules of Civil Procedure have been well-developed by Mississippi appellate courts. The burden of proving that no disputed issues of material fact exist rests with the moving party. *Frank v. Dore*, 635 So. 2d 1369, 1373 (Miss. 1994). The burden upon the non-movant is to rebut the motion by producing significant probative evidence. *Hurst v. Southwest Mississippi Legal Servs. Corp.*, 610 So.2d 374, 383 (Miss. 1992), overruled on other grounds, *Rains v. Gardner*, 731 So.2d 1192, 1196 (Miss. 1999). However, the burden shifts to the non-movant only after the movant has satisfied her burden. *Id.* In fact, a party is not even required to file a response to a summary judgment motion if the record evidence shows an issue of fact necessitating a trial. *Id.* If the evidentiary materials attached to a party's motion for summary judgment do not entitle the party to prevail as a matter of law, the burden never shifts to the non-movant and summary judgment is inappropriate. *Id.* at 383-84. Courts have often stated that summary judgment motions should be viewed with "great skepticism" and a trial court should err on the side of denying that motion. *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss. 1993). Accordingly, the non-movant should receive the benefit of any doubt as to whether a fact issues exists for trial. *Id.*; *Lee v. Alexander*, 607 So.2d 30, 34 (Miss. 1992); *Ratliff v. Ratliff*, 500 So.2d 981 (Miss. 1986)(finding chancery court erred in granting summary judgment in a domestic matter where the motion was unsupported by affidavit or other sworn statement).

Particularly relevant to this case, if the record is incomplete as to a material fact, summary judgment should generally be denied. *Prescott v. Leaf River Forest Prods., Inc.*, 740 So.2d 301, 309 (Miss. 1999). The Mississippi Supreme Court has cautioned chancery courts in granting summary judgment where a full factual development would often take no more time than the presentation of the motion. *McDonald v. Holmes*, 595 So.2d 434, 438 (Miss. 1992).

With these rules in mind, the record evidence demonstrates that the chancery court failed to recognize the existence of material fact issues. The will and codicil were admitted to probate containing the signatures of two witnesses. Whether or not a second witness, a notary public in the case of the will and the codicil, observed Samuel A. Farr and the other attesting witness sign the documents and affixed their signatures also as "attesting" witnesses presents genuine and material issues of fact. It is not removed as a fact issue merely because the will contestant raises questions about the form of the will and the codicil and offers her own interpretation of the documents. Wirick, as the will contestant, presented no evidence from any of the witnesses as to the will execution. In fact, the only evidence in the record is the will and the codicil. At the very least, more than one reasonable interpretation can be drawn from these documents which requires further development of the facts before summary judgment is appropriate. *See Miller v. Meeks*, 762 So.2d 302, 304-05 (Miss. 2000)(stating issues of fact "may be present where there is more than one reasonable interpretation of undisputed testimony, where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts, or when the purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed").

Accordingly, summary judgment in this matter was inappropriate. Wirick presented only the will and the codicil, which contained two signatures, and failed to present any eyewitness testimony concerning the execution of the will and the codicil. Because the will and the codicil are open to conflicting interpretations concerning the number of attesting witnesses, the burden of rebuttal never shifted to the Estate. In light of two conflicting interpretations, the trial court should have denied summary judgment and required further development of the facts concerning the execution of the will and the codicil. For this reason alone, the grant of summary judgment should be reversed.

3. The signature of a notary public is sufficient to create a fact issue.

It has long been held that one witness to the will is sufficient to take a case to the jury on the issue of due execution of a will or codicil. In *Tyson v. Utterback*, 154 Miss. 381, 122 So. 496, 497 (1929), *overruled on other grounds*, *Estate of Griffith*, 30 So.3d at 1196, a will was signed by two witnesses and a notary public. The will was held invalid by the trial court based on the conclusion that due execution of the will had not been proved by sufficient legal evidence which must be offered by "attesting witnesses." *Id.* The Mississippi Supreme Court reversed the trial court and held that one witness to the execution of the will was sufficient to make a jury question. *Id.* at 498. The court reiterated that proof of due execution "may, if necessary, be made by others than any of the subscribing witnesses, although the subscribing witnesses must be produced, if possible." *Id.* at 499. The court concluded that the testimony of the notary public was sufficient to make a prima facie case of due execution. *Id.* at 500.

In light of *Tyson*, the chancery court should have determined from the evidence presented that the signature of the notary public on the will and codicil was sufficient to make out a prima facie case of due execution. Wirick failed to offer any testimony in support of her theory that the notary did not observe the execution of the will or codicil, or that they failed to sign the will or codicil in the presence of the testator. The only evidence, or testimony, is the documents themselves which contain their signatures. This being the only record evidence before the chancery court, summary judgment should have been denied. To determine the notary public does not satisfy the requirement of a second attesting witness, the chancery court resolved a factual dispute. The proper use of Rule 56 is to determine whether issues of fact exist to be tried. *See* M.R.C.P. 56, cmt.

Accordingly, the judgment of the Chancery Court of Chickasaw County should be reversed. The only evidence presented by Wirick to support summary judgment on the issue of due execution

was the will and codicil. Because both documents contain two signatures, much more should have been required to invalidate the intent of Samuel A. Farr to make a will and thereby dispose of his property as he wished. Wirick's interpretation of the will and codicil, and the chancery court's adoption of that interpretation, cannot support summary judgment where a factual dispute exists as to the capacity of a notary public who signed the will. This matter can be easily and quickly determined at a hearing on the merits, which is the proper venue for determining factual issues. *See Ratliff*, 500 So.2d 981 (Miss. 1986)(stating "chancellors should not attempt to use [Rule 56] as a shortcut to the determination in open court of issues that are very frequently factual"). Therefore, summary judgment should be reversed and this matter remanded for a hearing on the merits.

III. The Determination of Heirs was Entered Without Notice and Should be Set Aside.

If the Court reverses and remands this matter for a trial on the merits, the Chancellor's finding that Wirick is the sole heir at law should be set aside. The original order was entered without prior notice to the Estate. According to Wirick, the order entered on April 21,2010 was necessary to continue the case for a trial on the merits and preserve process to all interested parties. If the order merely fulfilled this purpose, there would have been no objection by the Estate. However, the order goes beyond preserving process and awarded relief to Wirick. If the Estate had been given notice that the hearing on April 21, 2010 was to adjudicate the heirs at law, counsel for the Estate would have been present.

Therefore, if the Court finds that the issue of due execution should be remanded for a trial on the merits, the Court also should set aside the order determining the heirs at law. See *Estate of Thomas*, 962 So.2d 141, 142 (Miss. Ct. App. 2007) (affirming summary judgment as to the validity of the will, but remanding for further proceedings including a determination of heirs). The Prospect Methodist Church should be afforded a reasonable opportunity to appear at a trial on the merits.

CONCLUSION

Based on the foregoing, the judgment of the Chancery Court of Chickasaw County should be reversed and the case remanded for trial. The chancellor erroneously granted summary judgment as a matter of law based on the form of the will and codicil, while ignoring the presence of two signatures on both documents. There was no evidence presented that Samuel A. Farr did not execute his will and codicil in the presence of two (2) credible witnesses, who then affixed their signatures to the documents in his presence. This is all that is required by Mississippi Code Section 91-5-1. To the extent there are questions concerning due execution in compliance with the statutory requirements, such issues should be determined at a trial on the merits. Therefore, summary judgment was premature and this matter should be reversed and remanded.

Respectfully submitted, this the 21st day of January, 2011.

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CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Appellant has this day delivered a true and correct copy of the above and foregoing Brief of Appellant to the following individuals by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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