

WILLIAM GENE ROLLINS, JR., AS INDEPENDENT ADMINISTRATOR OF  
THE ESTATE OF WILLIAM EUGENE ROLLINS, SR., Appellant v. DIANNA  
SIMMONS & PHYLLIS RUNDHAUG, Appellees

NO. 01-00-00669-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2002 Tex. App. LEXIS 8496

November 27, 2002, Opinion Issued

**NOTICE:** [\*1] PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

**PRIOR HISTORY:** On Appeal from Probate Court No. 1. Harris County, Texas. Trial Court Cause No. 293635-403.

*Rollins v. Simmons*, 2002 Tex. App. LEXIS 6909 (Tex. App. Houston 1st Dist. Sept. 26, 2002).

**DISPOSITION:** Reversed and remanded to trial court.

**JUDGES:** Panel consists of Justices Mirabal, Nuchia, and Price.<sup>5</sup>

<sup>5</sup> The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

**OPINION BY:** Margaret Garner Mirabal

**OPINION**

**OPINION ON MOTION FOR REHEARING**

Appellees, Dianna Simmons and Phyllis Rundhaug, have filed a motion for rehearing and motion for rehearing en banc. We deny rehearing, but withdraw our opinion and judgment of September 26, 2002, and issue this new opinion in its stead. Accordingly, we deny the motion for rehearing en banc as moot.<sup>1</sup>

<sup>1</sup> *Hartrick v. Great American Lloyds Ins. Co.*, 62 S.W.3d 270, 272 (Tex. App.--Houston [1st Dist.] 2001, no pet.).

Appellant, William "Gene" Rollins, Jr., as independent administrator of the [\*2] estate of William Rollins, Sr., appeals the summary judgment granted in favor of appellees, Dianna Simmons and Phyllis Rundhaug. We reverse and remand.

**BACKGROUND FACTS AND PROCEDURAL HISTORY**

The summary judgment evidence is undisputed and may be summarized as follows:

Janie E. Rundhaug, decedent, executed her last will and testament on January 25, 1996. The will was witnessed by Ronald L. Moore (decedent's brother), Forrest Moore (decedent's nephew), and William Eugene Rollins, Sr. (decedent's former husband).<sup>2</sup> The will was not self-proved. Two of the witnesses, Rollins, Sr. and Ronald Moore, were also beneficiaries under the will. Other beneficiaries under the will were Lindof Rhodes, Emogene Jones, Ida Jo Campbell, Charlene Dunaway, Zelda

Townsend, Neal Carlyle Rohrig, Jr., Brenda Kay Diponio, and appellees Dianna Simmons and Phyllis Rundhaug, daughters of decedent.

2 Decedent and Rollins Sr. were divorced on June 23, 1994, one and one-half years before decedent signed her will. They had been married eight and one-half years.

[\*3] On October 8, 1997, the decedent died. On December 9, 1997, an evidentiary hearing was held on the application to admit the will to probate. There is no reporter's record of that evidentiary hearing. After the hearing, the trial court admitted the will to probate by order dated December 9, 1997. No appeal was taken from that order.

Rollins, Sr. died on April 27, 1998 and his estate is being administered by William "Gene" Rollins, Jr., the independent administrator. Appellees filed this declaratory judgment action against William "Gene" Rollins, Jr. as independent administrator and sought summary judgment seeking to hold all bequests in the will of appellees' mother to Rollins, Sr. void as a matter of law pursuant to sections 61 and 62 of the Texas Probate Code. The trial court granted appellees' motion for summary judgment.

#### STANDARD OF REVIEW

Appellees filed a traditional motion for summary judgment under rule 166a of the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 166a(c). Summary judgment is proper only when the movants prove there is no genuine issue as to any material fact, and they are entitled to judgment as a matter of law. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644, 38 Tex. Sup. Ct. J. 167 (Tex. 1995); [\*4] *Marchal v. Webb*, 859 S.W.2d 408, 412 (Tex. App.--Houston [1st Dist.] 1993, writ denied). When evaluating a motion for summary judgment, we assume all the non-movant's evidence is true. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911, 40 Tex. Sup. Ct. J. 438 (Tex. 1997). We indulge every reasonable inference in favor of the non-movant. *Id.* We resolve all doubts about the existence of a genuine issue of any material fact against the movant. *Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285, 39 Tex. Sup. Ct. J. 872 (Tex. 1996). If the movants show they are entitled to judgment as a matter of law, the non-movant must present evidence raising a fact issue to defeat a motion for summary judgment. *Haight v. Savoy Apartments*, 814 S.W.2d 849, 851 (Tex. App.--Houston [1st Dist.] 1991, writ denied).

#### DISCUSSION

In issue one, appellant complains the trial court erred in granting summary judgment because there exists

a genuine issue of material fact as to Rollins, Sr.'s right to take under the will. We agree.

As previously stated, it is undisputed that the decedent's will was not self-proven as defined by the Probate Code. TEX. PROB. [\*5] CODE ANN. § 59(b) (Vernon Supp. 2002). Therefore, in order to admit the will to probate, the appellant was required to introduce "the sworn testimony or affidavit of one or more of the subscribing witnesses . . . , taken in open court." *Id.* § 84(b)(1) (Vernon 1980); *In re Estate of Livingston*, 999 S.W.2d 874, 877 (Tex. App.--El Paso 1999, no pet.).

According to the probate court's order dated December 9, 1997:

On this day came on to be heard the 2nd Amended Application filed herein by WILLIAM E. ROLLINS and BARBARA J. EGAN on November 26, 1997, for the probate of the will of Janie E. Rundhaug, hereinafter called Decedent, and for issuance of Letters Testamentary.

The Court, after having heard and considered the evidence, finds that legal notices of the filing of said 2nd Amended Application have been issued and posted in the manner and for the length of time required by law, and no one came to contest same; and it further appearing that said Will was not self-proved according to the law during the life time of said Decedent; that Decedent died at Houston, Harris County, Texas on October 8, 1997; that this Court has jurisdiction and venue over the estate [\*6] because Decedent was domiciled in Texas and had a fixed place of residence in Harris County, Texas at the time of her death; that four years have not elapsed since the death of Decedent or prior to the said 2nd Amended Application; that Decedent, at the time of executing said will was over eighteen (18) years of age and of sound mind; that said will was executed on June 25, 1996 with the formalities and solemnities and under the circumstances required by law to make it a valid will; that such Will has not been revoked by Decedent; that no state, governmental agency of the State, nor charitable organization is named by the Will as a devisee; that Decedent's Will named Applicants to serve as Co-Executors to act Independently without bond or other security, in which capacity Applicants would not be disqualified by law from serving as such or from accepting Letters Testamentary, and Applicants would be entitled to such Letters.

IT IS THEREFORE, ORDERED AND DECREED by the Court that said Will is hereby proved and established and admitted to probate and recorded as the LAST WILL AND TESTAMENT of said Janie E. Rundhaug, Deceased, and that WILLIAM E. ROLLINS and BARBARA J. EGAN be, and [\*7] are hereby appointed In-

dependent Co-Executors of said Will and Estate without bond.

(Emphasis added).

In appellees' motion for summary judgment, they rely heavily on *sections 61 and 62* of the probate code. *TEX. PROB. CODE. ANN. §§ 61, 62* (Vernon 1980). Appellees contend that these two sections void Rollins Sr.'s bequests under the will as a matter of law because, they allege, Rollins Sr. was the only witness at the evidentiary hearing.

*Section 61* provides as follows:

should any person be a subscribing witness to a will, and also be a legatee or devisee therein, and if the **will cannot be otherwise established**, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. . . .

*Id.* at § 61 (emphasis added).

*Section 62* provides as follows:

In the situation covered by the preceding Section, the bequest to the subscribing witness **shall not be void if his testimony proving the will is corroborated by one or more disinterested and credible persons who testify that the testimony of the subscribing witness is true and correct**, and such subscribing [\*8] witness shall not be regarded as an incompetent or non-credible witness under *Section 59* of this Code.

*Id.* § 62 (emphasis added).

In support of their claim that Rollins Sr. was the only witness at the probate hearing, appellees rely on Rollins Sr.'s affidavit, titled "Proof by Subscribing Witness," which was filed with the probate court before the will was admitted to probate. However, this affidavit does not establish that the probate court did not hear additional evidence before admitting the will to probate. Appellees' unsworn statements in their motion for summary judgment and reply do not constitute evidence. *See Liggett*

*v. Blocher*, 849 S.W.2d 846, 852 (Tex. App.--Houston [1st Dist.] 1993, no writ); *Kendall v. Whataburger, Inc.*, 759 S.W.2d 751, 754 (Tex. App.--Houston [1st Dist.] 1988, no writ). Further, appellees failed to present any summary judgment evidence establishing the unavailability of any other disinterested witness who could prove-up the will. It is undisputed that Forrest Moore, who also signed the will as a witness, was a disinterested witness who could establish the will. There was no evidence Forrest Moore was unavailable [\*9] at the hearing on the application for probate, or at the time of the hearing on the motion for summary judgment.<sup>3</sup>

3 In appellant's response to appellees' motion for summary judgment, he maintained that the trial court, before admitting the will to probate, also considered answers to certain interrogatories prepared by Forrest Moore that corroborated Rollins' testimony. Appellant attached a copy of Forrest Moore's sworn answers to interrogatories to his response. The answers to the interrogatories are dated November 28, 1997, several days before the hearing to admit the will to probate.

Appellees failed to meet their burden to prove their entitlement to summary judgment. Accordingly, the trial court erred in granting their motion for summary judgment.

We sustain appellant's first issue.<sup>4</sup>

4 In light of our sustaining issue one, it is not necessary to reach the merits of issues two and three, and we decline to do so.

#### [\*10] CONCLUSION

We reverse the judgment and remand the case to the trial court.

Margaret Garner Mirabal

Justice