RENDERED: APRIL 6, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000588-MR

MICHAEL STEWART; CHARLES STEWART — APPELLANTS

v.

APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE KIM CHILDERS, JUDGE
ACTION NO. 03-CI-00057

RUDOLF NOBLE AND ALICE NOBLE, CO-EXECUTORS OF THE ESTATE OF ALBERT STEWART; AND RUDOLF NOBLE AND ALICE NOBLE, INDIVIDUALLY — APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

[1] Senior Judges David C. Buckingham and Michael L. Henry, sitting as Special Judges by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BUCKINGHAM, JUDGE: Charles Stewart and Michael Stewart appeal from an order of the Knott Circuit Court granting summary judgment to Rudolf[2] and Alice Noble in an action by the Stewarts challenging the validity of a will executed by their father, Albert Stewart. We reverse the circuit court's award of summary judgment on the issue of undue influence but affirm as to all other issues.

FACTUAL AND PROCEDURAL BACKGROUND

Albert Stewart was the father of Charles and Michael Stewart. In his lifetime Albert was an English professor at various institutions, including Morehead State University and Alice Lloyd College. He was also a published author.

Albert returned to Knott County in the mid-1960's and remained there for the rest of his life. He owned a home there, but because of heating issues, he usually stayed with friends or family during the winter months. In late November or early December 2000, he began living with his niece, Alice, in his deceased sister's home, where Alice made her residence.

Rudolf and Alice Noble are Albert's nephew and niece, they being the children of Albert's deceased sister. Rudolf lived about 300 yards from Alice's residence. After Albert moved in with Alice in late 2000, Rudolf and Alice helped Albert with meals, shopping, and transportation, although Albert remained mostly self-sufficient for his daily needs.

In September 1996, Albert had executed a will devising, except for certain literary rights, his estate to Charles and Michael in equal shares. However, sometime in

[2]It is unclear from the record whether Mr. Noble spells his name "Rudolf" or "Rudolph".

January 2001, Albert asked Rudolf to contact attorney Jerry Slone, an old friend of Albert's, about preparing a new will.

Albert had accumulated an estate valued in excess of $637,000. He informed Slone that he wanted to draft the will leaving his estate in equal shares to Rudolf and Alice. Slone testified in his deposition that he was concerned because the will would completely disinherit Albert's children, and he undertook to make sure that Albert was doing this of his own free will and not under any pressure. Albert assured Slone that he was under no pressure; that he wanted to disinherit his children, though he did not state specifically why; that he wanted his estate to be used for philanthropic purposes; and that Alice knew of these philanthropic wishes and he trusted her to carry them out. Slone testified to the effect that he was satisfied Albert understood the ramifications of what he was doing.

Slone drafted the will leaving the entire estate to Alice and Rudolf; however, still concerned with the situation, he included a provision in the will, Item III, to the effect that the estate would initially be paid into a trust (with Alice and Rudolf named as co-trustees), held for five years, and only then paid out to Alice and Rudolf. Slone stated that this was done, with Albert's understanding and agreement, to allow time for any contests or claims that might arise against the will to be addressed and also to give time for Alice and Rudolf to seek advice on carrying out Albert's philanthropic wishes.

The new will was executed on February 22, 2001, less than three months after Albert moved in with Alice, at Alice's residence. The will was witnessed by Rudolf's wife, Pearl Noble, and by Lawton Noble, a cousin of Rudolf and Alice's who lived nearby. Rudolf and Alice were also present, along with Slone's secretary, who notarized the self-proving will.

Albert died on April 1, 2001.[3] Rudolf and Alice probated the 2001 will and were appointed as co-executors pursuant to its terms. The estate was settled and closed by order of the Knott District Court dated November 29, 2001. Contrary to the provision of Item III of the will that the estate was to be initially paid into a trust for five years and only then distributed to the beneficiaries, Rudolf and Alice immediately paid the estate out to themselves.

In performance of Albert's desire that his estate be used for philanthropic purposes, Alice testified that a scholarship had been established at Alice Lloyd College, a computer had been bought for a young student, and $2,000 had been donated to the June Buchanan School in Knott County. The record does not disclose the total outlays for these philanthropic purposes or whether these disbursements alone would meet with the Albert's expectations .

On March 3, 2003, Charles and Michael filed a civil complaint in the Knott Circuit Court contesting the 2001 will. The complaint alleged that the will "was the product of coercion, undue duress, and fraud" and that Albert "did not possess the

[3] Albert's age at the time of his death is not readily apparent from the record; however, it appears that he was in his mid-80s.

Testamentary Capacity required to execute such a document at the time and place it was executed." The complaint also alleged that the will was defective; as relevant to this appeal, this count concerns the Stewarts' contention that the will was improperly executed because witness Pearl Noble is the wife of a beneficiary, thereby making her incompetent as a witness.

In due course, the parties filed their respective motions for summary judgment. On February 22, 2006, the circuit court entered an order granting the Nobles summary judgment upon all counts of the complaint. This appeal by the Stewarts followed.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rule of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001), *citing Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, *citing Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Scifres*, *supra*.

TESTAMENTARY CAPACITY

We first address the Stewarts' contention that Albert lacked the testamentary capacity to execute his will.[4]

In Kentucky there is a strong presumption in favor of a testator possessing adequate testamentary capacity. This presumption can only be rebutted by the strongest showing of incapacity. *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998).

Further, "Kentucky is committed to the doctrine of testatorial absolutism." *Id.*, *citing* J. Merritt, 1 Ky.Prac., Probate Practice & Procedure, § 367 (Merritt 2d ed. West 1984); *New v. Creamer*, 275 S.W.2d 918 (Ky. 1955); and *Jackson's Ex'r v.*

[4]The Stewarts raised this issue in their complaint before the circuit court; however, they made little mention of it in their brief. Nevertheless, as we are somewhat uncertain as to whether they are raising this issue again on appeal, we will address it.

Semones, 266 Ky. 352, 98 S.W.2d 505 (1937). "The practical effect of this doctrine is that the privilege of the citizens of the Commonwealth to draft wills to dispose of their property is zealously guarded by the courts and will not be disturbed based on remote or speculative evidence." *Id*., *citing* A*merican National Bank & Trust Co. v. Penner*, 444 S.W.2d 751 (Ky. 1969). "The degree of mental capacity required to make a will is minimal." *Id.*, *citing Nance v. Veazey*, 312 S.W.2d 350, 354 (Ky. 1958). "The minimum level of mental capacity required to make a will is less than that necessary to make a deed [] or a contract." *Id., citing Creason v. Creason*, 392 S.W.2d 69 (Ky. 1965) and *Warnick v. Childers*, 282 S.W.2d 608 (Ky. 1955).

The Stewarts have not produced affirmative evidence that Albert lacked the testamentary capacity to execute his will on February 2, 2001. All witnesses produced for deposition who had been in the company of Albert during the period surrounding the execution of the will testified to the effect that Albert was in full possession of his mental faculties. There is no evidence in the record that he was mentally dysfunctional in any way or that he had ever been.

The Stewarts concede that they have no personal knowledge of Albert's mental functioning around the time of the execution of the will and that there is no medical evidence to support their contention of incapacity. The only evidence offered in support of their contention that Albert lacked the testamentary capacity to execute this will is an argument to the effect that (1) the will was inconsistent because it both left the estate to the Nobles outright and at the same time directed that the assets be placed in a

trust for five years, and Albert would never have agreed to such an inconsistency, and (2) the will contained grammatical errors that Albert, being an English professor and author, would never have permitted to be in his will.

The Stewarts evidence of lack of testamentary capacity is remote, speculative, and based upon specious deductions. They have produced no affirmative evidence that Albert lacked the testamentary capacity to execute his February 21, 2001, will. Therefore, the Nobles were entitled to summary judgment on this issue.

UNDUE INFLUENCE/FRAUD

We next consider the Stewarts' argument that Albert's will should be set aside upon the grounds that it was a product of fraud and undue influence exerted by the appellees. We consider these two counts together because, in Kentucky law, undue influence in the area of wills is considered to be a species of fraud, *see Marcum v. Gallup*, 237 S.W.2d 862, 865 (Ky. 1951), and the fraudulent conduct alleged in this case is redundant with the conduct supporting the allegation of undue influence. Hence we review this issue under the standards applicable to undue influence.

The Stewarts' assertion of undue influence may be summarized as follows: (1) Albert wanted his estate to be used for philanthropic purposes; (2) the Nobles fraudulently misled Albert into believing that if he left his estate to them, they would see to it that his plans for his estate to be used for philanthropic purposes would be carried out by them; (3) as evidenced by the Nobles' conduct following Albert's death, their representations that they would comply with Albert's philanthropic wishes were

fraudulent from the outset; and, (4) the Nobles' fraudulent misrepresentations unduly influenced Albert into making them the beneficiaries of his will.

To invalidate a will on the ground of undue influence, the contestant must show more than the mere opportunity to exercise it. *Bodine v. Bodine*, 241 Ky. 706, 44 S.W.2d 840, 843 (1931). There must be some specific evidence of circumstances from which it can be reasonably inferred that undue influence was in fact exercised. C*opley v. Craft*, Ky., 312 S.W.2d 899, 900 (1958). Furthermore, "reasonable influence obtained by acts of kindness or by argument addressed to the understanding is not in law an undue influence." *Faulkes v. Brummett's Adm'r*, 305 Ky. 434, 204 S.W.2d 493, 496 (1947).

In the usual case, to justify setting aside a will, the influence exercised must be such that it "obtains dominion over the mind of the testator to such an extent as to destroy his free agency in the disposal of his estate, and constrains him to do that which he would not have done if left to the free exercise of his judgment." *Copley*, *supra*. However, the contestant's burden of proof is lowered when, as here, allegations of undue influence are coupled with an unequal or unnatural disposition, allegations of mental incapacity, or both. *See Waggener*, *supra* at 274; *Pardue v. Pardue*, 312 Ky. 370, 227 S.W.2d 403, 406 (1950). Thus, a combination of these will usually suffice to overcome summary judgment. "[W]hen slight evidence of the exercise of undue influence and the lack of mental capacity is coupled with evidence of an unequal or unnatural disposition, it is enough to take the case to the jury." *Gibson v. Gibson*, 426 S.W.2d 927, 928 (1968); *Burke v. Burke*, 801 S.W.2d 691, 693 (Ky.App. 1990).

Furthermore, undue influence is usually proved by circumstantial evidence. In the *Marcum case*, our highest court recognized that undue influence by its very nature often may be proved only by circumstantial evidence:

> It is well settled law that, like other species of fraud, influence that results in the execution of a will which is not in truth the free expression and desire of the maker may be proved by a chain of circumstances. Ordinarily that is the case; often of necessity. *Walls v. Walls*, 99 S.W. 969, 30 Ky.Law Rep. 948; *Barber's Executors v. Baldwin's Executor*, 138 Ky. 710, 128 S.W. 1092. As stated in *Livering's Executor v. Russell*, 100 S.W. 840, 844, 30 Ky.Law Rep. 1185, "All that can be done is to prove certain acts and facts, and it is from these, when connected into a composite whole, that the evidence of undue influence is made to appear . . . [and the jury has] a right to weigh these facts for what they were worth."

Id. at 865.

The *Burke* case has somewhat similar facts to those in this case. In *Burke*, the testator left his estate to his wife of one month to the exclusion of his three children. A jury set the will aside. The *Burke* court, citing *Belcher v. Somerville,* 413 S.W.2d 620, 622 (Ky. 1967), stated that "[o]ne of the 'badges' of undue influence is a 'lately developed and comparatively short period of close relationship' between the testator and the principal beneficiary." *Burke*, 801 S.W.2d at 694. The court also noted other "badges of influence" as being participation by the beneficiary in the physical preparation of the will and the unnatural disposition of property. *Id*.

As in *Burke*, the relationship between Albert and Alice became much closer when he moved in with her. In addition, Albert's changing of the will to exclude his sons, an unnatural disposition of his estate, came within three months after he moved in with

Alice. Furthermore, Rudolf called Slone, who had prepared Rudolf's will, to ask him to prepare Albert's will.

The complete disinheritance of the testator's only living children and the leaving of his entire estate to his more remote relations, as here, brings the will within the scope of an unnatural disposition. *See Bennett v. Bennett*, 455 S.W.2d 580 (Ky. 1970) (will that disinherited all living children and grandchildren of testator except one was an unnatural disposition and an indicia of a jury question in will contest on ground of undue influence and lack of testamentary capacity, though it could be satisfactorily explained). As explained below, there is at least slight evidence of undue influence, and, coupling that with the unnatural disposition, we believe that the Stewarts are to be held to the lower standard as stated in the *Gibson case.*

Based upon the record as a whole, when viewed in the light most favorable to the Stewarts, we are persuaded that there is sufficient evidence of undue influence developed in the record so as to defeat summary judgment. As argued by the Stewarts, a reasonable jury could conclude that Albert wanted his estate to be used for charitable purposes; that at least Alice assured him that she could be trusted to carry out his philanthropic wishes; that based upon the Nobles' conduct following Albert's death, their representations that they would carry out his philanthropic wishes were fraudulent from the outset; and, from the foregoing factors, that the Nobles impermissibly influenced Albert to leave his estate to them.

It is essentially uncontroverted that Albert wanted at least some of his estate to go for philanthropic purposes. Slone testified in his deposition to the effect that philanthropy was a purpose for the bequest to the Nobles and that Alice, in particular, knew Albert's wishes and that he trusted her to carry them out. Moreover, Alice conceded that Albert wanted at least part of his estate to go toward charitable purposes and that he confided his philanthropic wishes to her.

Further, a jury could conclude that the Nobles actively encouraged Albert's belief that if he left his estate to them they would see to it that his philanthropic wishes were carried out. For example, in her deposition, Alice describes an episode at the time of the execution of the will when she stated to Albert: "'Uncle Albert, are you sure this is what you want to do . . . Are you sure you trust me. Are you sure this is what you want to do.' In front of everybody. I asked him at least twice." From the foregoing, viewed in the light most favorable to the Stewarts, a jury could conclude that at least Alice led Albert to believe that she would use the proceeds of his estate for philanthropic purposes.

Events occurring after Albert's death, when viewed in a light most favorably to the Stewarts, could be interpreted by a reasonable jury as circumstantial evidence that the Nobles fraudulently led Albert into believing that they would carry out his philanthropic wishes. Chief among these is that what could be construed as a relatively insignificant portion of the estate proceeds appears to have been used for philanthropic purposes. While it appears that a scholarship was established at Alice Lloyd college in an unknown amount, that a computer was bought for a young student,

and that a $2,000 gift was given to June Buchanan school, a reasonable jury could conclude that these charitable distributions are *de minimis* in comparison to the size of the estate, contrary to Albert's philanthropic plans, and reflective of an absence of intent by the Nobles to comply with Albert's philanthropic plans during the time they were assuring him that they would. If so, the jury could conclude that the Nobles' assurances to the contrary were fraudulent

Also, a jury could conclude that following Albert's death, the Nobles, as co-executors of Albert's estate, did not comply with Item III of the will that the estate be held in trust for five years. Rather, the Nobles promptly dissolved the trust and distributed the estate to themselves. Their failure to comply with Item III could be interpreted by a jury as reflective of a more general disregard of the Albert's wishes and cast doubt upon the sincerity of their assurances to him that they would carry out his philanthropic plans.

Finally, it appears that the Nobles quickly spent much of their respective shares of the estate, which amounted to approximately $313,853 each, on themselves. Rudolf testified that he spent most of his share on a new home. Rudolf had approximately $70,000 of his share remaining as of October 2, 2003, the date of his deposition, and none of his expenditures had been for philanthropic purposes. Alice had approximately $114,000 as of the date of her deposition. Of her expenditures, as previously noted, it appears that only the scholarship established at Alice Lloyd College, the gift to June Buchanan School, and the computer bought for a young student were for

philanthropic purposes. The foregoing could be construed by a jury as evidence that the Nobles falsely assured Albert that they would carry out his philanthropic plans, when their actual intent was to use the proceeds of the estate for their own benefit.

In summary, we conclude that it would not be impossible for a jury to conclude that the Nobles fraudulently misled Albert into believing that they would use his estate for philanthropic purposes when, in fact, they had no intention of doing so. From this, the jury could likewise conclude that the Nobles unduly influenced Albert into making them the beneficiaries of his will. We accordingly reverse the circuit court's award of summary judgment on the issue of undue influence and remand for trial on this count of the Stewarts' complaint.

IMPROPER EXECUTION OF WILL

Finally, the Stewarts claim that the bequest to Rudolf is invalid pursuant to Kentucky Revised Statute (KRS) 394.210 because the will was witnessed by his wife, Pearl. We disagree.

KRS 394.040 requires that for a nonholographic will to be valid, it must be witnessed by "at least two *credible* witnesses, who shall subscribe the will with their names in the presence of the testator, and in the presence of each other." (Emphasis added). We construe the term "credible" in its normal sense, that is, "worthy of belief." *Black's Law Dictionary* 336, (6th ed. 1990).

In this case, one of the witnesses was Pearl Nobel, the wife of Rudolf Nobel, who was bequeathed one-half of Albert's estate in the February 2001 will. The

other witness to the execution was Lawton Noble. The Stewarts have not produced affirmative evidence that either Pearl or Lawton are not worthy of belief, and there is no issue of fact regarding whether the two-witness requirement of KRS 394.040 was met in the execution of Albert's will.

KRS 394.210(2) provides that

> If a will is attested by a person to whom, or to whose wife or husband, any beneficial interest in the estate is devised or bequeathed, *and the will cannot otherwise be proved*, such person shall be deemed a competent witness; but such devise or bequest shall be void, unless such witness would be entitled to a share of the estate of the testator if the will were not established, in which case he shall receive so much of his share as does not exceed the value of that devised or bequeathed. (Emphasis added).

In order for KRS 394.210(2) to be triggered, not only must a beneficiary or his/her spouse be a witness, but, also, it must be that "the will cannot otherwise be proved[.]" The first prong to trigger the statute is clearly met. Pearl is the wife of a beneficiary. While we do not have the record of the probate proceedings before us and thus have no way of knowing how the will was actually proved in those proceedings, it is apparent that Albert's will can "otherwise be proved."

"A will may be proved by the testimony of one (1) of the subscribing witnesses without regard to the availability or competency of the other witnesses, provided said will was acknowledged or subscribed by the testator in the presence of two (2) witnesses at the same time." KRS 394.210(3); *see also Shoup v. Ketron*, 528 S.W.2d 731 (Ky. 1975), and *Birch v. Jefferson County Court*, 244 Ky. 425, 426, 51 S.W.2d 258,

259-60 (1932). Moreover, "persons who were present during the executing of a will, but who did not serve as attesting witnesses, may offer sufficient evidence to establish due execution." *Thompson v. Hardy*, 43 S.W.3d 286, 281 (Ky.App. 2000).

In this case, the will may "otherwise be proved" by witness Lawton Noble. In addition, Slone and his secretary, Doris Issac, were also present at the execution and could, if necessary, offer sufficient evidence to establish due execution. Thus, because the will may otherwise be proved, the provisions of KRS 394.210(2) do not apply.

The Stewarts appear to contend that the fact this was a self-proved will is significant to our review of this issue; however, "[a] self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise treated no differently from a will not self-proved." KRS 394.225(4). As such, the foregoing discussion is equally applicable to a self-proved will.

In summary, because the will may otherwise be proved, the bequest to Rudolf is not void.

CONCLUSION

For the foregoing reasons, the judgment of the Knott Circuit Court granting summary judgment is affirmed in part, reversed in part, and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Harlan Callis III
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Frank C. Medaris, Jr.
Hazard, Kentucky