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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000040-MR

GARY JOHNSON — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 06-CI-00267

LILLIE JOHNSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Gary Johnson, appeals from a ruling of the Floyd Circuit Court granting a directed verdict in favor of the Appellee, Lillie Johnson, in a will contest action. Finding no error, we affirm.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In May 1994, Luther and Velva Johnson executed a joint will leaving everything to the surviving spouse by life estate with the remainder passing to their seventeen children or their heirs equally upon the death of the survivor. Following Luther's death in 1997, the joint will was admitted for probate and duly recorded in the Floyd County Clerk's office. Subsequently, in May 1997, Velva executed a new will leaving her entire estate to her daughter, Lillie, to the exclusion of the other children. Velva died on August 12, 2005, and her will was thereafter admitted for probate.

On March 13, 2006, Appellant, along with the Johnson's other children, step-children and heirs at law, filed a complaint in the Floyd Circuit Court claiming improper execution, incapacity, undue influence and fraud with respect to Velva's 1997 will. An April 2008 trial ended in a mistrial following improper voir dire questioning by Appellant's trial counsel. The case again went to trial in December 2008. At the close of Appellant's case-in-chief, the trial court granted Appellee's motion for a directed verdict on the grounds that Appellant failed to introduce Velva's 1997 will as well as failed to produce any evidence of fraud or undue influence.

Appellant thereafter filed a notice of appeal in this Court captioned *Gary Johnson et al. v. Lillie Johnson*. Appellee filed a motion to dismiss the appeal for failure to properly identify all of the siblings as parties. On April 28, 2009, this Court denied the motion to dismiss but ruled that Appellant was the sole appealing party.

Appellant argues to this Court that the trial court erred in granting a directed verdict at the close of his case. As he did in the trial court, Appellant argues that Velva's 1997 will should not have been upheld because (1) the signature is invalid because Velva could not read or write; (2) its provisions are "unnatural" thus indicating she lacked mental capacity; and (3) the fact that Velva left her entire estate to Lillie rather than all of the children as provided in the joint will indicates the exercise of undue influence or fraud. We disagree.

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988). Generally, a trial court cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. *Id.* at 18-19. *Cf. Taylor v. Kennedy*, 700 S.W.2d 415 (Ky. App. 1985).

When presented with a motion for a directed verdict, the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." *Hornung,* 754 S.W.2d at 860. In such a case, a directed verdict should be given. Otherwise, the motion should be denied. *Id.*

(Citing Nugent v. Nugent's Ex'r., 281 Ky. 263, 135 S.W.2d 877 (1940)). Thus, while it is the jury's province to weigh the evidence, the trial court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture. *Gibbs v. Wickersham*, 133 S.W.3d 494, 496 (Ky. App. 2004). Once the issue is squarely presented to the trial court, which heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984), *overruled on other grounds* by *Sand Hill Energy, Inc. v. Ford Motor Co*., 83 S.W.3d 483 (Ky. 2002).[2]

The record herein reveals that the only evidence produced by Appellant at trial was the testimony of several of the plaintiffs/siblings who stated that Luther and Velva treated all of their children the same and would have wanted them to share equally in their estate. In addition, a couple of the witnesses indicated that Velva did not know how to read or write. Inexplicably, however, Appellant did not introduce Velva's will, or any evidence pertaining to the alleged fraud or undue influence presumably by Lillie. Nor does Appellant offer such evidence to this Court. We would point out that the record does contain the deposition testimony from the attorney who prepared and witnessed Velva's will, as well as Velva's treating physician. Both stated unequivocally that Velva was in sound mental health and fully aware of the ramifications of her will at the time of

[2] *Sand Hill* was subsequently vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

its execution in 1997. Accordingly, we are of the opinion that there was a complete absence of proof in the record to support any of Appellant's claims, and the trial court properly granted a directed verdict in Appellee's favor.

Further, we find no merit in Appellant's argument that the original joint will was a contract that precluded Velva from executing a new will after Luther's death. KRS 394.540 provides, in pertinent part:

> (1) A contract to make a will or devise, or not to revoke a will or devise or to die intestate, if executed after June 16, 1972, can be established only by:
>
> (a) Provisions of a will stating material provisions of the contract;
>
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
>
> (c) A writing signed by the decedent evidencing the contract.
>
> (2)**The execution of a joint will or mutual wills gives rise to no presumption of a contract not to revoke a will**. (Emphasis added).

The burden was on Appellant to satisfy the requirements of KRS 394.540. *Duncan v. Ward*, 846 S.W.2d 720 (Ky. App. 1992). As the joint will was executed after 1972 and contained no reference to a contract or a separate writing evidencing such, Appellant's claim is misplaced in law and fact.

The decision of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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