RENDERED: JUNE 11, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001956-MR
AND
NO. 2008-CA-002178-MR

JAMES D. LARKEY, IV, INDIVIDUALLY,
AND AS TRUSTEE OF THE TRUST OF
JAMES D. LARKEY, III, DECEASED — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NOS. 07-CI-00038 & 08-CI-00270

MARK LARKEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: James D. Larkey, IV (Appellant), proceeding individually and as trustee of the trust of James D. Larkey, III, appeals from two

[1] Senior Judge Michael L. Henry 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.

separate orders of the Letcher Circuit Court that dismissed both of his will contest actions filed against Mark Larkey (Appellee). Appellant and Appellee are the surviving sons of Dorothy Larkey. This appeal centers on the issue of where Ms. Larkey resided at the time of her death and, accordingly, which county (Fayette or Letcher) has the authority to conduct a probate proceeding regarding her will and estate. After our review, we affirm as to both orders of dismissal.

Facts and Procedural History

On May 18, 1988, Ms. Larkey executed a Last Will & Testament that named Appellant as executor of her estate and as a beneficiary of her will. She supplemented this will with a Codicil on February 18, 1994. (These documents will henceforth be collectively referred to as the "First Will.") At the time the First Will was executed, Ms. Larkey lived in Whitesburg, Letcher County, Kentucky.

On February 19, 2004, Ms. Larkey revoked the First Will by executing a new Last Will & Testament (henceforth referred to as the "Second Will") that named Appellee as the executor of her estate and explicitly removed Appellant as a beneficiary. After executing the Second Will, Ms. Larkey moved to Lexington, Fayette County, Kentucky to live closer to Appellee. She resided there for nearly three years before passing away on December 23, 2006.

On December 28, 2006, Appellant filed a probate action before the Letcher District Court seeking to probate the First Will and to be appointed as its executor. Appellee attended the resulting probate hearing with counsel and argued that because Ms. Larkey was residing in Fayette County at the time of her death,

any probate proceeding had to be maintained in Fayette County. Appellee subsequently filed his own probate action in the Fayette District Court seeking to probate the Second Will.[2]

On January 26, 2007, the Letcher District Court conducted an evidentiary hearing and took proof as to the question of where Ms. Larkey was residing at the time of her death. Appellant introduced a psychiatric report produced by Dr. Robert Granacher in another civil litigation involving the parties. Dr. Granacher evaluated Ms. Larkey on July 20, 2006 – nearly three years after she moved to Lexington – and diagnosed her with progressive dementia with a loss of intellectual capacity. Appellant used this report to support the argument that while Ms. Larkey lived in Fayette County at the time of her death, she did not have the mental capacity to form the intent to make that county her domicile.

Appellant also testified that Ms. Larkey still owned property in Letcher County and that she lived by herself there until November 2003, when Appellee took her to live with him in Fayette County. Appellant acknowledged that he had had no contact with his mother after this but indicated that as far as he knew, she was still registered to vote in Letcher County.

In response, Appellee produced the following evidence to support his position that Ms. Larkey was a resident of Fayette County at the time of her death: (1) a copy of Ms. Larkey's driver's license, which had a Fayette County address; (2) a Fayette County "Motor Vehicle Tax and/or Registration Renewal Notice" for

[2] According to Appellee, the Fayette District Court is holding that action in abeyance pending resolution of the current appeal.

Ms. Larkey's automobile; (3) home insurance letters acknowledging that Ms. Larkey had moved from Letcher County to Fayette County; and (4) a copy of the Second Will.

Appellee also introduced a deposition from Robert Gullette, Jr., the attorney who prepared the Second Will. Gullette testified that he had first met Ms. Larkey in November 2003 when she came to live with Appellee in Fayette County. According to Gullette, he had spoken on the phone with Ms. Larkey on several occasions in late 2003, and he indicated that she did not appear to have had any mental defect or to have been under any undue influence at that time or when the Second Will was executed. Gullette also testified that Ms. Larkey had expressed a clear intent to reside in Fayette County for the remainder of her life. Appellee also testified that he took Ms. Larkey to live with him in Fayette County in November 2003 because her furnace was not working properly and because she was worried about living alone. He also indicated that after Ms. Larkey moved to Fayette County, she had all of her furniture in her home in Letcher County moved to that location and had all of the utilities in her old home turned off.

Shortly following the evidentiary hearing – and before the district court issued a ruling on the venue question – Appellant filed an original action against Appellee in the Letcher Circuit Court (Civil Action No. 07-CI-00038) pursuant to KRS 24A.120(2) and KRS 394.240. In that action, Appellant asked the circuit court to preemptively declare Ms. Larkey to have been a resident of Letcher County at the time of her death and to enjoin Appellee from proceeding with the

probate petition in the Fayette District Court. He further sought a declaration that the First Will was valid – and the Second Will consequently invalid – because Ms. Larkey lacked testamentary capacity to execute the Second Will and/or because she was unduly influenced to execute it. Appellee subsequently filed an answer in which he asserted that the circuit court lacked venue to consider the action.

Meanwhile, on July 7, 2008, the Letcher District Court entered an order in which it rejected probate of the First Will on the grounds that Ms. Larkey did not reside in Letcher County at the time of her death. In doing so, the district court concluded that it retained jurisdiction to rule on the issue because the Letcher Circuit Court action had been prematurely filed before the district court had ruled on whether or not it would admit the First Will to probate. The district court then noted, citing to the express language of KRS 394.140, that wills are required to be proven before, and admitted to record by, the district court of the testator's residence. After reciting the evidence that had been presented at the evidentiary hearing of January 26, 2007, the court concluded that Ms. Larkey resided in Fayette County at the time of her death and concluded that Fayette County was the proper venue to probate her will.

Immediately thereafter, on July 10, 2008, Appellant filed another original action against Appellee in the Letcher Circuit Court (Civil Action No. 08-CI-00270) pursuant to KRS 24A.120(2) and KRS 394.240. This action was virtually identical to the one previously filed by Appellant and once again asked the circuit court to find that Ms. Larkey was a resident of Letcher County at the

time of her death and to declare that the First Will was valid and the Second Will invalid because of a lack of testamentary capacity and/or the existence of undue influence. Appellant also argued that the district court's order finding that proper venue for the probate action lay in Fayette County was void and unenforceable because the district court had lost jurisdiction over the case once Appellant filed his first will contest action in Letcher Circuit Court.

On July 15, 2008, Appellee notified the circuit court of the district court's ruling. He subsequently filed a motion to dismiss Appellant's first will contest action on the grounds that venue did not lie in Letcher County and that Appellant had prematurely filed the action. He also filed a motion to dismiss Appellant's second will contest action on the same grounds of improper venue.

On September 18, 2008, the circuit court entered an order dismissing Civil Action No. 07-CI-00038. The order provided no grounds for the decision. On October 22, 2008, the circuit entered an order dismissing Civil Action No. 08-CI-00270. Again, no grounds were given for the decision. Appellant filed appeals from both orders that were consolidated by order of this Court on January 15, 2009.

Analysis

On appeal, Appellant argues that the Letcher Circuit Court erred in dismissing both of his complaints. In so doing, he specifically contends that the Letcher District Court lacked the authority to determine Ms. Larkey's residency at the time of her death. Appellant states that the Letcher Circuit Court was the

proper venue for probating her will because resolution of that issue necessarily required an examination of her mental capacity to change her residence and whether she was unduly influenced to do so. Appellant asserts that issues of mental capacity and undue influence in probate matters may be resolved only by circuit courts. In response, Appellee argues that the district court had the authority to determine whether it was the appropriate venue for the subject will probate action; moreover, the Letcher Circuit Court properly dismissed Appellant's actions because, as determined by the district court, Ms. Larkey was not a resident of Letcher County at the time of her death. The parties also raise a number of procedural issues that merit discussion relating to how Appellant challenged the district court's authority to proceed and its ultimate decision.

We feel constrained to insert a *caveat* at this point regarding confusion of the terms "venue" and "jurisdiction" in Kentucky probate residency-requirement law in general and in this case in particular. KRS 394.140 uses the term "venue" although the statute is actually addressed to a court's authority to decide a specific case, a legal concept more accurately referred to as "particular-case jurisdiction." *See Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422, 429-30 (Ky. App. 2008). The older cases cited in the annotation to KRS 394.140 use the term "jurisdiction" when referring to the requirements of the statute. However, because the statute uses the term "venue" and neither the parties nor the respective courts addressed this confusion of terms, we have adopted the terminology used by the parties in their briefs.

With this established, our analysis of this case focuses on the following questions: Did the Letcher District Court have the authority to determine whether it had venue to consider Appellant's probate action, and, if it did, did Appellant appropriately challenge the court's decision? In considering these questions, we note that the granting of the motion to dismiss in this case is subject to *de novo* review by this Court. *American Premier Ins. Co. v. McBride*, 159 S.W.3d 342, 345 (Ky. App. 2004); *see also* Kentucky Rules of Civil Procedure (CR) 52.01 and CR 41.02.

We first address Appellant's contention that the Letcher District Court lacked the authority to determine Ms. Larkey's residency at the time of her death in deciding whether that court was the proper venue for probating her will. Appellant is correct that any challenge to a will's validity based on undue influence or lack of testamentary capacity must be brought in circuit court. *Cf. Vega v. Kosair Charities Committee, Inc.*, 832 S.W.2d 895, 896-97 (Ky. App. 1992). He assumes, however – we believe mistakenly – that this same rule of law applies to considerations of mental capacity and undue influence for purposes of determining residence when the question of venue is raised. Appellant has cited us to no statutory or case law that purports to limit a district court's authority to decide questions of mental capacity or undue influence for purposes of deciding questions of residence and whether it has venue in a particular probate matter. While Appellant correctly argues that a challenge to a will's validity based on undue influence or lack of testamentary capacity must be brought in circuit court, this

same rule of law does not apply to determinations of venue by district courts in probate actions such as the one in issue. KRS 24A.120(2) vests district courts with "exclusive jurisdiction" over probate matters, except for adversary proceedings. KRS 24A.120(2). KRS 24A.120(3) further provides: "Matters not provided for by statute to be commenced in Circuit Court shall be deemed to be nonadversarial within the meaning of subsection (2) of this section and therefore are within the jurisdiction of the District Court." There is no statute precluding a district court from determining whether it is the proper venue in a probate proceeding. Indeed, KRS Chapter 452 expressly gives district courts that authority. *See* KRS 452.105; KRS 452.700. Thus, it follows that a district court is the appropriate entity to determine whether it is the proper venue for a probate proceeding. *See also Collins v. Duff*, 283 S.W.2d 179, 182 (Ky. 1955); *Allen v. Lovell's Adm'x*, 303 Ky. 238, 197 S.W.2d 424, 426 (1946).

We further note that KRS 394.140 provides, in relevant part, that "[w]ills shall be proved before, and admitted to record by, the District Court of the testator's residence[.]" It follows, then, that a determination of where a testator resided prior to her death must be made before the decision of whether to admit a will to probate can be made. This determination is of considerable importance because when a will is probated in a county that was not the residence of the testator at the time of her death, the order of the court probating that will is subject to attack. *See Johnson v. Harvey*, 261 Ky. 522, 88 S.W.2d 42, 48-49 (1935); *Ewing v. Ewing*, 255 Ky. 27, 72 S.W.2d 712, 713 (1934). Consequently, the

Letcher District Court acted appropriately in fully addressing the issue of whether it had venue to admit or reject the First Will to probate.

We also believe that the Letcher District Court did not err in its ultimate determination that Ms. Larkey's residence at the time of her death was in Fayette County and that, therefore, it did not have venue to probate her will. "Change of venue is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion." *Bowling v. Commonwealth*, 942 S.W.2d 293, 299 (Ky. 1997); *see also Miller v. Watts*, 436 S.W.2d 515, 518 (Ky. 1969).

In *Burr's Adm'r v. Hatter*, 240 Ky. 721, 43 S.W.2d 26 (1931), it was stated:

> Legal residence is based upon fact and intention; that is, it is to be determined by location of the person and his intention to abandon a former domicile and establish a new one. Intention is the dominant factor and it is to be deduced from the facts in evidence, conjoined with residence or location.

Id., 43 S.W.2d at 27. Here, Appellee produced considerable evidence supporting his position that Ms. Larkey had intended to and did change her residence to Fayette County. This evidence included a copy of her last driver's license, which had a Fayette County address, a Fayette County "Motor Vehicle Tax and/or Registration Renewal Notice" for her automobile, home insurance letters acknowledging that Ms. Larkey had moved from Letcher County to Fayette County, and a copy of the Second Will. Appellee also introduced a deposition

from Robert Gullette, Jr., the attorney who prepared the Second Will, in which he indicated that Ms. Larkey had appeared to be of sound mind when they met in 2003 and that she had expressed a clear intent to reside in Fayette County for the remainder of her life. Appellee also testified that he took Ms. Larkey to live with him in Fayette County in November 2003 because her furnace was not working properly and that she subsequently had all of her furniture in her home in Letcher County moved to Mark's home in Fayette County and had all of the utilities in her old home turned off. Appellant presented his own evidence in support of his position that Ms. Larkey did not have the requisite mental capacity to change her residence. However, given the evidence presented by Appellee, we cannot say that the district court abused its discretion in finding that Ms. Larkey had changed her residence to Fayette County and that, consequently, any will of hers must be probated there.

Even with this question resolved, however, we are compelled to address the manner in which this action proceeded procedurally in order to clarify a number of issues raised by the parties. As noted above, Appellant filed two separate original actions in Letcher Circuit Court – one before the district court decided the venue question and the other immediately after the court determined that venue for the case lay in Fayette County. As to the first complaint filed in Letcher Circuit Court, Appellant argues that he had the right to contest the will and to raise the issue of venue – even before the district rendered a probate decision or its own determination regarding venue – by bringing an action for declaratory

relief under KRS 418.040[3] independently and apart from the statutory scheme for challenging a probate decision set forth in KRS 394.240. We disagree.

As an initial matter, we do not believe that Appellant adequately pled a request for declaratory relief pursuant to KRS 418.040. His first complaint specifically sets forth that it "is an original action pursuant to KRS 24A.120(2), and declaratory judgment action pursuant to KRS 394.240." No mention of KRS 418.040 is contained anywhere within the pleading. However, even after giving Appellant the benefit of the doubt and assuming that he was seeking a declaratory judgment under that provision, we believe that his request was prematurely made and dismissal was merited.

KRS 394.240(1) provides that "[a]ny person aggrieved by the action of the District Court in admitting a will to record or rejecting it may bring an original action in the Circuit Court of the same county to contest the action of the District Court." We have interpreted this statute, when considered together with KRS 24A.120(2) and (3), as requiring:

> (1) that all proceedings for the admission to probate of a will or codicil be commenced in the district court; (2) that the district court must either admit or reject the instrument; and (3) that the district court retains jurisdiction over the matter until such time as a will contest, or adversary proceeding, is commenced in the circuit court.

[3] KRS 418.040 provides: "In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked."

Mullins v. First American Bank, 781 S.W.2d 527, 528 (Ky. App. 1989). More importantly, we correspondingly held that KRS 394.240 "plainly provides for an original action in circuit court *after* the district court has rendered a decision to either admit or reject the will." *Id.* at 529. Thus, *Mullins* anticipates that a challenge to a district court's probate determination will be filed under KRS 394.240 only after the court has either admitted or rejected a will to probate.

Accordingly, to the extent that Appellant's first complaint in the Letcher Circuit Court was brought pursuant to KRS 24A.120 and KRS 394.240, it was clearly done so prematurely because the district court had yet to make a decision to admit or reject the will to probate. The same can also be said to the extent that Appellant's first complaint raised a claim under the Declaratory Judgment Act.

> A declaratory judgment proceeding will not be entertained "for the determination of the procedural rules, or the declaration of the substantive rights involved in a pending suit. Such decisions and declarations must be made in the first instance by the court whose power is invoked and which is competent to decide them."

Pritchett v. Marshall, 375 S.W.2d 253, 257 (Ky. 1964), *quoting Jefferson County ex rel. Coleman v. Chilton*, 236 Ky. 614, 33 S.W.2d 601, 603 (1930); *see also Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205, 210 (Ky. 2008); *Gibbs v. Tyree*, 287 Ky. 656, 154 S.W.2d 732, 733 (1941). Here, Appellant asked the circuit court to decide the question of venue even though the issue was already pending before the Letcher District Court and a will had not been accepted or

rejected for probate. Thus, the question was prematurely put before the circuit court, and the court properly refrained from considering it at that time.

We further note that "[c]ourts are in general agreement that a declaratory judgment act is not a substitute or alternative for such actions as are particularly provided for, to be brought in a particular way." *Sullenger v. Sullenger's Adm'x*, 287 Ky. 232, 152 S.W.2d 571, 574 (1941); *see also Cox v. Howard*, 261 S.W.2d 673, 675-76 (Ky. 1953). While it is true that CR 57 provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate[,]" we have nonetheless maintained that "[c]ourts have a discretion in exercising their power to act in declaratory judgment cases and generally will not take jurisdiction where another statutory remedy has been expressly provided for the character of case presented." *Cox*, 261 S.W.2d at 675-76. *See also City of Pikeville v. Pike County*, 297 S.W.3d 47, 52 (Ky. App. 2009). Thus, where a statutory scheme expressly provides for a remedy in a particular type of case, a request for declaratory relief is generally frowned upon as an alternative. In this case, KRS 394.240 provides a clear and obvious statutory path for challenging the action of a district court in admitting a will to record or rejecting it. Therefore, the circuit court did not err in dismissing Appellant's first complaint.

The circuit court also did not err in dismissing Appellant's second complaint. We first note that this complaint was filed pursuant to KRS 24A.120 and KRS 394.240 after the Letcher District Court made its venue determination –

thereby following the conventional statutory route for challenging the district court's decision and eliminating the need for any related procedural discussion. As discussed above, we found no error in the district court's determination that venue for any probate action in this case arose in Fayette County. The circuit court's dismissal of Appellant's complaint reflected that it reached the same conclusion. The facts support this decision and also provide additional support for the circuit court's dismissal of Appellant's first complaint.

In passing, we also note that the following arguments presented by Appellee were rejected and had no influence on our decision to affirm. Appellee contended that the district court's ruling on venue was final and not subject to attack in the current appeal because Appellant failed to file a direct appeal of the district court's venue decision pursuant to KRS 23A.080(1).[4] However, KRS 394.240(1) allows "[a]ny person aggrieved by the action of the District Court in admitting a will to record or rejecting it may bring an original action in the Circuit Court of the same county to contest the action of the District Court." It is arguable that both avenues – or either avenue – for circuit court relief could have been utilized in this case. *See* James R. Merritt, 2 Ky. Prac. Prob. Prac. & Proc § 1282 (2d ed. 1984). However, there is nothing that required Appellant to file a direct appeal at the exclusion of the procedure set forth in KRS 394.240.

Appellee also argued that Appellant was required to file any declaratory judgment action in district court. However, declaratory judgment

[4] That provision states: "A direct appeal may be taken from District Court to Circuit Court from any final action of the District Court."

actions must be filed in circuit court. *Griffiths v. City of Ashland*, 920 S.W.2d 78, 79 (Ky. App. 1995); *see also* KRS 418.040 and KRS 23A.010(1).

Appellee further contended that Appellee's second complaint was also filed prematurely in violation of KRS 394.240 because the Letcher District Court never actually "admitted" or "rejected" a will to probate and instead only determined that it lacked venue to decide the matter. However, we believe that this argument overengages in semantics and attempts to render an already complicated and convoluted process even more so. Although Appellant's second complaint was appropriately dismissed, we have no qualms with when and pursuant to what authority it was originally filed.

Conclusion

For the foregoing reasons, the judgment of the Letcher Circuit Court dismissing both actions filed by Appellant is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Ronald G. Polly
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Todd C. Myers
Donald M. Wakefield
Lexington, Kentucky