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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002198-MR

KATHY LOVELY — APPELLANT

APPEAL FROM MAGOFFIN CIRCUIT COURT
v. HONORABLE KIMBERLEY CORNETT CHILDERS, JUDGE
ACTION NO. 07-CI-00276

BARNETT BUILDERS, INC.;
PHILLIP W. BARNETT;
CHRISTIAN PHILLIP BARNETT;
DAVIN BARNETT;
STEPHEN BARNETT, A MINOR,
BY AND THROUGH HIS NEXT
FRIEND, PHILLIP BARNETT;
HALEY RAE SLUSHER;
RAE BETH BARNETT;
HEATHER GEARHART, GUARDIAN
AD LITEM FOR HALEY RAE SLUSHER;
ROBIN A. SMITH, RECEIVER FOR
BARNETT BUILDERS, INC.; AND
GREGORY A. ISAAC, ADMINISTRATOR
OF THE ESTATE OF DONNIE BARNETT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND WINE, JUDGES; HARRIS,[1] SENIOR JUDGE.

NICKELL, JUDGE: Kathy Lovely has appealed from the Magoffin Circuit Court's findings of fact, conclusions of law, and judgment entered on October 2, 2008, striking the Last Will and Testament of Donnie R. Barnett executed in December 2006 from the probate records, probating a "lost will" executed by Donnie in January 2007, and removing Lovely as the Trustee of any trusts created under either of the two wills. After a careful review of the record, we affirm.

The facts underlying this action are complicated but largely undisputed. Donnie was in the construction business and had extensive holdings in several business and partnership ventures in Kentucky, West Virginia, and North Carolina. Donnie and Kathy were married for twenty-three years when they divorced in 1992. Their union produced one daughter, Rae Beth Barnett, and one grandchild, Haley Rae Slusher. Kathy had custody of the minor grandchild from the time she was one month old and Donnie was very close to the child. Following his divorce from Kathy, Donnie married Andrea Barnett, divorced her a year later, remarried her several years later, and divorced her again in 2006, approximately five months prior to his death. Donnie had resumed a relationship with Kathy following his second divorce from Andrea.

[1] Senior Judge William R. Harris 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.

Donnie was diagnosed with cancer in 2003 and was able to successfully combat the disease for a number of years. However, in early December 2006, his condition began to rapidly deteriorate and doctors informed him he should not expect to live much longer. Donnie thus began to put his affairs in order, first by seeking the counsel of his attorney and long-time friend, Gordon Long, to prepare a last will and testament as well as deeds transferring his interest in several tracts of land to Kathy.[2] Long prepared a will for Donnie leaving his entire estate to Kathy and Haley in equal shares. He intentionally did not provide for his daughter due to her severe substance abuse problem. Donnie executed this will on December 8, 2006. Long advised Donnie to obtain estate planning from another attorney, Terri Stallard, an expert in the field, due to his sizeable estate.

On December 18, 2006, Donnie and Kathy met with Stallard in her Lexington, Kentucky, office to discuss Donnie's assets and his estate plan. Donnie added two important elements to his estate plan which were not a part of the will prepared by Long. First, he informed Stallard he wished to leave a three-fifths interest in his numerous partnership interests to his nephews, Christian, Davin and Stephen Barnett, subject to a $100,000.00 floor that was to pass to Kathy and Haley. Second, Donnie indicated he wished for any assets passing to Kathy outside the estate to be credited against her probated share. The balance of his

[2] Long first prepared deeds transferring ownership completely to Kathy, but they were amended prior to execution to transfer the interest to Donnie and Kathy as joint tenants with rights of survivorship. Thus, Donnie's interest would pass immediately upon his death to Kathy without first being made a part of his estate.

estate was to pass in equal shares to Kathy and Haley. Under both wills, Kathy was named as executrix of Donnie's estate and as trustee of any trusts created by the will. After leaving Stallard's office, Donnie visited a Lexington bank and changed approximately $400,000.00 in certificates of deposit to "payable on death" or "P.O.D." instruments whereby Kathy would receive the proceeds immediately upon his death and without those amounts being added to his estate.[3]

Stallard prepared the necessary documents to effectuate Donnie's estate plans and delivered them electronically to Long on December 22, 2006. Due to Donnie's worsening condition, Long was unable to immediately have the documents executed. However, on January 3, 2007, Long traveled to Donnie's home to have the documents signed. The circumstances surrounding the execution are in dispute in this appeal. Kathy contends the will was not duly executed while the appellees herein rely on Long's trial testimony that the will was, in fact, executed in proper form. Regardless, at some time shortly after the ceremony, Donnie allegedly directed Kathy to shred the signature pages of the will and trust documents Stallard had prepared. Kathy followed Donnie's wishes thus destroying the only fully executed copy of the second will. Donnie mistakenly believed such actions would revoke the second will and its accompanying trust and reinstate the first will he had executed on December 6, 2006. Although the attempted revocation was contested in the trial court, the parties have now agreed the trial

[3] The changes to these certificates of deposit are also the subject of litigation in a separate appeal before this Court.

court correctly determined that Donnie's actions were insufficient to constitute a valid revocation of the second will, and that issue is not properly before us in this appeal.

Donnie died on January 14, 2007. On February 2, 2007, Kathy tendered the December 6, 2006, will to the Magoffin District Court and moved that it be admitted to probate. The first will was ordered probated on February 14, 2007. On October 18, 2007, the instant action was filed in the Magoffin Circuit Court seeking, *inter alia*, an order setting aside the February 14 order probating the first will and substituting the second will in the probate action. On January 18, 2008, the trial court removed Kathy as executrix and appointed a special administrator for the estate and a receiver for Barnett Builders, Inc.

A bench trial was conducted on August 27, 2008, to determine which, if either, of the two wills was in effect on the date of Donnie's death. Following the trial, the court determined that the probate of the first will should be set aside, the second will should be probated, and Kathy should be permanently removed as executrix and trustee.[4] This appeal followed. We affirm.

Kathy first contends the trial court erred in finding the second will was duly executed. She argues the evidence presented was insufficient to prove the will was witnessed by two credible witnesses as required by KRS 394.040, and that it was therefore invalid and of no effect. The appellees contend the trial court

[4] Other issues determined in the trial court's order following the bench trial are not part of this appeal. Additional issues, also unrelated to this appeal were presented at a subsequent jury trial.

properly weighed the conflicting testimony and correctly judged the weight and credibility of the evidence before making its decision on the contested facts.

It is undisputed that the original of the second will was destroyed and was thus unavailable for review. To establish the validity of a lost will, the proponent must show "by clear, satisfactory and convincing testimony[:] (1) the due execution of the instrument; (2) its contents; (3) that it has been lost and cannot be found; and (4) the continued existence of the will unrevoked by the testator." *Thompson v. Hardy*, 43 S.W.3d 281, 285 (Ky. App. 2000) (quoting *Clemens v. Richards*, 304 Ky. 154, 155, 200 S.W.2d 156, 157 (1947)). The parties concede the existence of adequate proof of elements 2, 3 and 4. Thus, the sole issue presented herein is whether the second will was duly executed.

Kathy persists in her argument that the second will was not executed pursuant to the statutory guidelines. KRS 394.040 states:

> No will is valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction. If the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two (2) credible witnesses, who shall subscribe the will with their names in the presence of the testator, and in the presence of each other.

The only witnesses to testify as to the occurrences surrounding the execution of the second will were Kathy and Long. Kathy testified only one witness was present at the execution and that this witness was provided by Long. Long testified Kathy called him to arrange the meeting and that she agreed to arrange to have witnesses

present as he could not bring his entire office staff to Donnie's home and leave his office unattended. Long stated he was well-aware of the statutory requirements for proper execution of a will and affirmed there were, in fact, two witnesses present when Donnie signed the second will, those two witnesses then signed the will, and he notarized all three signatures. It thus became incumbent on the trial court to determine which of the conflicting testimony to believe, *Commonwealth, Dept. of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971), and a trial court is free to believe all of a witness's testimony, part of a witness's testimony, or none of it. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926). We will not disturb a trial court's findings of fact in the absence of clear error, CR[5] 52.01, and "mere doubt as to the correctness of a finding will not justify its reversal." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted). However, while we review findings of fact for clear error, we review questions of law *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky. App. 1998).

> In its findings of fact, the court stated:
>
> > [a]s to the disputed element of due execution, the Court finds that the testimony of Gordon Long concerning the will signing ceremony that was witnessed by him is sufficient as a matter of law to establish the due execution of the second will and trust. Pursuant to the holding in *White* [*v. Brennan's Adm'r*, 212 S.W.2d 299 (Ky. 1948)] and the later holding in *Thompson v. Hardy*, 43 S.W.3d 281 (Ky. App. 2000), "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" (sic) see *Thompson*, p. (sic)

[5] Kentucky Rules of Civil Procedure.

> 286. Mr. Long, as [Donnie's] attorney and acting in a fiduciary capacity, testified clearly and unequivocally that he witnessed the will being signed by [Donnie], in the presence of two witnesses who also signed in his presence and in the presence of [Donnie] witnessing his signature and that Mr. Long, as attorney for [Donnie] notarized all signatures in completing the self proving clause of the will. The Court concludes as a matter of law that the will was duly executed and assigns no credibility to the testimony of Kathy Lovely that only one witness was present at the signing.

It is apparent that the trial court found Long's testimony more credible, a matter soundly within its discretion. Thus, Long's testimony constituted substantial evidence to prove due execution of the second will and trust. Therefore, based on the record before us, we conclude the trial court's findings of fact were not clearly erroneous.

Further, we hold the trial court correctly applied the facts to the law. Kathy contends Long's testimony concerning the will signing ceremony was not clear and convincing and thus the trial court's ruling on the law was incorrect.[6] We disagree. As noted by the trial court, the instant action bears remarkable similarity to the facts and issues raised in *White*. Just as is the case here, in *White*, the executed will could not be found or produced, and the decedent's attorney could neither remember nor locate the attesting witnesses even though he had attended the will signing ceremony. The decedent's attorney was able to definitively attest that there were at least two such witnesses present who signed the will in the

[6] We note that Kathy, in her trial memorandum, "concedes that Gordon Long's deposition testimony is, under [*White*], sufficient to support a finding of due execution, but this does not mean that it requires such a finding." (emphasis in original).

presence of each other and the Testatrix following their witnessing of the Testatrix's execution of the will in their presence. Further, the attorney indicated he was aware of the contents of the will and was familiar with the requirements of a valid will. The testimony was held to be sufficient to establish due execution of the will. *White*, 212 S.W.2d at 300-01. Contrary to Kathy's assertion, *White* remains good and valid precedent in this Commonwealth and is clearly applicable, both legally and factually, to the case at bar. It has not been overturned by subsequent case law nor superseded by statute. We are thus bound by its holding, as was the trial court. Therefore, it is abundantly clear that the trial court's determination that the second will was duly executed as a matter of law was correct.

Next, Kathy contends the trial court's judgment removing her as executrix of the estate and trustee of any trusts created thereunder was unsupported by substantial evidence. She alleges the judgment included no findings of fact or conclusions of law supporting the decision, that the issue was beyond the scope of the court's trial order, and that the issue was not heard by the court. In addition, Kathy, citing *Davis' Adm'r v. Davis*, 162 Ky. 316, 172 S.W. 665, 666 (1915), argues mere animosity or family hostility constitute insufficient grounds for removal of a trustee. Thus, she urges reversal. We believe the issue was squarely before the trial court for its determination based on the adversarial nature of the proceedings and, upon review, find no basis for granting Kathy the relief she seeks.

"A duty to defend a will if possible rests on an executor. If a personal representative cannot in good faith and conscience perform his trust in a fair and unbiased manner, he ought to resign voluntarily. If he does not, then he should be removed by the court, under the provisions of KRS 395.160, because he is 'incapable to discharge the trust.'" *Karsner's Ex'r v. Monterey Christian Church*, 304 Ky. 269, 200 S.W.2d 474, 475 (1947) (internal citations omitted). If the personal representative assumes a position that is adverse or antagonistic to the estate to the detriment of others having an interest in the estate, "he thereby becomes incapable of discharging the trust, and because of which he may be removed upon the proof of such facts." *Price's Adm'r v. Price*, 291 Ky. 211, 163 S.W.2d 463, 465 (1942). The antagonistic nature of the claims made by the personal representative must demonstrate she is unable to discharge her duties fairly and impartially. *Ewald v. Citizens Fidelity Bank & Trust Co.*, 305 S.W.2d 533, 534-35 (Ky. 1957). *See also Hunt v. Crocker*, 246 Ky. 338, 55 S.W.2d 20, 21 (1932).

In the case *sub judice*, Kathy's actions were clearly antagonistic toward other intended beneficiaries under Donnie's second will. Her own testimony was that Donnie intended for her to have half of his estate and for Haley to have the other half, regardless of what might have been written in the second will. She submitted a will to the probate court she knew had been revoked and failed to disclose her knowledge of the subsequently executed instrument. It was Kathy who shredded the only executed copy of the second will, and although she

insisted she did so only at Donnie's behest, no other evidence was presented to verify her testimony. She failed to file the statutorily required inventory of the estate and failed to disclose assets to the estate beneficiaries, but represented to the circuit court she had performed these duties. She also opposed discovery requests which would have revealed the nature and extent of the estate's assets. Kathy clearly had a major stake in the outcome of the matter as she fared much better under Donnie's first will than the second. With these and other facts before it, we hold the trial court acted within the statutory guidelines in removing Kathy from her fiduciary positions as executrix of the estate and trustee of any trusts created under either the first or second will. It is abundantly clear that Kathy could not perform the required duties with fairness and impartiality based on her undisputed actions and her removal was justified.

Finally, we note that although Kathy mentioned in her motion for post-judgment relief that the trial court failed to include "any reasons or conclusions of law as to why she may not serve as either executrix or trustee," she did not request that the court make such findings. In the absence of such a request, we will not consider the issue as grounds for reversal on appeal. CR 52.04. *See also Whicker v. Whicker*, 711 S.W.2d 857 (Ky. App. 1986). We also observe that Kathy did not raise the issue of the trial court acting outside the scope of its trial order nor seek modification of the judgment on that ground. It is well-settled that a legal argument will not be considered for the first time on appeal and "appellants

will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

For the foregoing reasons, the judgment of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES, CHRISTIAN PHILLIP BARNETT, STEPHEN BARNETT AND DAVIN BARNETT:

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