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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002078-MR

JUSTIN COPLEY AND
MELISSA HOWELL — APPELLANTS

v.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 09-CI-00271

DANITA COPLEY AND
CAROLINE COPLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

CLAYTON, JUDGE: Justin Copley and Melissa Howell appeal the Martin Circuit Court's entry of summary judgment involving a will contest in favor of Danita Copley and Caroline Copley. After careful review, we affirm.

This case concerns the will of Daniel H. Copley (hereinafter "Daniel"), who died on March 3, 2008. The will was probated on March 18, 2008, in Martin District Court. Danita Copley (hereinafter "Danita"), an Appellee, was named the Executrix of the estate.

The will provides for the Appellees, Danita, the decedent's daughter, and Caroline Copley (hereinafter "Caroline"), the decedent's widow. The will specifically omits the Appellants who are the other two children of Daniel, Justin Copley (hereinafter "Justin") and Melissa Howell (hereinafter "Melissa"). In fact, the language of the will intentionally omits Justin and Melissa and no other provisions are made for them in the will.

On October 7, 2009, Justin and Melissa filed a complaint against Danita and Caroline in Martin Circuit Court seeking to set aside the probated will. This action was the second lawsuit directed at Daniel's will. Earlier, Caroline had brought a separate action challenging the validity of the couple's antenuptial agreement and seeking to have it set aside so that she could pursue her statutory share of the estate. On September 3, 2010, our Court, in an unpublished opinion, affirmed the Martin Circuit Court's judgment and upheld the antenuptial agreement.

Here, on September 7, 2010, Danita filed a motion for summary judgment almost one year after the action was initially filed. During the interim, the parties had engaged in discovery including taking the depositions of Danita, Caroline, Justin, Melissa, Mary Copley (Daniel's ex-wife and Justin's mother),

Cecil Varney (Daniel's attorney), and Hazel Stepp (Varney's secretary). The circuit court granted the summary judgment motion on September 23, 2010. Subsequently, Justin and Melissa filed a motion to alter, amend, or vacate the summary judgment. The trial court denied it on November 3, 2010. Justin and Melissa now appeal these two orders.

In the complaint, Justin and Melissa made several arguments including that certain language in the will was irregular and ambiguous. Second, they maintain that Daniel lacked the capacity to execute his will because he was of unsound mind and impaired mentally at the time he executed the will. Lastly, Justin and Melissa suggest that the will is invalid and void because Danita exerted undue influence on her father.

To these allegations, Danita and Caroline counter that the language was not ambiguous, that Daniel intentionally omitted Justin and Melissa from the will, that Daniel was of sound mind and not mentally impaired when he executed the will and, finally, that Danita did not exercise undue influence over Daniel.

In granting the summary judgment motion, the trial court noted that no medical evidence was provided that Daniel lacked mental capacity to execute the will, that the testimony of Cecil Varney and Caroline supported the fact that Daniel did not lack mental capacity when he executed the will and, further, that no expert testimony was provided that Daniel's medications impaired his mental capacity. With regard to undue influence, the trial court noted that even though Danita was the primary beneficiary, Caroline was provided for in an antenuptial

agreement; that Melissa, who was acknowledged as Daniel's biological daughter but born outside of wedlock, had previously been provided for by Daniel with land and a trailer; and, lastly, that neither Danita nor Caroline was present when Daniel executed the will. The trial court concluded that the evidence in this case is so weak that it was unnecessary to have a jury hear the evidence.

On appeal, "[t]he standard of review [of a trial court grant] of a 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). 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. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-482 (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." *Id*. at 482. "The trial [court] must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Id*. at 480. "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*." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001)(footnote omitted).

Before addressing the efficacy of the summary judgment, we note that Justin and Melissa maintain that the Appellants used an incorrect standard of proof in making the motion for summary judgment. They state that the Appellees in making the summary judgment motion characterize the standard as one wherein the plaintiffs/appellants have provided no proof of anything required to meet their burden of proof. Additionally, Justin and Melissa dispute the standard of review used by the trial court and contend that the judge used the standard for a directed verdict when he said, "[c]onsidering all of the evidence in a light favorable to the Plaintiffs, it is crystal clear to the Court that the Plaintiffs will not be able to make a case sufficient to go to the jury."

In essence, when making a motion for summary judgment, the movant has the burden of showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. Yet, even under the standard of summary judgment, which inquiry the Supreme Court described as requiring greater judicial determination and discretion than that for directed verdict (*see Steelvest*, 807 S.W.2d at 482), a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Hoskins Heirs v. Boggs*, 242 S.W.3d 320, 330 (Ky. 2007).

Since we review this matter *de novo*, any mischaracterization of the words used by the Appellees or the trial court to examine the requirements for a summary judgment is harmless error. Likewise, in the examination of whether there was a genuine issue of material fact, we will also review whether the Appellees, in their opposition to the summary judgment motion, provide more than mere allegation or denials of the reasoning in the motion.

Keeping the appropriate standards in mind, we turn to the case here. According to Justin and Melissa, there are genuine issues of material fact regarding ambiguous language in the will, the mental capacity of Daniel, and undue influence exercised by Danita. The first point the Appellants make is that the following language in the will is ambiguous:

> I have, except as otherwise provided in this Will, intentionally and with full knowledge, omitted to provide for certain of my heir or heirs, who may be living at the time of my death, including any person or persons who may, after the date of this Will, become my heir or heirs by reason of marriage or otherwise. Additionally, if I have omitted anyone from this Will, including my son, Justin Copley, and my daughter, Melissa Howell, I have done so intentionally.

They contend that not only does the language, based on the use of "if," make the wording ambiguous but also that this ambiguity illustrates Daniel's lack of mental capacity at the time the will was executed. We are not persuaded by their reasoning regarding "if." The language obviously expresses that Daniel does not want them to receive anything under the will. Furthermore, he does not give them anything elsewhere in the will. This reasoning is bolstered by the deposition

testimony of Cecil Varney. Daniel's attorney stated that his client was clear during the preparation of the will about his intent. Daniel told Mr. Varney that he did not want to provide for them in the will and that Justin had a trust and that Melissa had been given land and a trailer.

Notably, "[t]he construction as well as the meaning and legal effect of a written instrument . . . is a matter of law for the court." *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010) quoting *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Furthermore, a testator's intent controls the interpretation of a will. *Clarke v. Kirk*, 795 S.W.2d 936, 938 (Ky. 1990). "To ascertain the testator's intention, it is necessary to first examine the language of the instrument. If the language used is a reasonably clear expression of intent, then the inquiry need go no further." *Id*. And, while canons of construction are available where the testator's intent is unclear, a court need not resort to canons of construction where a testator uses clear and unambiguous language. *Hammons*, 327 S.W.3d at 448. The language of the will clearly says that Justin and Melissa are omitted from it.

Next, Justin and Melissa argue that the mental capacity of Daniel was questionable at the time of the execution of the will. It is worth noting that in Kentucky courts, a strong presumption exists favoring a testator's mental capacity to make a will. This presumption can only be rebutted by a strong showing of incapacity. *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998). As stated in that case, "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 *American National Bank & Trust Co. v. Penner*, 444 S.W.2d 751 (Ky. 1969)). Before turning to the other facts that the Appellants provide to support their contention that Daniel's mental capacity was diminished, we address whether the so-called ambiguity of language in the will was an indicia of mental incapacity. This allegation is no longer convincing since we have resolved that the language is not ambiguous.

The issues raised by Justin and Melissa to support Daniel's lack of mental capacity include that Mr. Varney said in his deposition that Daniel had given a car wash to Justin. But, in actuality, Varney primarily said that Daniel felt that Justin was being taken care of and he mentioned the Kermit Car Wash. Mr. Varney's description of the conversation suggests that, rather than Daniel's being confused, Mr. Varney may not have remembered the full implications of the remark since Justin testified that he did receive income from the car wash doing maintenance for it. Additionally, both Mr. Varney and his secretary emphatically said that Daniel was of good mind when he made and executed his will. Justin's statement that his father would never sell his car lot was merely Justin's perception. No direct evidence existed to bolster this supposition.

The Appellants imply, based on Caroline's deposition testimony about a trip with Daniel to Chicago shortly after the cancer diagnosis, that Daniel was not mentally healthy because he was facing a grim diagnosis. But, Caroline also stated in the deposition that Daniel was of good mind during the time he made the will.

Next, Justin and Melissa allege that Daniel's medications had an impact on his mental capacity. As stated in the trial court's order, they produce no medical testimony about the medications or about Daniel's mental incapacity. Consequently, with regard to Daniel's mental incapacity, Justin and Melissa have failed to show that a genuine issue of material fact exists as to Daniel's testamentary incapacity.

Justin and Melissa also allege that a genuine issue of material fact exists as to whether Daniel was subject to undue influence. Besides, the inability to make a case for a lack of testamentary capacity does not preclude a finding of undue influence. *See Gibson v. Gipson*, 426 S.W.2d 927, 928 (Ky. 1968). The Court explained that, while a person with diminished mental ability may be competent to make a will, he or she could be in a condition that is more susceptible to fraud or undue influence. *Id.* Typically, undue influence is exerted in a subtle manner. It can rarely be established with direct proof. Usually, its existence can only be ascertained by examining the facts and circumstances leading up to the execution of the particular will. *McKinney v. Montgomery*, 248 S.W.2d 719, 721 (Ky. 1952). Certain circumstances are especially indicative of undue influence and were described in *Belcher v. Somerville*, 413 S.W.2d 620, 622 (Ky. 1967) as follows:

1. A physically weak, mentally impaired [testator;]
2. [A] will unnatural in its provisions[;]

> 3. [A] lately developed and comparatively short period of close relationship between the [testator] and the principal beneficiary[;]
>
> 4. [P]articipation by the beneficiary in the physical preparation of the will and possession of the will by the beneficiary after its being written;
>
> 5. [E]fforts by the beneficiary to restrict contacts by the [testator] with other persons[.]

The Appellants cite various parts of Justin's testimony to imply that Danita subjected Daniel to undue influence. They support this allegation by observing that Danita came home immediately after her father's cancer diagnosis. Prior to her father's illness, Danita was working in Tennessee. In addition, Appellants imply that Danita kept Justin away from his father, and Justin stated that it appeared that his father was afraid to be around him. Furthermore, Justin opines that his dad would never have left everything to Danita. These assertions are not supported by any other evidence or witnesses. More instructive regarding his father's apparent unease may be Justin's testimony that he had drug charges and four or five DUI charges.

Regarding the Appellants' charges that Danita strong-armed Daniel into omitting Justin from the will, Danita was unaware of the will and thought the operative will was one that left Daniel's estate to a foundation for scholarships. Further, Mr. Varney said that Danita was not present at any time during the creation of the will. More significantly, Mr. Varney and others in their depositions testified that Daniel was extremely private about his business and financial

decisions. Finally, Caroline's testimony that Danita came home to spend time with her father and took him to the doctors' offices when Caroline was not able appears to be a very normal reaction for an adult child upon learning that a parent has been diagnosed with a serious, life-threatening illness.

The circumstances described in *Belcher*, which are especially indicative of undue influence, are not implicated in this situation. Daniel's will was not unnatural in its provisions. He provided for his wife and daughter. And Daniel previously had created a trust for Justin and provided a trailer with land for Melissa. While Daniel had a grievous illness, nothing on the record showed him to be mentally impaired. Danita did not participate in the preparation of the will, and Daniel was the only person in possession of the will after its execution. Danita spent time with her father but nothing in the record, other than allegations by Justin, shows any effort by her to restrict contact with Daniel by others. Finally, Danita was Daniel's daughter and so there was no possibility of a lately developed and short-lived relationship between them. Again, we conclude that Justin and Melissa have failed to show a genuine issue of material fact as to their allegation of undue influence.

In sum, the Appellants simply claim that Daniel's will was the result of mental incapacity and undue influence primarily because he left most of his estate to Danita. The law, however, is clear that a testator can convey the bounty of his estate to whomever he chooses. *Burke v. Burke*, 801 S.W.2d 691, 693 (Ky. App. 1990). As stated above, parties who oppose a properly supported motion for

summary judgment may not rest their opposition to the motion upon mere allegations or denials it but must set forth specific facts showing that there is a genuine issue for trial. In the instant case, Appellants have failed to produce any affirmative evidence that, at trial, they could prove the allegations set forth in their complaint. Therefore, the trial court did not err in granting summary judgment.

Similarly, the trial court properly denied Appellants' motion to alter, amend, or vacate the summary judgment. A party cannot invoke a motion to alter, amend, or vacate, to raise arguments and introduce evidence that should have been presented before the entry of the judgment. *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). Accordingly, a party certainly cannot use such a motion to re-argue its previous grounds. The arguments proffered by the Appellants in the motion to alter, amend, or vacate were just that. Indeed, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* (footnote omitted). We review a trial court's ruling pursuant to a motion to alter, amend, or vacate for an abuse of discretion. *Id.* at 892. Given the grounds to support the motion to alter, amend, or vacate, we do not find that the trial court abused its discretion since its denial was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *See Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

We therefore conclude that summary judgment was properly granted and affirm the decision of the Martin Circuit Court.

ALL CONCUR.

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