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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002015-MR

BONNIE KEMPER; AND BONNIE
KEMPER, EXECUTRIX OF THE
ESTATE OF WILLIAM SCOTT KEMPER — APPELLANTS

v.

APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NOS. 06-CI-00147 AND 08-CI-00031

PAUL KEMPER; AND
DAVID KEMPER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,[1] SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Bonnie Lee Kemper, individually, and in her capacity as Executrix of the Estate of William Scott (W.S.) Kemper (collectively referred to as "appellants") bring this appeal from an August 27, 2009, judgment of the Cumberland Circuit Court following a jury trial declaring that the Last Will and

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

Testament of W.S. Kemper was procured by undue influence and setting aside same. We affirm.

W. S. Kemper was born February 18, 1920. W.S. married Norma Jean Kemper, and the couple had two sons, Paul Kemper and David Kemper. W.S. and Norma were married for over forty years and raised their sons in Carroll County, Kentucky. W.S. acquired a substantial amount of wealth during his marriage to Norma. On August 13, 1986, W.S. and Norma executed a joint will. The will contained a provision providing that upon the death of either party, his or her estate would pass to the other. Thereafter, Norma died and her entire estate passed to W.S. per the will. After Norma's death, W.S. executed a new will on December 30, 1992. W.S. named Paul as executor and left his entire estate to his two sons, Paul and David.

On September 7, 1993, W.S., then seventy-three years of age, married thirty-five-year-old Bonnie Lee Maiden. As a result of the marriage between W.S. and Bonnie, familial relations between W.S., his two sons, and their families became seriously strained to the point of an alleged physical altercation between Bonnie and W.S.'s daughter-in-law. It also was alleged that Bonnie discouraged and restricted Paul and David's access to W.S. Sometime in 2000, Bonnie relocated W.S. from Carroll County to Cumberland County, Kentucky. After the move, W.S. was diagnosed with prostate cancer. In January 2006, W.S. was hospitalized. His cancer had metastasized causing compression of his spinal cord and resulting in paralysis below the waist. On January 21, 2006, while still

hospitalized, W.S. executed another will leaving the bulk of his estate to Bonnie; Paul and David were each devised a mere one-sixth interest in a tract of real property. W.S. died on June 27, 2006.

On December 8, 2006, Paul and David filed a complaint in Cumberland Circuit Court seeking to set aside the January 21, 2006, will due to lack of W.S.'s mental capacity to execute same and due to Bonnie's undue influence over W.S. In August of 2009, the case was tried in the Cumberland Circuit Court. The jury found that W.S. possessed the requisite mental capacity to execute the January 21, 2006, will but that Bonnie exerted undue influence over W.S. in the drafting of the will. By judgment entered August 27, 2009, the circuit court set aside the January 21, 2006, will. This appeal follows.

Appellants initially contend the circuit court erred by denying the motion for directed verdict upon the claim that Bonnie exerted undue influence over W.S. in drafting the January 21, 2006, will. The record reveals that appellants moved for a directed verdict on the claim of undue influence, and the circuit court denied the motion. Kentucky Rules of Civil Procedure (CR) 50.01. Our standard of review upon the denial of a motion for directed verdict is as follows:

> The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the court may not

> consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then 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." In such a case, a directed verdict should be given. Otherwise, the motion should be denied.
>
> It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. While it is the jury's province to weigh evidence, the 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.

Rothwell v. Singleton, 257 S.W.3d 121, 124 (Ky. App. 2008)(quoting *Gibbs v. Wickersham*, 133 S.W.3d 494, 495-496 (Ky. App. 2004)).

Undue influence is generally defined as influence that rises to the level of destroying the testator's free will to dispose of his property in accordance with his own judgment and replaces it with the "desires of the influencer." *Nunn v. Williams*, 254 S.W.2d 698 (Ky. 1953). Ordinarily, undue influence is subtly imposed without any witness, and direct evidence is unavailable. *Rothwell v. Singleton*, 257 S.W.3d 121 (Ky. App. 2008); *Zeiss v. Evans*, 436 S.W.2d 525 (Ky. 1969). Therefore, to determine the existence of undue influence, courts recognize certain indicia or "badges" of undue influence. *Rothwell*, 257 S.W.3d 121. The indicia of undue influence are as follows:

> [A] physically weak and mentally impaired testator, a will which is unnatural in its provisions, a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, participation by the principal beneficiary in the preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs. (Internal citations omitted).

Rothwell, 257 S.W.3d at 125. Some or all of these indicia may be present and are recognized as circumstantial evidence of undue influence sufficient to warrant submission of the issue to the jury. 1 James R. Merritt, *Kentucky Practice – Probate Practice and Procedure*, § 545 (2 ed. 1984). We will address the relevant indicia of undue influence introduced at trial in this case.

As to the first relevant indicium of undue influence, physically weak and mentally impaired testator, the record reveals that W.S. had become physically weak and seriously ill in the weeks prior to executing the January 21, 2006, will. According to the medical records introduced at trial, W.S. initially developed numbness in both legs, had no movement in his right leg, could not hold his own weight, and could not ambulate. The prostate cancer had metastasized to his thoracic spine and eventually left him paralyzed below the waist. Also, medical records reveal that W.S. was in much "distress." Thus, there existed sufficient evidence of a probative value to support this indicium of undue influence.

As to the second indicium of undue influence (unnatural disposition), there was also sufficient testimony of a probative value introduced at trial. There

was evidence that W.S. had accumulated a significant amount of property during his forty-year marriage to his first wife, Norma. Also, it was revealed that his sons had engaged in significant business transactions with him over the years, including building a subdivision in Carroll County. Under the January 21, 2006, will, this subdivision was devised to Bonnie,[2] and Bonnie was given most of W.S.'s estate to the detriment of his biological sons.

The third and fourth indicia of undue influence – participation by the principal beneficiary in preparation of the will and possession of the will by the principal beneficiary – is also relevant herein. There was sufficient evidence of a probative value introduced at trial regarding Bonnie's participation in preparation of the January 21, 2006, will. Bonnie even testified that she wrote part of the draft used in the preparation of the will. W.S.'s attorney, Lanny Judd, testified that Bonnie transported W.S. to his office on numerous occasions to discuss preparation of the will and would often be present during the discussions between W.S. and Judd. Bonnie also arranged execution of the January 21, 2006, will when W.S. was hospitalized. She contacted the witnesses, contacted a notary, and arranged a time for their attendance to execute the will. Bonnie also testified that she retained possession of the will for approximately six days after its execution. Thus, there existed sufficient evidence of a probative value to demonstrate these relevant indicia of undue influence.

[2] The January 21, 2006, Last Will and Testament of W.S. Kemper specifically provided that Paul Kemper and David Kemper would each receive one-sixth interest in "the Greensbottom farm." In the event the farm had been sold (or was under contract to be sold) at the time of W.S.'s death, Paul and David would instead receive a one-sixth interest in the Harbor Pointe Estates Subdivision.

The fifth relevant indicium of undue influence – efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty – was also clearly present in the case. Specifically, there was evidence that Bonnie restricted contact by Paul and David with W.S. There was testimony that Paul and David were unable to contact their father by phone after he and Bonnie moved to Cumberland County, that the phone was frequently taken off the hook, and that Bonnie would eavesdrop on the occasions when Paul and David were able to speak with their father by phone. Paul also testified that Bonnie would not allow W.S. to be alone with him.

Upon the whole, we are of the opinion that sufficient evidence of a probative value existed upon which reasonable men could differ regarding whether Bonnie exerted undue influence over W.S. in the drafting of the January 21, 2006, will. The above indicia of undue influence certainly constituted sufficient circumstantial evidence of Bonnie's undue influence. As such, we do not believe the circuit court erred by denying Bonnie's motion for a directed verdict upon the claim of undue influence.

As to the propriety of the trial court's denial of a directed verdict, we also point to the Supreme Court decision in *Rothwell*, which held:

> When the will provides for an unequal or unnatural disposition and there is slight evidence of the exercise of undue influence, the evidence will be deemed sufficient to submit the case to the jury. *Burke v. Burke*, 810 S.W.2d 691 (Ky. App. 1990).

Rothwell, 257 S.W.3d at 125. As hereinbefore set forth, the January 21, 2006, will certainly provided for an "unequal or unnatural" disposition of W.S.'s estate; thus, only "slight evidence" of undue influence was necessary to defeat a directed verdict. *See id.* We also conclude that more than slight evidence existed of Bonnie's undue influence necessary to mandate submission of the issue to the jury. *See id.*

Appellants further argue that the trial court committed reversible error by excluding certain evidence at trial. We disagree.

A trial court possesses broad discretion in ruling upon evidentiary issues. *Clephas v. Garlock, Inc.,* 168 S.W.3d (Ky. App. 2004). If the trial court abuses its discretion in admitting or excluding evidence, such error is only reversible if it affected the substantial rights of a party; i.e., whether there existed a reasonable possibility that the outcome of the proceedings would have been different absent the error. Kentucky Rules of Evidence (KRE) 103; CR 61.01; *Hawkins v. Rosenbloom*, 17 S.W.3d 116 (Ky. App. 1999)(citing *Crane v. Com.*, 726 S.W.2d 302 (Ky. 1987).

As to the trial court's erroneous exclusion of evidence, appellants specifically argue:

> Kentucky Courts have long established that a decedent's statements before or after the signing of the will could be used to prove the contents of the will, the mental condition at the time of the signing and the decedent's susceptibility to external influences when executing the will. *Atherton* [*v. Gaglin*], 239 S.W. [771], 772 [(Ky. 1922)]. At no time did the decedent ever indicate his intent or desire not to execute the will, nor

any desire to revoke or change his will. To the contrary, his statements and positive attitude had the legal effect of validating and ratifying the will and corroborating his intention to "take care of Darlin."

The Court excluded statements made after the execution of the will on the grounds that *Atherton* did not apply because it was limited to forgery cases only. Consequently, the corroborating testimony of Gary White was not allowed where the decedent told him after returning home from the hospital all about the will, how he had taken care [of] his wife and how she had always taken excellent care of him. This same ruling also excluded the corroborating testimony of Rev. Raymond Costello, who spoke to the decedent shortly after the execution of the will and would testify that the decedent told him that his wife would be taken care of. (Citations omitted.)

During the direct examination of Lanny Judd, the undersigned was engaged in a very important and critical line of questioning concerning "follow up" to the will and the implementation of the decedent's estate plan, which included the preparation and execution of certain deeds closely integrated into his plan. The deeds were finally ready after months of preparation and Mr. Judd needed to set up a meeting to execute them. This meeting occurred at the decedent's home about five (5) days after the execution of the will. Counsel for Appellees objected to questioning about the deeds because the conversations occurred after the execution of the will and were therefore irrelevant. However, deeds are testamentary acts, especially survivorship deeds, and were clearly related to the execution and terms of the will. Therefore, statements by the testator after the signing of the will should have been admitted and their exclusion seriously impaired Appellant's ability to corroborate the testamentary intent of the decedent. (Citations omitted.)

. . . .

Similarly, testimony concerning the $4.5 million promissory note from the decedent to Appellee Paul Kemper on September 6, 1999 (the same day the decedent

> was treated at the TriCounty Hospital for alleged spousal abuse), was improperly excluded by the Court. This ruling was devastating to Appellant's case as it was crucial to impeach Paul Kemper's argument that his father was afraid of or under the exclusive financial control of his wife. Clearly this was not the case if Paul Kemper was able to transact such amounts from his father in order to hide assets in a potential divorce scheme. (Citations omitted.)

Appellants' Brief at 13-15.

The excluded testimonies of Gary White and Raymond Costello centered upon W.S. intimating to them that he had taken care of Bonnie. Under KRE 803(3),[3] a prior statement made by the decedent is generally admissible to prove "the contents of his or her will, the material condition of the decedent at the time of execution of the will, and the susceptibility of the decedent to external influences when executing the will." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.50(3)(4th ed. 2003). For the following reasons, we conclude that the excluded testimonies of White and Costello are not admissible under KRE 803(3).

[3] Kentucky Rules of Evidence 803(3) reads:

> The following are not excluded by the hearsay rules, even though the declarant is available as a witness:
>
> . . . .
>
> (3)Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

A statement by W.S. that he had taken care of Bonnie is vague and ambiguous; moreover, such statement does not directly prove the contents of W.S.'s will, his mental condition at the time of executing the will, or his susceptibility to external influences at the time of executing the will. Taken together, we cannot conclude that the trial court abused its discretion by excluding the above testimonies of White and Costello. For these same reasons, we also do not believe the trial court abused its discretion in excluding the testimony of Judd concerning the implementation of the decedent's estate plan. However, even if an abuse of discretion occurred, the exclusion of this evidence certainly did not affect the substantial rights of appellants. KRE 103; CR 61.01; *Hawkins*, 17 S.W.3d 116.

As to the exclusion of evidence concerning the $4.5 million promissory note, we think its relevancy is seriously questionable, and any impeachment or probative value thereof was much outweighed by the danger of undue prejudice and confusion of the issues. KRE 401; KRS 403. Thus, no reversible error occurred by the exclusion of such evidence.

Next, appellants maintain that the trial court committed reversible error by admitting certain evidence at trial. Appellants set forth several items of evidence, and we shall address each.

Appellants believe the trial court erred by admitting the testimony of Raymond Garret that W.S. stated in 2005 that he was afraid of Bonnie and that Bonnie possessed a handgun. Also, appellants complain that the testimony of David Carter was erroneously admitted. Appellants object to Carter's testimony

that W.S. stated that he wanted to leave his estate to his biological children (Paul and David) but that Bonnie would not allow him to do so. Carter testified that W.S.'s statement was made in 2005 while they were fishing. Further, appellants claim that the trial court erred by admitting W.S.'s medical records from Tri-County Hospital. These records concerned physical injuries sustained by W.S. and allegedly cause by Bonnie.

At trial, a claim was presented to the jury that Bonnie exerted undue influence upon W.S. in the making of the January 21, 2006, will. Generally, undue influence exists when such influence is "sufficient to destroy the free agency of the testator so that his disposing of his property in a way which he would otherwise refuse to do." 1 James R. Merritt, *Kentucky Practice – Probate Practice and Procedure*, § 545 (2 ed. 1984). Moreover, the influence may occur prior to or at the time of executing the will. *Id.*

Here, the testimonies of Garrett and Carter and the Tri-County Hospital medical records were directly relevant upon the claim of undue influence. KRE 401. Moreover, it is immaterial that W.S.'s statements concerning Bonnie's influence and that the hospital records were dated some years prior to the actual execution of the January 21, 2006, will so long as the statements evidenced undue influence that "operated upon the testator [W.S.] at the time the will was executed." Consequently, we cannot say the trial court abused its discretion by admitting into evidence the above testimonies of Garrett and Carter and Tri-County Hospital medical records.

Appellants also argue that the trial court erroneously admitted into evidence a handwritten "note" of W.S. Appellants point out that the note appears to be a holographic will and is dated October 9, 2000. As a previous will of W.S., appellants maintain that the trial court erred by admitting same under KRS 394.130.[4]

The record reveals that W.S.'s handwritten note was admitted for the narrow purpose of demonstrating W.S.'s signature and writing style. Moreover, the trial court gave the jury a specific admonition that the note should only be considered for such narrow purpose. In *Trivette v. Johnson*, 257 Ky. 681, 79 S.W.2d 6, 7 (1935), the Court held that KRS 394.130 "does not prevent the introduction in evidence of an unprobated testamentary paper, not offered as a will of testator, but to establish a collateral fact." As the note was introduced to establish a collateral fact and with a jury admonition, we perceive no prejudicial error. *See* CR 61.01.

Appellants next maintain that the trial court erred in denying their motion for a new trial due to juror misconduct. CR 59.01. Specifically, appellants cite to the affidavits of two jurors asserting that another juror or jurors disregarded an admonition given to the jury by the trial court. Appellants contend that the jury's failure to follow the trial court's admonition resulted in reversible error, thus necessitating a new trial.

[4] KRS 394.130 provides:

> No will shall be received in evidence until it has been allowed and admitted to record by a District Court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled.

In this Commonwealth, it has long been the law that a jury's verdict generally may not be impeached by affidavit or testimony of an individual juror or jurors. *Pittsburg Coal Co. v. Withers*, 19 Ky. L. Rptr. 113, 37 S.W. 584 (1896); *Cadle v. McHargue*, 249 Ky. 385, 60 S.W.2d 973 (1933); *Dillard v. Ackerman*, 668 S.W.2d 560 (Ky. App. 1984); *Doyle, By and Through Doyle v. Marymount Hospital, Inc.*, 762 S.W.2d 813 (Ky. App. 1988); *Previs v. Dailey,*180 S.W.3d 435 (Ky. 2005). For this reason alone, we reject appellants' argument.

Appellants lastly claim the appellees' counsel engaged in "misconduct" resulting in prejudicial error and, thus, necessitating a new trial under CR 59.01(b).

Specifically, appellants complain that appellees' counsel made improper statements during closing argument and during cross-examination and examination of witnesses. In particular, appellants state that appellees' counsel incorrectly "told the jury there was nothing in the Tri-County Hospital records that revealed decedent made a statement that there had been an altercation between his wife and his daughter-in-law." Appellants' Brief at 19. Additionally, appellants point out that appellees' counsel improperly cross-examined Judd and, in doing so, misled the jury regarding how W.S.'s estate would pass if the January 21, 2006, will was invalidated:

> On cross-examination of Mr. Judd, [appellees' counsel] overstepped the bounds of fairness by asking the following question: "Well when you had discussion with him and I want you to correct me if I'm wrong, from March of '04 up until the time you did a draft of the will sometime around Thanksgiving of '05, you certainly

> advised him if he didn't have a will that his estate would go by intestate succession didn't you?" to which Mr. Judd replied "I did." At this point [appellees' counsel] made a statement with a "question inflection" in his voice stating, "and that meant everything would go to his boys?" to which Mr. Judd replied, "Well it would go according to his heirs, yes."

Appellants' Brief at 20. Appellants also allege appellees' counsel engaged in misconduct when questioning Paul at trial:

> [Appellees' counsel] asked Appellee Paul Kemper about several matters that had previously been excluded by prior ruling of the Court. Paul Kemper, at the questioning of his attorney, tried to discuss that his cousin, a preacher, would not marry his father and [Bonnie] due to issues of adultery, testimony that the Court had previously admonished counsel and parties not to discuss. Counsel for Appellant properly objected and the Court stated that such testimony would not be permitted, but the next question continued on this line of questioning. Paul Kemper then insinuated, at the prompting of his attorney, that his father and [Bonnie] committed adultery together prior to the death of Norma Kemper, Paul's mother. (Citations omitted.)
>
> [A]s previously discussed, [appellees' counsel] misused the handwritten note purporting to be a "replacement will" and implied that the jury should consider the note for the manner in which the decedent would dispose of his property.

Appellants' Brief at 21-22. In support of the above argument, appellants cite this Court to *Risen v. Price*, 807 S.W.2d 945 (Ky. 1991).

However, we cannot say that appellees' counsel's alleged misconduct rises to a level tantamount to the attorney's misconduct in *Risen*, 807 S.W.2d 945, necessary to warrant reversal without a showing of prejudice. Moreover, even considering the alleged instances of counsel's misconduct together, we are of the

opinion that no prejudicial error resulted therefrom. In this case, the jury heard evidence from each party over the span of several days and ultimately found that Bonnie exerted undue influence over W.S. as to the January 21, 2006, will. Appellants' specific allegations of appellee's counsel misconduct are simply insufficient to vitiate the jury's verdict.

In sum, we hold that no reversible error occurred necessitating reversal of the August 27, 2009, judgment upon the jury verdict in favor of appellee upon their claim of undue influence.

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

ALL CONCUR.

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BRIEF FOR APPELLEES:

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