RENDERED: DECEMBER 23, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001191-MR

CHAD HAYS AND COREY HAYS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 11-CI-002721

KENNETH S. HAYS SR., Individually and as Trustee of The Mildred Jean Kurz Revocable Trust Agreement as amended; KENNETH S. HAYS, JR, Individually and as Trustee of The Mildred Jean Kurz Revocable Trust Agreement as amended; THE UNKNOWN DEFENDANTS, being the Beneficiaries of the Estate of Mildred Jean Kurz, deceased, or the Recipients of Intervivos gifts or as a Beneficiary under a Trust instrument created during the lifetime of Mildred Jean Kurz; and THE UNKNOWN DEFENDANTS, being individuals who were the Recipients of Unequal or Unnatural Disposition of the Assets of Mildred Jean Kurz, deceased. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellants, Cory Hays and Chad Hays, appeal from orders of the Jefferson Circuit Court granting summary judgment in favor of Appellees, Kenneth Hays, Sr. and Kenneth Hays, Jr., in their individual capacities and as Trustees of the Mildred Jean Kurz Revocable Trust Agreement, and dismissing Appellants' claims arising out of their great-aunt's testamentary dispositions and inter vivos gifting practices. For the reasons set forth herein, we affirm the trial court.

Mildred Jean Kurz ("Jean"), a resident of Louisville, Kentucky, died on May 3, 2010, leaving a substantial estate. At the time of her death, Jean was a widow who had no children during her lifetime. Her closest relatives were the descendants of her deceased brother, Fontaine Smith Hays, Jr., who had two sons, Ken Hays, Sr., and James Hays. Ken has two children, Ken Hays, Jr. and Jennifer Miller, who is not a party to this action. James has four children, Corey, Chad, Cara, whose claims have been settled, and Cindy, who is not a party to this action.

After her husband's death in 2002 until her death in 2010, Jean executed a total of twelve testamentary documents, all prepared with legal assistance, as well as the aid of a CPA and an investment broker. The record reveals that it was her habit to review and modify her estate planning documents

on almost a yearly basis. All of the dispositions made by Jean were comprised of a pourover will and a revocable trust. The documents that Jean executed can be generally summarized as follows:

1. On August 28, 2002, Jean executed a will bequeathing all of her tangible personal property, her residence, and three-fourths of the remainder of her estate to Ken, Sr. Ken, Sr. was named executor. There were no provisions for Chad or Corey.

2. On December 30, 2003, Jean executed a new will and revocable trust agreement. Jean bequeathed her tangible property as well as the residue of her trust and estate to Ken, Sr., who was again named executor as well as successor trustee of the trust. Neither the will nor trust included any provisions for Chad or Corey.

3. In December 2005, Jean revised her will and trust, again leaving tangible personal property and the residue of the trust and estate to Ken, Sr., who remained executor and successor trustee. Cara Brown (Chad and Corey's sister) received a bequest of $500,000. There were no provisions for Chad or Corey.

4. In December 2006 revisions, Jean continued to bequeath her tangible property to Ken, Sr. and continued to name him executor and successor trustee. In addition, Jean left Ken, Sr. all of her interest in W&J Investments, LLC, an investment company holding the majority of Jean's assets. Jean left the residue of her estate to certain named charities. Chad and Corey were included as contingent beneficiaries of Jean's tangible personal property and the sum of

$650,000 if Ken, Sr. predeceased Jean. However, Jean made a direct, non-contingent bequest to Cara of $650,000.

5. In December 2007, Jean revised her documents, retaining the bequests made to Ken, Sr., as well as his designation as executor and successor trustee. Corey and Chad remained contingent beneficiaries of a share of Jean's tangible personal property and the sum of $650,000, but only if Ken, Sr. predeceased her. Jean made a non-contingent bequest of a one million dollar trust fund for Cara and her children. The trust residue was left to the same charities designated in the 2006 documents.

6. In March 2008, Ken was retained as successor trustee of the revocable trust and was designated as the sole beneficiary of her residuary trust. Cara was designated to receive the sum of $300,000, but Chad and Corey were not included.

7. In 2009, Jean executed a document entitled "Amendment to Trust Agreement," which permitted Ken, Sr. and Ken, Jr. to both act as immediate successor trustees. (Up to that point, Jean had remained the trustee of her own trust). The 2009 trust amendment provided that the underlying 2008 Trust documents were to remain, in all other aspects, in full force and effect.

Thus, the substantive provisions of Jean's 2008 Will and Trust represented the final expression of her wishes for the disposition of her estate. Notably, none of Jean's estate planning documents make any reference to or provision for Ken, Sr.'s brother and Appellants' father, James Hays.

The Jefferson District/Probate Court ordered Jean's will probated on October 20, 2010. In April 2011, Cara filed a complaint in the Jefferson Circuit Court against Appellees asserting claims of undue influence and breach of fiduciary duty, and seeking damages and an accounting of Jean's trust assets. Shortly thereafter, Chad and Cory filed their complaint claiming breach of fiduciary duty, undue influence, and exploitation of an elderly person. Chad and Cory also sought an accounting of Jean's estate. The two actions were subsequently consolidated.

In September 2011, Appellees filed a motion for summary judgment. Therein, Appellees contended that since Appellants' father, James, was still living, they were not heirs at law and did not have standing to bring the action. Further, Appellees claimed that Appellants' complaint failed to state a claim upon which relief could be granted. Because Appellants were listed in the 2006 documents as only contingent beneficiaries in the event that Ken, Sr. predeceased Jean, Appellees argued that Appellants could not have been damaged by any of Jean's estate planning documents since none of the documents made a direct bequest to either of them.

By order entered on December 13, 2011, the trial court granted Appellees' motion for summary judgment. Citing to *Ryburn v. First National Bank of Mayfield*, 399 S.W.2d 313 (Ky. 1965), the trial court agreed that Appellants did not have standing to pursue their claims:

> [I]t would appear that Chad and Corey's interests are too attenuated to proceed. If they were successful in their challenge, Jean's older wills would not be reinstated, nor would her intention be implied to any distribution. The estate would pass as in cases of intestacy and be distributed to James and Kenneth Sr.

The trial court further concluded that regardless of standing, Appellants had failed to produce any evidence to support their claim for undue influence and further that the only evidence Appellants had produced regarding their entitlement to a distribution was their own testimony, which would not have been admissible for the purpose of contesting the will or trust. However, the trial court did rule that pursuant to *Day v. Walker*, 445 S.W.2d 422 (Ky. 1969), and Kentucky Revised Statutes (KRS) 386.675(1),[1] Appellants, as contingent beneficiaries, were entitled to receive information concerning the management of Jean's trust.

In March 2002, Appellants were granted leave of court to file an amended complaint asserting a tort claim for intentional interference with an expectancy of inheritance. Therein, Appellants argued that Jean had made representations during her lifetime that they would be provided for at her death and that Ken, Sr. had intentionally interfered with their right to receive an inheritance from their aunt. Appellees responded that Kentucky has not adopted the tort of intentional interference with an expectancy of inheritance and even if it had, Appellants failed to establish the elements of such.

In April 2013, Appellants were again granted leave to file a second amended complaint asserting a cause of action for failure to make equal inter vivos gifts.

[1] KRS 386.675, entitled "Initiation of Judicial Proceedings" was repealed in July 2014.

Therein, they claimed that Jean's "practice and intention was that her inter vivos gifts to her nieces and nephews be equal" and that Ken, Sr., while acting as trustee, failed to make the same monetary gifts to Appellants as he made to his own children. In response, Appellees moved for summary judgment arguing that there was no cause of action for failure to make a gift; that Ken owed no duty to Appellants; and that there was no evidence that Ken had acted contrary to Jean's instructions regarding gifting.

On June 8, 2013, the trial court granted Appellees' motion for summary judgment, finding that Kentucky has not adopted Restatement Second of Torts, §774B and thus, does not recognize such tort claim. The trial court further concluded that even if Kentucky had adopted the tort, Appellants produced no evidence to satisfy the elements of such as set forth in §774B.

By opinion and order entered on October 23, 2013, the trial court denied Appellants' motion to alter, amend or vacate its prior order granting summary judgment in favor of Appellees on the claim for tortious interference with the expectancy of an inheritance, as well as granted summary judgment in favor of Appellees on Appellant's claim of the right to receive inter vivos gifts. This appeal ensued. Additional facts are set forth in the course of this opinion.

Our standard of review on appeal 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). Summary judgment shall

be granted "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

On appeal, Appellants first argue that the trial court erred in ruling that they did not have standing to bring the claims asserted in their first complaint. Appellants contend that they were listed as contingent beneficiaries in Jean's 2006 estate documents and it is irrelevant whether the contingency was likely to happen or not. Appellants cite to the decision in *Wells v. Salyer*, 452 S.W.2d 392 (Ky. 1970), for the proposition that beneficiaries in a prior will have standing to contest another will that reduces their share in the decedent's estate.

In ruling that Appellants did not have standing, the trial court relied on the rationale set forth in *Ryburn v. First National Bank of Mayfield*, 399 S.W.2d at 313, wherein the plaintiffs, a great-niece and great-nephew of the decedent, appealed the trial court's ruling prohibiting them from challenging the validity of the decedent's probated documents. On appeal, Kentucky's then-highest court agreed that the plaintiffs did not have standing:

> The person claiming as an heir must show that those standing in an intervening relationship to the intestate are dead. Thus, it is concluded that [the great niece and great nephew] are not heirs at law of [the deceased] Ed Gardner because Bunk Gardner, Sr., an intervening taker, became the sole heir at law of Ed Gardner. Upon the death of Bunk Gardner, Sr., subsequently, Bunk Gardner, Jr., became his heir at law. The fact that Bunk Gardner, Jr., was living at the time of Ed Gardner's death also precluded his children from becoming heirs at law of Ed Gardner since Bunk Gardner, Jr., was an intervening taker. Hence, appellant has no right to contest the probate of the Ed Gardner will.

Id. at 315 (citations omitted).

Admittedly, the *Ryburn* decision is confusing in that although the deceased died testate, having a will, the appellate court analyzed the matter as if he died intestate, and in fact specifically stated so in the opinion. While the *Ryburn* court analyzed the issue under the principles of intestate succession, it nevertheless concluded that the plaintiff did not have standing to contest the probate of the decedent's will. The trial court herein noted the distinction but concluded that even though Jean's estate was disposed of by a trust, the existence of an intervening taker would still operate as a bar to Appellants' standing. The trial court further observed,

> The holding of *Anderson v. Old National Bankcorp*, 675 F.Supp.2d 701 (W.D. Ky. 2009), seems to support this conclusion. The Court noted that, "The purpose of the real party in interest rule is to protect the defendant against a subsequent action by the party actually entitled to recover." Conceivably, the trustee could be subject to an action by Chad and Corey, then later face an action by Kenneth, whose interest precedes their own contingent interest.

Appellants rely upon *Wells* to argue that all beneficiaries, contingent or otherwise, have standing to contest a will or trust. In *Wells*, the court did, in fact, note that, "[i]t is well-established that persons who are beneficiaries in a prior will have such an interest as entitles them to contest another alleged will of the same testator which would reduce their share in his estate." *Id.* at 394. However, "the burden is on every person contesting a will . . . to prove, that he has some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefited, *or in some manner materially affected*, by the probate of the will." *Logan v. Thomason*, 202 S.W.2d 212, 215 (Tex. 1947) (emphasis added). The fallacy in Appellants' argument is the simple fact that they did not have an interest in any of Jean's prior estate documents that was subsequently reduced by the most recent documents. In the 2006 and 2007 documents, wherein Appellants were named as beneficiaries, their bequest was specifically contingent upon Ken, Sr. predeceasing Jean. Clearly, that condition did not occur. Accordingly, even if Appellants were successful in contesting the estate planning documents admitted for probate, it would be a pyrrhic victory as they were not materially affected by those documents. Further, even if the trial court were to have set aside all of the documents and declared Jean intestate, Appellants would likewise not have inherited under intestate succession because they are not heirs-at-law. *See Ryburn*. Quite simply, there are no set of circumstances under which Appellants could have prevailed under their first

complaint against Appellees and, as such, the trial court properly declared they were without standing to proceed.

Appellants next argue that the trial court erred in dismissing their claims for intentional interference with the expectancy of an inheritance or gift. Appellants contend that Kentucky has long recognized the general underlying tort of interference, *Brooks v. Patterson*, 29 S.W.2d 26 (Ky. 1930),[2] and that it is now time to formally adopt Restatement (Second) of Torts, §774B, to allow a claim for tortious interference with an expectancy to receive an inheritance or a gift. Appellants cite to an unpublished decision by a panel of this Court in *O'Brien v. Walker*, 2002-CA-000976-MR (November 26, 2003),[3] as indication that under the proper set of facts, Kentucky would recognize and adopt §774B.

Restatement (Second) of Torts §774B (1979) defines the tort of intentional interference with an inheritance or gift as: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." As pointed out by Appellees, a number of jurisdictions have rejected the tort, including Maryland, Arkansas, Alabama, Indiana, and New York. However, in *Firestone v. Galbreath*, 616 N.E.2d 202 (Ohio 1993), the Ohio Supreme Court acknowledged that Ohio has

[2] The holding in *Brooks* was abrogated by Restatement of Torts § 766 as recognized in *Carmichael-Lynch-Nolan Advertising Agency, Inc. v. Bennett & Associates, Inc.*, 561 S.W.2d 99 (Ky. App. 1977).

[3] 2003 WL22799031.

adopted the tort of intentional interference with expectancy of inheritance, setting for the elements of such as follows:

> (1) an existence of an expectancy of inheritance in the plaintiff;
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> (2) an intentional interference by a defendant(s) with that expectancy of inheritance;
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> (3) conduct by the defendant involving the interference which is tortious, such as fraud, duress or undue influence, in nature;
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> (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and
>
> (5) damage resulting from the interference.

Id. at 203.

As previously noted, Appellants contend that the *O'Brien* opinion demonstrates this Court's willingness to adopt §774B if presented with the appropriate fact scenario. In *O'Brien,* the plaintiffs appealed the trial court's denial of a motion to amend their complaint to include a claim for tortious interference with an inheritance. Although this Court briefly discussed the language contained in §774B, we concluded that trial court properly denied the motion to amend as there was no evidence of record demonstrating tortious conduct by the defendants. We believe the same is true herein.

While Kentucky has never overtly recognized and adopted the tort of intentional interference with inheritance, neither has it been specifically rejected. However, we need not decide that particular question because we agree with the

trial court that Appellants could not have established a prima facie case. Appellants claim that each element of the tort can at least be inferred from the record. However, in granting summary judgment in favor of Appellees on the claim for intentional interference with the expectancy of inheritance, the trial court observed,

> In this case, there is clearly no documentary evidence. As previously stated, Chad and Corey were never set forth as beneficiaries of Jean Kurtz. Their deposition testimony reveals that, although she indicated that she would leave them something, she never indicated that they would receive a specific amount. Cases from jurisdictions which accept the tort vary on the degree of proof necessary to show an expectancy but generally hold it to be "more than a scintilla," *see Urbanczak v. Urbanczak*, 278 S.W.3d 829 (Tx. App. 2009), or a "bare possibility," *see In the Matter of the Estate of Margaret Young*, 156 Misc.2d 301, 592 NYS.2d 905 (Sur. Ct. 1992). This element is missing from the claims of Chad and Corey.
>
> Similarly they are unable to cite any specific conduct by Kenneth Sr. which would constitute an intentional interference with the "inheritance" or which could be characterized as "tortious." Finally, there is no proof as to the issue of damages. Although [sic] Chad and Corey have indicated that Jean stated at a family dinner at the Longhorn steakhouse that Chad, Corey and Cara would split their 50% share of her estate through their father, and nothing would be left for him. However, this statement is corroborated only by Corey's ex-wife and inconsistent with all of the testamentary documents which purposely exclude him. . . . Thus, even if the Court were to accept the tort of intentional interference with inheritance, Chad and Corey cannot meet the elements.

As noted above, Appellants rely heavily on a statement by Jean during a dinner at Longhorn Steakhouse wherein she allegedly said, "But don't worry about - about him [James], once you all get yours from me, there won't be anything left for him." Appellants maintain that this is clear evidence that Jean intended to include them in her estate planning. However, we are of the opinion that the alleged statement is not only illogical in that Jean had already excluded James from all planning documents, but is also too vague and ambiguous to create any sort of expectancy of an inheritance in Appellants. In other words, Appellants have, at best, established a "bare possibility" of an expectancy, which falls short of the burden of proof required.

Similarly, Appellants claim that "Ken's pattern of conduct exhibiting the level of persuasion he used to destroy Jean's will and replace it with his own is shown throughout the record." Yet, other than Appellants' suspicions and bare assertions, we find nothing in the record pointing to any act or conduct by Ken, Sr. which can be construed as intentional interference, much less tortious conduct. There is no testimony that Ken, Sr. participated in, directed, or had any input into the preparation of Jean's estate planning documents. Moreover, there is no indication that such were not in accordance with her wishes or that she did not freely and voluntary execute them.

We reach the same result with respect to Appellants' claim that Ken interfered with their right to receive inter vivos gifts. Appellants argue that, historically, Jean made equal gifts to her kin of equal relationship, including

birthday and educational gifts, and that this history created in them an expectancy to receive equal inter vivos gifts. However, we must agree with Appellees that Appellants rely on a flawed premise that a tendency of a donor to make a gift in the past somehow binds the donor to make future gifts. Appellants do not cite, and we do not find, any law that would support such a proposition.

Even if Appellants could somehow establish an expectancy, they have failed to show any tortious conduct on Ken, Sr.'s behalf. The earlier gifts which Appellants cite as evidence of Jean's tendency to equalize among family members were Christmas or Birthday gifts, not the larger unrelated amounts which Jean gifted to Ken, Sr. and his family before her death. Appellants offered no evidence to contradict Ken, Sr.'s affidavit of record that all checks were authorized and written in accordance with Jean's directives. There is simply nothing in the record to establish that Ken, Sr. failed or refused to make a gift to Appellants as instructed by Jean or that he made any gifts that he was not directed to make. Again, Appellants have offered nothing more than speculation and supposition of Jean's intent with respect to inter vivos gifting and such falls short of establishing the elements of §774B.

Accordingly, even if Appellants are correct that the *O'Brien* decision is an indication that this Court would adopt §774B and recognize a tort claim for intentional interference with the expectancy of an inheritance or gift, we do not believe that the facts presented herein warrant doing so at this time. As such, we

conclude that the trial court properly dismissed Appellants' claims premised on said tort.

For the reasons set forth herein, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES KENNETH S. HAYS, SR. AND KENNETH S. HAYS, JR.:

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