RENDERED: April 7, 2000; 2:00 p.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003123-MR

JACQUELINE FARMER, EXECUTRIX OF
THE ESTATE OF FLORENCE CLARK TODD;
JACQUELINE T. FARMER;
DAMIE ANDERS HUSSON; AND
ELIZABETH ANDERS — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 97-CI-02005

MICHAEL D. MEUSER, EXECUTOR
OF THE ESTATE OF JOHN H. CLARK;
UNIVERSITY OF KENTUCKY EQUINE
RESEARCH FOUNDATION, INC.;
PHYLLIS A. CLARK; KAREN R. RICHARDS;
STEVEN C. CLARK; JANET CLARK BEARD;
SUSAN E. POPP; AND CATHY CLARK WORRALL — APPELLEES

AND: APPEAL NO. 1998-CA-003197-MR

MICHAEL D. MEUSER, EXECUTOR
OF THE ESTATE OF JOHN H. CLARK — CROSS-APPELLANT

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 97-CI-02005

JACQUELINE FARMER, EXECUTRIX OF
THE ESTATE OF FLORENCE CLARK TODD;
JACQUELINE T. FARMER;
DAMIE ANDERS HUSSON; ELIZABETH ANDERS;
PHYLLIS A. CLARK; KAREN R. RICHARDS;
STEVEN C. CLARK; JANET CLARK BEARD;
SUSAN E. POPP; AND CATHY CLARK WORRALL CROSS-APPELLEES

OPINION
REVERSING AND REMANDING ON APPEAL
AFFIRMING ON CROSS-APPEAL
** ** ** ** **

BEFORE: HUDDLESTON, MCANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: Jacqueline Farmer, executrix of the estate of Florence Clark Todd, Jacqueline T. Farmer, Damie Anders Husson, and Elizabeth Anders (appellants) bring this appeal from a Judgment of the Fayette Circuit Court entered October 28, 1998, upon a jury verdict. Michael D. Meuser, executor of the estate of John H. Clark, cross-appeals. We reverse and remand on appeal. We affirm on cross-appeal.

This litigation involves the will of John H. Clark, a prominent citizen of Fayette County, Kentucky, and a noted figure in the equine industry. In his declining years, Mr. Clark executed a series of testamentary documents taking into consideration his relatives. On November 17, 1995, he executed the will in question leaving his entire estate to the University of Kentucky Equine Research Foundation, Inc. (UKERF). Weeks later, on January 10, 1996, Mr. Clark died at age seventy-six by reason of two self-inflicted gunshot wounds. The November 17,

1995, will was entered for probate in the Fayette District Court on January 12, 1996. Meuser was appointed executor. As executor, he filed a petition in the Fayette Circuit Court on June 3, 1997 seeking a declaration of rights. Kentucky Revised Statutes (KRS) Chapter 418. He sought to uphold the will. Appellants herein are the blood relatives of John H. Clark and contestants of the will.

The initial question presented to the circuit court was whether Mr. Clark's will was executed in conformance with the requirements of KRS 394.040. The court concluded it was properly executed. Thereafter, the matter came on for trial before jury. It was submitted on the issues of testamentary capacity and undue influence. The jury found in favor of the will. This appeal followed.

The appellants raise four issues for our consideration: (1) that the will was improperly executed; (2) that the instructions rendered to the jury on the issues of testamentary capacity and undue influence were improper; (3) that the court erred in refusing to admit into evidence a videotape and still photographs of the suicide scene; and (4) the court erred in failing to join certain parties deemed necessary because they were beneficiaries under a previous will.

On cross-appeal, Meuser, as executor of Mr. Clark's will, contends he was entitled to a directed verdict on the issues of testamentary capacity and undue influence.

We first consider the execution of the will. Acting out of the ordinary, Meuser (drafter of the will, a subscribing

witness thereto, and named executor therein) "printed" his name as a subscribing witness. This laxness has created one of the problems at hand. The burden of proving proper execution of a will is, of course, upon the proponents of the instrument. See Hall v. Hall, 153 Ky. 379, 155 S.W. 755 (1913), and Smith v. Neikirk, Ky. App., 548 S.W.2d 156 (1977). The question before us is whether the proponents of Mr. Clark's will sufficiently proved that execution of same was in conformance with KRS 394.040, notwithstanding Meuser's name as a subscribing witness was printed rather than written. KRS 394.040 provides as follows:

> 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. (Emphasis added.)

Meuser testified that it was not his custom to print his name as a signature. This is substantiated by the fact that his name as drafter of the instrument appears in cursive form.

The uncustomary printing of a name by a subscribing witness may well be a fatal act if the witness is deceased or otherwise unavailable and it is necessary to prove his signature. Such is not the case before us, however, as the authenticity of the printed signature is not in dispute. It is uncontested that Meuser printed his name in the capacity of a subscribing witness. The quandary arises in that it is affixed in print rather than cursive. We are presented with no authority directly addressing

this issue. As the printed signature was adequately authenticated, however, we believe the burden of proving proper execution was sustained.

We now turn to the instructions rendered by the court. Appellants make two arguments pertaining to same. They contend the jury should have been instructed that when both lack of testamentary capacity and undue influence are at issue, the evidence necessary to prove undue influence need not be as convincing as would be necessary to prove either alone. See Roland v. Eibeck, Ky., 385 S.W.2d 37 (1964), and Hines v. Price, 310 Ky. 758, 221 S.W.2d 673 (1949). It is true that a person of infirm mind might be more easily influenced, and the law recognizes such. We know of no rule of law, however, requiring an instruction on this premise. This is something a jury can well understand. It is, of course, a principle to be considered by the court in determining submissibility.

The more serious complaint about the instructions is the trial court's decision to instruct on clear and convincing evidence rather than a mere preponderance. We deem this error.

Appellees direct us to the cases of Bye v. Mattingly, Ky., 975 S.W.2d 451 (1998), and Hardin v. Savageau, Ky., 906 S.W.2d 356 (1995), for the principle that clear and convincing evidence is the appropriate standard to prove undue influence and testamentary capacity. We do not so believe. In Hardin, it was held that in all civil cases where the standard of proof is greater than a preponderance it is necessary to state the heightened standard in the instructions -- without definition.

Hardin, however, addressed the matter of fraud incident to a contract for sale of real estate. The standard of proof in cases of fraud has been, and perhaps always has been, that of clear and convincing evidence. Larmon v. Miller, 195 Ky. 654, 243 S.W. 939 (1922). The Hardin court simply stated that the jury should be instructed as such. We have also reviewed Bye and, likewise, do not believe it dispositive of the instant case. We view neither Bye nor Hardin as elevating the standard of proof in will cases to the level of clear and convincing evidence.

It is well-established that the standard of proof in undue influence and testamentary capacity cases is that of a preponderance of evidence. Henson v. Jones, 247 Ky. 465, 57 S.W.2d 498 (1933); McGee v. Brame, 176 Ky. 302, 195 S.W. 473 (1917); Murphy's Ex'r. v. Murphy, 146 Ky. 396, 142 S.W. 1018 (1912); and Wells v. Salyer, Ky., 452 S.W.2d 392 (1970); Carter v. Carter, 216 Ky. 732, 288 S.W. 666 (1926).

We next address the question of the trial court's exclusion of video and still photographs of the suicide scene. This evidence was rejected because it was deemed more prejudicial than probative. Kentucky Rules of Evidence (KRE) 403. Appellees seem to contend that Mr. Clark's suicide was a rational end to his life, and allowing the jury to view a depiction of the death setting would add nothing. Appellants contend the death scene is probative of Mr. Clark's unsoundness of mind when he executed his will a short time beforehand. Trial courts are afforded great latitude in the introduction or rejection of evidence. Reversal of a judgment erroneously admitting or excluding evidence will

not be had absent prejudice to the substantial rights of a party. See Bailey v. Hall, 295 Ky. 740, 175 S.W.2d 512 (1943). It is clear from the evidence that Mr. Clark took his own life. In a final note, he explained he was doing so because of poor health and a desire not to be a burden to others. We agree the photographic description of the death scene, though probative, would add little. The jury was adequately advised how and why Mr. Clark died. We will not reverse on the rejection of this evidence. Ky. R. Civ. P. (CR) 61.01, and KRE 103.

Finally, appellants contend the trial court erred in failing to require that beneficiaries under a previous will executed by Mr. Clark be joined in this matter as necessary parties. We are not of the opinion that the court so erred. We do not deem those parties necessary under CR 19.01. Nor, do we think failure to join them is offensive to KRS 394.280(1). Their absence does not impede the resolution of the issues presented. Generally, necessary parties are those benefitting from and attempting to uphold a will, not those benefitting if the will fails. See Security Trust Co. v. Swope, 274 Ky. 99, 118 S.W.2d 200 (1938), *modified,* West v. Goldstein, Ky., 830 S.W.2d 379 (1992). We do not read Scott v. Roy, 144 Ky. 99, 137 S.W. 858 (1911), *modified*, West v. Goldstein, Ky., 830 S.W.2d 379 (1992), cited by appellants, as mandating a contrary result.

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We perceive no merit to Meuser's cross-appeal. He urges that he was entitled to a directed verdict on the issues of

testamentary capacity and undue influence. CR 50.01. We disagree.

The rule on submissibility is, of course, that the trial court must draw all fair and reasonable inferences from the evidence in favor of the non-moving party. If, after so doing, reasonable minds may differ as to the conclusion to be drawn from the evidence, a jury issue is presented. See Lee v. Tucker, Ky., 365 S.W.2d 849 (1963). We review the denial of a directed verdict under the clearly erroneous rule giving deference to the trial court's decision. See Bierman v. Klapheke, Ky., 967 S.W.2d 16 (1998), and Meyers v. Chapman Printing Company, Inc., Ky., 840 S.W.2d 814 (1992).

The record contains evidence that Mr. Clark, during his last years, had been hospitalized and endured chronic problems with depression, anxiety, and paranoia for which he was under drug treatment. His mental condition was suspect, and there is evidence he was incapable of formulating an estate plan. We believe this evidence, superimposed upon his age, his general mental and physical infirmities, and his ultimate suicide, constitutes substantive evidence upon which a jury might reasonably conclude that Clark lacked mental capacity and/or suffered undue influence in the preparation and execution of his last will. The foregoing, together with his abrupt change of heart in favor of UKERF's fund raising efforts in disposing of

his entire estate, we think, creates submissible issues upon both mental capacity and undue influence.[1]

For the foregoing reasons, the Judgment of the Fayette Circuit Court is affirmed on cross-appeal and reversed and remanded on direct appeal for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS/CROSS APPELLEES:	BRIEFS FOR APPELLEES/CROSS-APPELLANT:
J. Robert Lyons, Jr. Bruce A. Rector Lexington, Kentucky	Thomas W. Miller David T. Faughn Lexington, Kentucky

[1]As appellants attacked Mr. Clark's will on grounds of undue influence and testamentary capacity, only slight evidence of undue influence was necessary for submission to the jury. 1 James R. Merritt, Kentucky Practice, §§ 541 and 550 (2d ed. 1984).