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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001098-MR

H. ELMER EDWARDS; DANIEL B. EDWARDS;
WENDELL F. EDWARDS; JOYCE E. MALONE;
KENNETH B. EDWARDS; DONALD R. EDWARDS;
AND CAROLYN E. MARLIN

APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. MCANULTY, JR., JUDGE
ACTION NO. 96-CI-007067

GRACE CLARA HILL;
AND ALLEN K. GAILOR,
IN HIS CAPACITY AS PUBLIC ADMINISTRATOR
AND SUCCESSOR PERSONAL REPRESENTATIVE

APPELLEES

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

BEFORE: BUCKINGHAM, KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: This is an appeal from a jury verdict and judgment by the Jefferson Circuit Court upholding the validity of a will. We find that there was sufficient evidence to support the trial court's decision to submit the issue of testamentary capacity to the jury. Furthermore, we conclude that the trial court did not abuse its discretion in denying the appellants' motions for a mistrial and for a new trial based upon improper conduct by the

appellants' trial counsel. Lastly, we find that the trial court did not abuse its discretion in allowing the admission of certain hearsay testimony. Hence, we affirm.

Facts

Sulia Blanche Edwards (Sulia) was born on January 29, 1910, in Tennessee. She had two brothers who were still living at the time of trial: the appellants H. Elmer Edwards (Elmer) and Daniel P. Edwards (Daniel). In addition, she had two other brothers who predeceased her. Sulia also had a sister, the appellee Grace Clara Hill (Clara). Approximately fifty years ago, following her divorce Sulia moved to Louisville. She worked and saved money over the years. Through frugal living, she managed to acquire significant assets. In particular, she owned her own house, several apartment buildings and substantial non-realty investments. At the time of her death in November 1995 she left an estate worth more than $600,000.00.

In early 1993, the Adult Protective Services Division of the Cabinet for Human Resources received a referral about Sulia regarding self-neglect and possible exploitation. A social services employee of the Cabinet, B.J. Mayes, was assigned to investigate Sulia's living conditions and mental capacity. Upon investigation, Mayes found Sulia's home to be very dirty and disordered, with a strong urine odor. Mayes was also concerned that Sulia was not eating properly or maintaining personal hygiene. Mayes further reported that Sulia had serious short term memory problems and that she was frequently confused. In

addition, Sulia was having difficulty paying her bills and collecting rent payments from her tenants.

In May of 1993, two of Sulia's nephews, Glen and Loys Edwards, traveled to Louisville to visit her. They testified that Sulia did not recognize them and that her living conditions were "deplorable." Glen testified that his aunt "did not know what was going on", and Loys testified that she "could not carry on a rational conversation." After several phone conversations and a visit in August 1993, Clara stated Sulia's condition was deteriorating. She described her sister as "crazy" and "mentally ill." Clara also noted to Mayes in August that Sulia did not have a will and that she needed one.

On September 16, 1993, Mayes filed a "Petition to Determine if Disabled" in the Jefferson District Court, naming Sulia as respondent. Pursuant to KRS 387.540, the district court appointed an interdisciplinary team consisting of a physician, a psychologist, and a social worker to evaluate Sulia. In the interdisciplinary team's report, Dr. Walter R. Butler reported that as of November 6, 1993, Sulia's home remained cluttered and there was evidence of self-neglect. She seemed easily distracted and confused. Sulia was oriented to person and place, but she did not know the date. However, she was aware of what year it was. Sulia was distrustful of the doctors and social workers and did not want to accept their help. Sulia was concerned that her brother was "trying to have me put away." Sulia further believed that her tenants were stealing from her. The report continued as follows:

> Cognitive testing noted that she could not identify the current President of the United States or the preceding one. She was asked to concentrate and recite the months of the year beginning with the last month and going backwards to the first month. She was able to do that for four months but then became distracted, tangential, went off subject and was unable to return to the task. I asked her to tell me three ways in which rivers and lakes had things in common, expecting answers such as "water" or "fish." She was unable to make any comparisons between a river and a lake. I asked her to tell me how apples and oranges were different, expecting her to note "color," taste," or "shape." She was unable to make any comparisons between an apple and an orange. She could not do simple mathematic calculations such as tell me how much change one would receive if a purchase were made for $.69 cents and a $1.00 bill tendered to the sales clerk. She could not interpret a simple proverb such as "Don't cry over spilled milk." Her judgment appeared to be impaired and her insight was extremely limited.
> With respect to activities of daily living, she indicated that she prepared meals for herself, but she could not tell me how she went to the grocery store or how she returned groceries to her house. She denied any need for medical care and said she was perfectly healthy and had not seen a doctor recently. She could not give appropriate answers as to what one would do if, for example, her house were on fire. She could not identify the nature of a contract or give an example of one, even though she said that she was a property owner and had tenants.

"Report of Examination and Opinion by Physician Member of Interdisciplinary Team," 11/9/93, pp 2-3.

The psychologist who examined Sulia also concluded that, as of November 5, 1993, she was incapable "of making any informed decisions regarding any aspect of her current care or needs." However, he did state that Sulia was aware that she owned apartments, and that she received rental and social security income. He concluded that Sulia was not capable of

managing her own affairs. Psychological Evaluation, Paul Bock, Ph.D. 11/03/93.

During this time, Sulia received visits from an old friend and co-worker, Jesse Benton. Benton and several members of a nearby church, Third Avenue Baptist Church, regularly checked up on her and sometimes brought her groceries. Benton testified that Sulia was able to reminisce about their time working together during the 1940's. She also indicated to him that she resented all the people who were coming into her house and removing her things. Benton further recalled that Sulia expressed great love for her sister Clara, but stated that she did not care for her brothers. Sulia told Rev. John Bishop (from Third Avenue Baptist) that she loved her sister but did not care for her nephews. Mayes testified Sulia told her that she wanted her house left to the church and the remainder of her estate left to Clara.

Following conversations with and letters from Clara, Mayes helped Sulia draft a will conforming to these wishes.[1] The will left Sulia's house to Third Avenue Baptist, and the remainder of Sulia's estate was left to Clara. On November 15, 1993, Mayes took Sulia to the bank where her principal lockbox was located. At the bank, Sulia cashed some bonds, and changed the beneficiaries on others. While at the bank, Sulia signed the

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[1] The evidence was conflicting concerning who prepared the will. There was testimony that it was typed by the secretary at Third Avenue Baptist Church. Sulia's middle name is consistently misspelled as "Blanch" throughout the will. The will also contains no preparer's signature.

will before a notary. Mayes and another person, Debbie Roberts, witnessed her execution of the will.

The following day, on November 16, 1993, a jury trial was conducted in Jefferson District Court concerning Sulia's competency. Based upon the medical and lay testimony presented, the jury found Sulia to be partially disabled in managing her personal affairs and financial resources. Based on the jury's findings, the district court appointed Rev. Bishop and Jessie Benton as Sulia's guardians. The district judge placed her under all the designated legal disabilities, except as to the loss of her right to vote. *See* KRS 387.590(11).

After Sulia died on November 19, 1995, the will was admitted to probate by the Jefferson District Court on January 4, 1996. Immediately, the devise of Sulia's house to Third Avenue Baptist was challenged because Sulia owned it jointly with her brother Elmer, with a right of survivorship. Other ambiguities and the circumstances surrounding the execution of the will were also noted. On December 6, 1996, Elmer and Daniel, along with the children of a deceased brother,[2] filed this action in Jefferson Circuit Court to contest the will. They asserted that the will was ambiguous and required clarification. They further argued that the will was invalid because Sulia lacked testamentary capacity at the time it was executed.

Throughout the proceedings, Elmer, Daniel, and the other family members challenging the will (the appellants), were

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[2] Wendell F. Edwards, Joyce E. Malone, Kenneth B. Edwards, Donald R. Edwards and Carolyn E. Marlin.

represented by John David Dyche of the firm of Tauchau, Maddox, Hovious and Dickens, PLC. Clara was represented by James P. Grohmann of the firm of O'Bryan, Brown and Toner. During the proceedings, Clara stepped down as administrator of Sulia's will, and the public administrator, Alan K. Gailor, was appointed. Prior to trial, Third Avenue Baptist Church disclaimed any interest in Sulia's estate and was dismissed as a party. (Hereafter, Clara and the public administrator collectively shall be referred to as "the appellees.")

Following extensive discovery and a number of motions for summary judgment, the matter proceeded to trial on July 28-31, 1998. The appellants presented evidence taken during the disability proceeding in an attempt to establish that Sulia was not competent to make a will on November 15, 1993. They also presented additional medical and lay testimony to support their argument that Sulia was not competent to make a will. The appellants countered Clara's and Mayes's assertions that Sulia was competent through the use of letters and reports written by Clara and Mayes prior to the disability judgment. In response, Clara and Mayes testified that while Sulia was not capable of carrying on her own affairs, she demonstrated to them that she was aware of what she owned and to whom she wanted it to go. Mayes testified that Sulia was lucid at the time the will was executed and was fully aware of what she was doing. Several witnesses testified that Sulia loved her sister dearly, but did not care for her brothers or her nephews. Over the strenuous objection of the appellants, Clara and several other witnesses

related statements allegedly made by Sulia in 1993. According to this testimony, Sulia accused her father and her brothers, including Elmer, of sexually abusing her as a child. In addition, there was testimony that Sulia stated she believed that her father had killed the child which was born as a result of the alleged incest.

At the close of proof on July 31, both parties moved unsuccessfully for a directed verdict. Mr. Grohmann made his closing arguments to the jury for the appellees. It was then Mr. Dyche's turn to make closing arguments, but rather than doing so he told the jury that he could not continue because he did not believe in the appellants' case. Another member of Mr. Dyche's firm appeared and moved for a mistrial, which was denied. The jury returned with a verdict for the appellees less than two hours later. Nine of the twelve jurors found that Sulia had testamentary capacity to execute the November 15, 1993 will. The legal issues regarding interpretation of the will were submitted to the trial court for adjudication. In an order entered on October 9, 1998, the trial court found that misplaced punctuation created a latent ambiguity in the will. However, the court found that the ambiguity was simply the result of a typographical error and amended the will accordingly.[3] Shortly thereafter, the

[3] The trial court construed the will as leaving Sulia's residence to Third Avenue Baptist Church and the remainder of her property to Clara. However, the trial court did not address whether Sulia had any interest in her residence which could pass by will. Furthermore, Third Avenue Baptist had disclaimed any interest in the estate and was dismissed as a party. Since the trial court's judgment does not purport to grant any interest in the residence to the church, and since the issue has not been raised on appeal, we presume that the trial court's order merely relates to the plain meaning of the will and not to any required disposition of the residence.

trial court entered a final judgment in the case. Subsequently, the trial court overruled the appellants' motions for a new trial or for relief from the judgment. This appeal followed.

I. Sufficiency of the Evidence as to Testamentary Capacity

The appellants first argue that the trial court erred by denying their motions for a directed verdict or for judgment notwithstanding the verdict because there was no evidence that Sulia had the requisite testamentary capacity to make a will on November 15, 1993. Recently, the Kentucky Supreme Court discussed the question of testamentary capacity in a case which was factually similar to the present case. Bye v. Mattingly, Ky., 975 S.W.2d 451, (1998). In Bye v. Mattingly, the testator, William Louis McQuady, was diagnosed as suffering from Alzheimer's disease. His family members initiated disability proceedings in district court. There was considerable evidence that McQuady was unable to manage his own affairs. As in the current case, McQuady was found to be partially disabled, and the district court appointed a guardian for him.

Thereafter, McQuady's family members took him to their attorney to execute a new will. The new will set aside a previous will and left the bulk of McQuady's estate to his conservator and guardian. After McQuady died, the beneficiary under the prior will challenged the validity of the last will. She argued that the district court's judgment finding McQuady to be partially disabled precluded a finding that he had testamentary capacity. The Supreme Court disagreed, stating, in pertinent part, as follows:

In Kentucky there is a strong presumption in favor of a testator possessing adequate testamentary capacity. This presumption can only be rebutted by the strongest showing of incapacity. Williams v. Vollman, Ky.App., 738 S.W.2d 849 (1987); Taylor v. Kennedy, Ky.App., 700 S.W.2d 415, 416 (1985). Testamentary capacity is only relevant at the time of execution of a will. New v. Creamer, Ky., 275 S.W.2d 918 (1955). Thus any order purporting to render a person *per se* unable to dispose of property by will is void *ab initio*, as such a ruling on testamentary capacity would be premature. This is not to say that such an order is irrelevant, but rather it is not dispositive of the issue of testamentary capacity.

Kentucky is committed to the doctrine of "testatorial absolutism." J. Merritt, 1 Ky.Prac.--Probate Practice & Procedure, § 367 (Merritt 2d ed. West 1984). See New v. Creamer, Ky., 275 S.W.2d 918 (1955); Jackson's Ex'r v. Semones, 266 Ky. 352, 98 S.W.2d 505 (1937). The practical effect of this doctrine is that 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. American National Bank & Trust Co. v. Penner, Ky., 444 S.W.2d 751 (1969). The degree of mental capacity required to make a will is minimal. Nance v. Veazey, Ky., 312 S.W.2d 350, 354 (1958). The minimum level of mental capacity required to make a will is less than that necessary to make a deed, Creason v. Creason, Ky., 392 S.W.2d 69 (1965), or a contract. Warnick v. Childers, Ky., 282 S.W.2d 608 (1955).

To validly execute a will, a testator must: (1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose. Adams v. Calia, Ky., 433 S.W.2d 661 (1968); Waggener v. General Ass'n of Baptists, Ky., 306 S.W.2d 271 (1957); Burke v. Burke, Ky.App., 801 S.W.2d 691 (1990); Fischer v. Heckerman, Ky.App., 772 S.W.2d 642 (1989). Merely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable of

validly executing a will. Ward v. Norton, Ky., 385 S.W.2d 193 (1964). "Every man possessing the requisite mental powers may dispose of his property by will in any way he may desire, and a jury will not be permitted to overthrow it, and to make a will for him to accord with their ideas of justice and propriety." Burke v. Burke, Ky.App., 801 S.W.2d 691, 693 (1991) (citing Cecil's Ex'rs. v. Anhier, 176 Ky. 198, 195 S.W. 837, 846 (1917)).

. . . While a ruling of total or partial disability certainly is evidence of a lack of testamentary capacity, it is certainly not dispositive of the issue. This Court has upheld the rights of those afflicted with a variety of illnesses to execute valid wills. Tate v. Tate's Ex'r, Ky., 275 S.W.2d 597 (1955) (testator suffered deafness and retarded speech); Bush v. Lisle, 89 Ky. 393, 12 S.W. 762 (1889) (testator was blind); In re: McDaniel's Will, 25 Ky. 331 (1829) (testator was paralyzed); Bodine v. Bodine, 241 Ky. 706, 44 S.W.2d 840 (1932)(testator was an epileptic). We have not disturbed the testatorial privileges of those who believed in witchcraft [footnote omitted], spiritualism [footnote omitted], or atheism [footnote omitted]. While none of these cases absolutely parallels the instant case, we recite them here to demonstrate how this Court has always taken the broadest possible view of who may execute a will no matter what their infirmity.

When a testator is suffering from a mental illness which ebbs and flows in terms of its effect on the testator's mental competence, it is presumed that the testator was mentally fit when the will was executed. This is commonly referred to as the lucid interval doctrine. Warnick v. Childers, Ky., 282 S.W.2d 608, 609 (1955); Pfuelb v. Pfuelb, 275 Ky. 588, 122 S.W.2d 128 (1938). See In re Weir's Will, 39 Ky. 434 (1840); Watts v. Bullock, 11 Ky. 252 (1822). Alzheimer's is a disease that is variable in its effect on a person over time. It is precisely this type of illness with which the lucid interval doctrine was designed to deal. By employing this doctrine, citizens of the Commonwealth who suffer from a debilitating mental condition are still able to dispose of their property.

> The lucid interval doctrine is only implicated when there is evidence that a testator is suffering from a mental illness; otherwise the normal presumption in favor of testamentary capacity is operating. The burden is placed upon those who seek to overturn the will to demonstrate the lack of capacity. Warnick, 282 S.W.2d at 609; Pfuelb, 275 Ky. at 588, 122 S.W.2d at 128. The presumption created is a rebuttable one, so that evidence which demonstrates conclusively that the testator lacked testamentary capacity at the time of the execution of the will results in nullifying that will.

Bye v. Mattingly, 975 S.W.2d at 455-56.

Although there was significant evidence that McQuady suffered from Alzheimers disease and that he was frequently mentally incapacitated, the Supreme Court concluded that there also was evidence to establish that McQuady also was aware of his surroundings and circumstances at other times. Consequently, the Supreme Court concluded that there was sufficient evidence to support the presumption that McQuady had a lucid interval at the time he executed his last will.

We find that the law as set out in Bye v. Mattingly is the controlling authority on this issue. The appellants argue that there was no evidence that Sulia either knew the character and value of her estate, or that she could dispose of her estate by her own fixed purpose. They point to the extensive evidence taken during the disability proceeding of Sulia’s confusion and her inability to take care of herself. They focus on Dr. Butler’s report and testimony that Sulia was incapable of appreciating the value of money only two weeks prior to the disability judgment. They also focus on the correspondence by

Clara and Mayes which noted Sulia's poor mental and physical condition. As a result, the appellants contend that they were entitled to a judgment as a matter of law finding that Sulia lacked sufficient testamentary capacity to make a will.

It is apparent that Sulia was not able either to handle her own finances or meet her own needs on the day that she executed her will or on the following day when the district court found her to be partially disabled. This was the whole point of the disability proceeding. However, as just noted, this is not the standard for determining testamentary capacity. Bye v. Mattingly, supra. Thus, in defending the November 15 will, it was not necessary to prove that Sulia was always aware of every aspect of her estate. Furthermore, and contrary to the appellants' argument, the testimony that Sulia experienced lucid intervals was relevant to the question of her testamentary capacity. In addition, this testimony also established that during these lucid intervals, Sulia understood what property she owned, who her friends and relatives were, and how she wanted to dispose of her estate. Any question as to the credibility of the evidence was properly left to the jury. As a result, the trial court properly denied the appellants' motions for a directed verdict or for a judgment notwithstanding the verdict.

II. Improper Statements by Appellant's Attorney During Closing Argument

The appellants next argue that the trial court erred in denying their motions for a mistrial, for a new trial or for relief from the judgment due to the improper statements by their attorney during his closing argument. The sequence of events

leading up to the closing argument made by Mr. Dyche is particularly significant in this case, and we shall set it out in detail. At the close of trial on Thursday, July 30, 1998, a discussion ensued between counsel and the trial court regarding the evidence which would be presented the following day. Mr. Grohmann advised the court that he intended to present the brief testimony of three witnesses. The trial judge observed that this evidence could be presented entirely on Friday morning. Mr. Dyche agreed, stating that they could get the case to the jury by the afternoon. He further commented that he preferred making his closing arguments on Friday afternoon rather than on the following Monday because his clients were from out-of-state.

Mr. Dyche argued several substantive and procedural motions on Thursday evening and Friday morning, giving no indication that he doubted the validity of the case which he was arguing. On Friday morning, Mr. Dyche conducted a vigorous cross-examination of several of the witnesses. After the defense closed its case, the parties renewed their motions for directed verdict, which the trial court again denied. Before the trial court took a break for lunch, Mr. Grohmann advised the court that the parties were attempting to reach a settlement, and he asked for additional time during the lunch recess.[4]

For whatever reason, no such settlement was reached during the recess. The affidavits in the record by nephews

[4] Mr. Grohmann's exact statement was: "We are talking trying to get some kind of deal constructed and if the court could give us until one. I really haven't ... it takes a while for me to talk to my clients, explain everything. So as far as us doing anything, I'd like til one o'clock". During this time, Mr. Dyche nodded his assent to what Mr. Grohmann was saying.

Maurice and Glenn Edwards aver that Mr. Dyche expressed confidence to them about the outcome of the case in the appellants' favor.[5] When the trial resumed, the court finalized the instructions and made rulings on pending motions which are not at issue here. Following the jury's return to the courtroom and the reading of the instructions to the jury, Mr. Grohmann commenced his closing arguments for the appellees. At the conclusion of Mr. Grohmann's argument, Mr Dyche addressed the jury as follows:

> Thank you all. I've been complaining to my friends all week long about how tough it is to try a case against Mr. Grohmann. I've been griping around, and a lot of them are here, and I've been telling them, you know, I get, I get sick of hearing what a nice guy Mr. Grohmann is. Mr. Grohmann really is a nice guy.
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> And I'm going to get in big trouble in so many ways and with so many people when I say this. And I'm going to probably be breaking faith with a lot of people when I say this. But I am not going to stand here and break faith with myself.
>
> And I can't make this closing argument right now. And I don't think I want to make this closing argument right now. I don't think I can stand here and advocate something that I don't really believe. We've been here a long time and that's why I apologize to you and I'll start dealing with the repercussions of what I am doing right now. And they'll be serious. And I just have to say that I can't make this closing right now because I don't believe in what I am about to argue.

At this point, Mr. Dyche and Mr. Grohmann approached the bench. The trial judge made a comment which is inaudible on

[5] Maurice Edwards is Elmer's son, and Glen Edwards is Daniel's son. Although neither of these gentlemen are parties to this action, they each hold a power of attorney for their respective fathers.

the tape, and Mr. Dyche responded, "Whatever you think's appropriate, I have no idea."[6] The trial court took a short recess, admonished the jury not to discuss the case, and then went off the record. When the record resumed, Mr. Dyche's partner, Gregg Hovious, appeared for the appellants and moved for a mistrial. Mr. Grohmann objected, stating that all of the evidence had been submitted to the jury. The trial court denied the motion, selected the alternate jurors, and then submitted the case to the jury without further comment.

Prior to considering the trial court's decision to deny the motion for a mistrial, this Court wishes to state that we regard Mr. Dyche's conduct at closing arguments as entirely improper. We do not question his sincerity or his sense of personal honor regarding his decision to make these remarks during his closing argument. However, his judgment in making this decision was sorely deficient. Further, Mr. Dyche's actions were totally unnecessary. As noted above, Mr. Dyche had ample opportunity to approach the court and seek either to postpone closing arguments or to withdraw from the case. He did neither. Instead, he deliberately made statements in front of the jury which were clearly calculated to prejudice his clients' interests. Nothing in the record discloses the reasons for Mr. Dyche's actions.

Nevertheless, this appeal is not about whether Mr. Dyche should be held liable for professional negligence, or

[6] Although Mr. Dyche made this statement at the bench, it is not clear that it was outside of the hearing of the jury.

whether he should be subject to disciplinary sanction. The issue before this Court is solely whether the trial court erred in denying the appellants' motions for a mistrial, a new trial, or for relief from the judgment because of Mr. Dyche's statements in lieu of closing argument. Although there is no direct legal authority dealing with the consequences of such actions by trial counsel, this Court, as did the trial court, may consider the legal issues presented by looking to the rules and the analogous cases regarding mistrials and motions for a new trial.

From the outset, we find that CR 60.02 relief is not available in cases such as this. In Young v. Edward Technology Group, Inc., Ky. App., 918 S.W.2d 229 (1995), the court stated as follows:

> The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court. Davis v. Home Idem. Co., Ky., 659 S.W.2d 185 (1983).

Id. at 231. See also Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998); and Berry v. Cabinet for Families & Children, Ky., 998 S.W.2d 464, 467 (1999). Because the issue was before the trial court and made subject to the trial court's ruling, relief by way of CR 60.02 was unavailable. See also McQueen v. Commonwealth, Ky., 948 S.W.2d 415 (1997), wherein the Kentucky Supreme Court stated that "CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." Id. at 416. Furthermore, even if CR 60.02 relief

were available, it would not be appropriate in this case due to the absence of the relevant factors stated in Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957).[7]

Because CR 60.02 relief is not available to the appellants, the remaining question is whether they are entitled to relief due to the trial court's denial of their mistrial and new trial motions. The standards of review for the trial court's rulings on these motions are the same: a trial court's denial of motions for mistrial and a new trial "cannot be disturbed absent an abuse of discretion." Gould v. Charlton Co., Inc., Ky. 929 S.W.2d 734, 741 (1996). Based upon the overwhelming weight of authority, we conclude that the trial court did not abuse its discretion in this case.

The trial court relied heavily on this Court's opinion in Vanhook v. Stanford-Lincoln City Rescue Squad, Ky. App., 678 S.W.2d 797 (1984), in denying the appellants' motions for a mistrial or for a new trial. In Vanhook, the intervening plaintiffs' attorney failed to appear in court for trial. As a result, their complaint was dismissed at the close of the trial, and the trial court denied their motions for a new trial pursuant to CR 59.01(c) or for relief from the judgment pursuant to CR 60.02(a) or (f).

This Court affirmed the denial of their motions, holding that "[n]egligence of an attorney is imputable to the

[7] The court in Fortney stated that "[t]wo of the factors to be considered by the trial court in exercising its discretion are whether the movant had a fair opportunity to present his claim at trial on the merits and whether the granting of the relief sought would be inequitable to the other parties." Id. at 843.

client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f)". Id. at 799. In reaching this conclusion, the Vanhook court quoted from Link v. Wabash Railroad Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), in which the United States Supreme Court, while discussing a similar problem, stated as follows:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unfair penalty on the client. Petitioner voluntarily chose this attorney as his representative and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent.

Id. 370 U.S. at 633-34.

Furthermore, Vanhook followed a line of Kentucky cases holding that neglect, mistake or bad advice of counsel are imputable to the client and are not grounds for granting a new trial.[8] Consequently, even if the cases cited by the appellants from other jurisdictions were not distinguishable, we would be bound by the precedents established by the appellate courts of this state.

Although the Kentucky cases previously cited deal with negligence of an attorney rather than an intentional act such as

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[8] See Modern Heating & Supply Co. v. Ohio Bank Bldg. & Equipment Co., Ky., 451 S.W.2d 401 (1970); Fortney v. Mahan, supra; McKay v. McKay, Ky., 260 S.W.2d 945 (1953); Saint Paul-Mercury Indemnity Co. v. Robertson, Ky., 313 Ky. 239, 230 S.W.2d 436 (1950); Gorin v. Gorin, 292 Ky. 562, 167 S.W.2d 52 (1942); Douthitt v. Guardian Life Insurance Company of America, 235 Ky. 328, 31 S.W.2d 377 (1930); and McGuire v. Mishawaka Woolen Mills, 218 Ky. 530, 291 S.W. 747 (1927).

this case, we conclude that the same principle applies. In Clark v. Burden, Ky., 917 S.W.2d 574 (1996), a plaintiff in a personal injury action sought to set aside a settlement agreement made without authorization by her attorney. The Supreme Court of Kentucky acknowledged that the attorney's conduct in accepting a settlement offer without notifying his client was unethical. Furthermore, the Court also noted the firm line of authority which "holds that with respect to settlement, attorneys are without power to bind their clients". Id. at 576. Nevertheless, the Supreme Court concluded that a client may be bound by her attorney's unauthorized settlement of a claim when the rights of innocent third parties are adversely affected. Id. at 577.

In the present case, there is not even a suggestion that the appellees were responsible for Mr. Dyche's statements during his closing argument. Were this court to set aside the jury verdict, the appellees would suffer a substantial and unfair prejudice. The appellees would be required to defend against the appellants' claims once again, through no fault of their own and after receiving a jury verdict in their favor. Accordingly, the drastic remedy of a mistrial was not appropriate in this case. Furthermore, the appellants' counsel's actions were not the sort of "surprise" contemplated by CR 59.01(c) so as to afford relief under that rule.

Finally, we recognize that the facts of this case are egregious, and that the appellants were seriously prejudiced by their counsel's statements. However, there is no way to draw a consistent exception to the general rule that each party is bound

by the actions of his or her attorney. If we allow a mistrial based upon intentional misconduct by an attorney, we would be creating a possible appeal in nearly every civil case. No party to a judgment would have finality. The alternative, a claim against one's own counsel, would have to be a separate action. However, the original action would be final, and at least one side could move on with their lives. Therefore, we hold that the trial court did not abuse its discretion in denying the appellants' mistrial and new trial motions.

III. Admissibility of hearsay statements allegedly made by Sulia

The final argument raised by the appellants is that the trial court erred in allowing hearsay testimony about statements allegedly made by Sulia which accused her father and brothers of incest, rape, and infanticide. As a preliminary matter, we have problems with the manner in which this issue is presented. CR 76.12(4)(c)(iii) requires an appellate brief to contain:

> A "STATEMENT OF THE CASE" consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed tape-recordings, supporting each of the statements narrated in the summary.

The appellants' brief contains no reference to the locations of the testimony at issue. This testimony was gathered over the course of a four-day trial and is found at widely dispersed intervals in the video tape record. Indeed, the testimony of Clara Hill, about which the appellants complain the most, was heard over the course of several hours on the morning

of July 29, 1998. This Court has stated in the past that it will not search a record for testimony where the proffering party provides no reference to the transcript or to digital counter numbers on an untranscribed tape to support his position. Ventors v. Watts, Ky. App. 686 S.W.2d 833, 835 (1985). We see no need to alter that practice for this case.

Nevertheless, while a citation to the precise testimony at issue would be helpful, it is not absolutely necessary to a consideration of the issues presented. This evidence was the subject of a pre-trial motion in limine, which preserved the issue for our review. Furthermore, there is no dispute concerning the testimony about which the appellants object. As previously noted, several witnesses recounted for the jury statements made by Sulia in 1993 and 1994[9] accusing her father and brothers of molesting her as a child. Sulia allegedly told these witnesses that she had become pregnant by her father, had a child, and that the child died at the age of two months under suspicious circumstances. Clara confirmed these accounts, both from her conversations with Sulia and from her own recollections as a child.

The appellants strenuously argue that this testimony should have been excluded as unreliable hearsay. We disagree. Kentucky Rule of Evidence (KRE) 801(c) defines "hearsay" as:

> a statement, other than one made by the declarant while testifying at the trial or

[9] This statements came in through the testimony of Alice Johnston, one of Sulia's caretakers in 1993 and 1994, B.J. Mayes, and Alvera Kegal, an expert witness who interviewed Sulia as part of the disability action.

> hearing, offered in evidence to prove the truth of the matter asserted.

Clara's statements from her own memory which support Sulia's allegations are not hearsay. Moreover, the other testimony which related to Sulia's allegations also was not hearsay because it was not being offered for the truth of the matter asserted. The appellees were not trying to prove that Sulia's father and brothers molested her as a child. Rather, the statements were being offered to prove that Sulia recognized the natural objects of her bounty and she was able to dispose of her estate according to her own fixed plan. Accordingly, the statements were properly admitted since they were being offered for legitimate, non-hearsay purpose. Moseley v. Commonwealth, Ky., 960 S.W.2d 460, 461-62.

Furthermore, even if the statements were hearsay, they were properly admitted under the exception to the hearsay rule contained in KRE 803(3).[10] The appellants contend that the testimony regarding Sulia's allegations of incest and infanticide should have been excluded because it was unreliable. The

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[10] KRE 803(3) includes in the list of hearsay statements admissible "even though the declarant is available as a witness":

> 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.* (Emphasis added).

appellants strongly assert that the accusations allegedly made by Sulia were false memories planted by Clara to turn Sulia against them, or that the charges were products of Sulia’s disordered and confused mind. However, the appellants fail to distinguish between the trial court’s role in determining the reliability of the statements and the jury’s role in determining their credibility. All that KRE 803 contemplates is that a party offering such evidence must lay a sufficient foundation to show the relevance and reliability of the hearsay statements: i.e.; that circumstances surrounding the way the statements were elicited evinces their trustworthiness. Jones v. Commonwealth, Ky., 833 S.W.2d 839, 841 (1992).[11] The circumstances surrounding the declarations and the motivation behind such declarations are primary factors in the court's determination of reliability. Bell v. Commonwealth, Ky., 875 S.W.2d 882, 887 (1994). See also Hellstrom v. Commonwealth, Ky., 825 S.W.2d 612, 615 (1992).

The appellants had the opportunity to cross-examine Clara and the other witnesses regarding the allegations. They raised significant issues regarding contrary statements made by Clara and by B.J. Mayes about Sulia’s lucidity. Nonetheless, the record indicates that the witnesses testified to the circumstances under which Sulia allegedly made these statements.

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[11] Jones v. Commonwealth, supra, considered the admissibility under KRE 803(4) of statements made by an alleged sexual abuse victim to a physician. Although the analysis under this rule may be somewhat different, we agree with the general principle that the party seeking to introduce hearsay under any of the exceptions set out in KRE 803 must first lay the proper foundation for its introduction by demonstrating its reliability and trustworthiness.

The trial court had an opportunity to determine whether the appellants laid a proper foundation to establish the reliability of the testimony. The absence of specific references to the record impedes this Court's closer examination of the issue. Under the circumstances, we are satisfied that the appellees laid an adequate foundation showing indicia of reliability for the statements which justified their admission.

The more significant issue presented in this case is whether the evidence was so unfairly prejudicial to the appellants as to outweigh its probative value. We agree with the appellants' citation of the applicable principles as set out in Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996):

> However, the admissibility of the above evidence must further be examined pursuant to the guidelines outlined in KRE 401 and KRE 403. Relevant evidence, defined in KRE 401, "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." A decision by the trial court will not be disturbed in the absence of an abuse of discretion. KRE 403 provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."
>
> According to [Robert Lawson, The Kentucky Evidence Law Handbook,] 2.10 [(3d ed. 1993)].
>
>> The following judgments are required by the equation formulated in KRE 403: (i) assessment of the probative worth of the evidence whose exclusion is sought; (ii) assessment of the probable impact of specified undesirable consequences likely to flow from its admission (i.e., "undue prejudice, confusion of the

> issues, or misleading the jury, ... undue delay, or needless presentation of cumulative evidence");
> and (iii) a determination of whether the product of the second judgment (harmful effects from admission) exceeds the product of the first judgment (probative worth of evidence.)

Id. at 56. Partin v. Commonwealth, 918 S.W.2d at 222.

Clearly, allegations of incest and infanticide were highly scandalous and incendiary. However, as previously discussed, the evidence was probative as to Sulia's testamentary capacity, which the appellants placed at issue. In addition to the medical and lay testimony regarding Sulia's mental condition at the time she executed the will, the appellants questioned why Sulia would leave the bulk of her estate to a sister she rarely saw, rather than to her two surviving brothers and their children, with whom she had visited and corresponded over the years.[12] The appellants also presented evidence regarding Sulia's supposedly amicable relationship with her brothers.

The appellees were entitled to present specific reasons to rebut that testimony. The testimony offered detailing Sulia's memories of sexual abuse at the hands of her father and brothers

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[12] However, the appellants' assertion that Sulia's devise to Clara was somehow "unnatural" is not relevant to a determination of her testamentary capacity. It is natural that a person recognizes his relatives as the objects of his bounty unless there is some reason not to do so. Sutton v. Combs, Ky., 419 S.W.2d 775, 776 (1967). However, there is no presumption that certain relatives should be considered natural objects of a testator's bounty more than others. *See* Rakhman v. Zusstone, Ky., 957 S.W.2d 241 (1997). Apart from the issues of undue influence and overreaching, there is no reason to assume that Sulia's devise to her sister Clara would be considered any more unnatural than would be a devise to brothers Elmer, Daniel or to her nephews. Every person possessing the requisite mental powers may dispose of his or her property by will in any way which he or she may desire. Bye v. Mattingly, 975 S.W.2d at 456. Where the testator is competent to make a will and is not under any improper influence, the reasons for any particular disposition are largely irrelevant.

(one of whom was apparently Elmer) was relevant to show the reasons why Sulia would be disinclined to leave her estate to her brothers. There was also testimony that Sulia had become disillusioned with one of her nephews and that she did care for the others. All of this evidence was relevant to the essential issues of whether Sulia was able to recognize the natural objects of her bounty and whether she was able to dispose of her estate according to her own fixed purpose.

We are disturbed by certain aspects of the use of this testimony. The allegations concern events which allegedly occurred over 70 years ago. At this late date, there is no way to prove or disprove such charges. The appellees' closing argument, as well as their brief to this Court, directly ask the question, "[w]hat were Sulia's 'natural obligations' to a brother who raped her as a child?" Appellee's brief, p. 10. Such statements push fair commentary on the evidence to its limits.

Nonetheless, that issue is not presented to this Court. The question presented is whether the trial court abused its discretion in finding that the probative value of the testimony was not outweighed by its prejudicial effect. The lower court had a full opportunity to consider the evidence in context both before and during trial. Based on that assessment, the trial court found that the probative value of that evidence outweighed its prejudicial effect. We cannot say that the trial court abused its discretion in reaching this conclusion.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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