

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002405-MR

MURVELLA HARRIS FERLAND, Heir,  
and CARLIN L. HARRIS, Heir

APPELLANTS

v. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 01-CI-00533

DELORA KRAUS, Heir; DAVID KRAUS,  
Co-Executor; DELMAR H. FRALEY,  
Co-Executor; LIDOLA HARRIS  
WEBSTER, Heir; CARLOS HARRIS;  
TRINITY HARRIS; and  
NATHAN HARRIS

APPELLEES

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART,  
AND  
REMANDING

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BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Murvella Harris Ferland and Carlin L. Harris,  
children and heirs of Bascom Harris, appeal from an order of the  
Floyd Circuit Court dismissing significant portions of their  
complaint and amended complaint against the co-executors of

Bascom Harris's estate and Delora Kraus, another child and heir of Bascom Harris. We affirm in part, reverse in part, and remand.

Bascom Harris died on April 26, 2000. At the time of his death, he was 82 years old. The five children that survived Harris are Murvella Harris Ferland (appellant), Carlin L. Harris (appellant), Rita Harris, Lidola Harris Webster, and Delora Kraus (appellee). One son of Bascom Harris, Wilven Bascom Harris, predeceased Bascom Harris. The children of Wilven Bascom Harris are Carlos Harris, Trinity Harris, and Nathan Harris. Bascom Harris had been married twice. All six of his children were born of the first marriage. Harris's first marriage ended in divorce, and his second wife predeceased him.

On May 25, 2000, Harris's will was probated in the Floyd District Court. David Kraus, who was the husband of Delora Kraus, and Delmar H. Fraley, Harris's accountant, were appointed co-executors of the estate. In his will, Harris left the farm, farm equipment, furniture, and furnishings to his daughter, Delora Kraus. He left tangible personal property to all his children, and he left the residue in trust to the children except for Delora Kraus. A trust, which was funded by certificates of deposit totaling approximately \$530,000, was established for the benefit of the children *per stirpes* other than Delora Kraus. A proposed final settlement of the estate

was filed on May 9, 2001, and the settlement was approved and confirmed by the Floyd District Court in an order entered on June 14, 2001.

On June 20, 2001, three of Harris's children (Murvella Harris Ferland, Rita Harris, and Carlin L. Harris) filed a civil complaint in the Floyd Circuit Court against Delora and David Kraus and Delmar H. Fraley. The complaint described the "NATURE OF THE ACTION" as follows:

This is a civil action contesting the Will and the Power of Attorney of Bascom Harris due to the undue influences of defendants on Testator when he was incompetent; for an accounting of the deceased's assets and transactions; for an accounting of the specific medication and medical care provided to deceased prior to his death; and for monetary damages.

The complaint alleged that on January 4, 2000, Delora Kraus took Harris to a law firm and influenced him to execute a new will, a living will, and a durable power of attorney. Delora Kraus was named by Harris as his power of attorney. The complaint alleged that Harris was incompetent and subjected to the undue influence of Delora Kraus and Delmar H. Fraley at the time he executed the documents. The complaint further alleged that the Krauses were medicating Harris with Oxycontin near the end of his life.

The complaint demanded that the will and power of attorney be declared invalid due to lack of testamentary capacity and undue influence, that the defendants give an

accounting of all financial transactions between them and Harris, that all important papers be produced, and that the defendants give an accounting of all medications and medical care provided to Harris prior to his death.

On July 19, 2001, the defendants/appellees filed a motion to dismiss the complaint. The main basis of the motion was that the court lacked subject matter jurisdiction because no adversary proceeding concerning the settlement of the estate had been filed within 30 days of the order of the Floyd District Court approving the final settlement. To support the argument, the appellees cited KRS<sup>1</sup> 395.617(2) which states that "[a]n aggrieved party may, no later than thirty (30) days from the entry of the order upon the proposed settlement, institute an adversary proceeding in Circuit Court pursuant to KRS 24A.120(1)(b)." KRS 24A.120(1)(b) gives the district courts exclusive jurisdiction in "[m]atters involving probate, except matters contested in an adversary proceeding." The statute further provides that adversary proceedings "shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal." Id.

Following the filing of the appellees' motion to dismiss, the appellants filed a motion to amend their complaint. A 24-page amended complaint was attached to the motion. Count I

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<sup>1</sup> Kentucky Revised Statutes.

of the amended complaint alleged that the will and power of attorney were invalid. Count II alleged wrongful acts by the appellees and requested an accounting of financial transactions as well as a "medical accounting." Count III alleged mismanagement of the estate by the co-executors. Finally, Count IV alleged breach of fiduciary duties by the co-executors and by Delora Kraus.

In an order entered on August 30, 2001, the Floyd Circuit Court granted the appellants' motion to amend their complaint to the extent that the amended complaint related to a will contest pursuant to KRS 394.240. However, the court dismissed all claims in the complaint and the amended complaint, including the adversary proceeding claim under KRS 395.617(2), except the will contest claim. Upon the trial court's denial of the appellants' motion to alter, amend, or vacate the order, this appeal followed.

The appellants argue that the circuit court erred in dismissing all their claims with the exception of the will contest. Their main argument is that they filed an adversary proceeding concerning the estate within 30 days from the entry of the final settlement in the district court as required by KRS 395.617(2). As we have noted, the settlement of the estate became final by an order of the district court dated June 14, 2001. Although the initial complaint was filed in the circuit

court on June 20, 2001, that complaint did not contain allegations amounting to an adversary proceeding challenging the final settlement under KRS 395.617(2).<sup>2</sup> Such adversary proceeding challenging the final settlement was first mentioned in the motion to file amended complaint which was filed on August 14, 2001, 61 days after the district court order approving the final settlement of the estate.

The appellants argue as follows:

The Appellants' Motion To File Amended Complaint was filed within the 30-day period required by KRS 395.617 for an adversary proceeding. Moreover, under CR 15.03 the expanded claims in the Amended Complaint relate back to the date of the original Complaint filed on June 20, 2001.

There are two problems with this argument. First, the appellants' motion to file an amended complaint was not filed within the 30-day period required by KRS 395.617(2). As we have noted, the motion to file an amended complaint was filed 61 days after the district court order. Second, CR<sup>3</sup> 15.03 is not applicable. That rule provides in relevant part that "[w]henver the claim or defense asserted in the amended

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<sup>2</sup> Three factors make it obvious that the original complaint did not raise an adversary proceeding challenging the final settlement of the estate. First, the statute, KRS 395.617(2), was not mentioned in the complaint. Second, there was no specific attack on the final settlement in the district court. Third, the co-executors were not named in their official capacities as parties in the original complaint.

<sup>3</sup> Kentucky Rules of Civil Procedure.

pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." CR 15.03(1). The appellants have cited no authority and made no specific argument to support their conclusion that their cause of action under KRS 395.617(2) relates back to their original complaint.

To the contrary, case law addressing the "relates back" argument demonstrates it would not apply in this case. The court in City of Ashland v. Brown's Adm'x., 290 Ky. 740, 162 S.W.2d 552, 554 (1942), noted that "[w]here, however, the amendment introduces a new cause of action or one which is different and distinct from that originally set up, the new pleading is deemed equivalent to the bringing of a new action, and there is no relation back[.]" (Citation omitted.) In that case, the amended pleading was merely used to correct deficiencies in a contract claim set out in the original pleading. Id. at 553. The application of "relates back" was addressed again in the more recent case of Perkins v. Rend, Ky., 616 S.W.2d 495 (1981). In that case the plaintiff, who had been involved in a head-on collision with the defendant, originally sought recovery for the wrongful death of her husband and for the damages to her vehicle. Id. The plaintiff subsequently sought to amend her complaint in order to recover for the

injuries she sustained in the accident. Id. In allowing the claim to relate back, the court noted that under CR 15.03, "the important consideration is not whether the amended pleading presents a new claim or defense, but whether the amendment relates to the general factual situation which is the basis of the original controversy." (Citation omitted.) Id. at 496. See also Wimsatt v. Haydon Oil Co., Ky., 414 S.W.2d 908 (1967).

In the case *sub judice*, the facts and circumstances raised in the original complaint surrounded the execution of the will and power of attorney, the transactions made under the power of attorney, and the medication and care provided to Bascom Harris. While the amended complaint attempted to correct any deficiencies in these claims, it also added separate and distinct claims concerning the facts and circumstances occurring subsequent to Harris's death. In particular, the amended complaint added claims challenging the final settlement entered by the district court. As the "relates back" argument fails, we conclude that the appellants' cause of action pursuant to KRS 395.617(2) was properly dismissed by the circuit court for failure to file it within 30 days of the June 14, 2001, order of the Floyd District Court approving the final settlement.

The portion of the appellants' complaint and amended complaint against the co-executors of the estate for mismanagement, breach of fiduciary duty, and financial

accounting were also properly dismissed by the circuit court. Kentucky courts have held that these type of actions fall under KRS 395.510(1) as actions for the settlement of estates. See Myers v. State Bank & Trust Co., Ky., 307 S.W.2d 933 (1957). Because the settlement of this estate was already final and because an adversary proceeding challenging the settlement under KRS 395.617(2) was not filed in a timely manner, the appellants were precluded from further pursuing their action against the co-executors for mismanagement, breach of fiduciary duty, and financial accounting.

The remaining cause of action alleged by the appellants was against Delora Kraus as attorney-in-fact for Bascum Harris. The complaint alleged that the power of attorney was invalid due to Harris's incompetence and the undue influence of Kraus. Further, the amended complaint alleged that Kraus breached her fiduciary duties in connection with serving as Harris's attorney-in-fact. These causes of action against Kraus are separate and distinct from actions concerning the settlement of the estate. Such causes of actions by heirs against a person serving as attorney-in-fact were expressly allowed by the Kentucky Supreme Court in Priestley v. Priestley, Ky., 949 S.W.2d 594 (1997), where the action was brought by the heirs following the death of the person for whom the attorney-in-fact had served.

Therefore, we affirm in part, reverse in part, and remand to the circuit court for further proceedings concerning the appellants' will contest claim and the claim against Delora Kraus as attorney-in-fact for Bascum Harris.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Harry D. Williams  
Paintsville, Kentucky

BRIEF FOR APPELLEE, DELORA  
KRAUS:

William G. Francis  
Prestonsburg, Kentucky

BRIEF FOR APPELLEES, DAVID  
KRAUS and DELMAR H. FRALEY:

Christopher A. Dawson  
Ashland, Kentucky