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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002471-MR

DODD & DODD ATTORNEYS, PLLC — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH McDONALD-BURKMAN, JUDGE
ACTION NO. 01-CI-001718

WILLIAM R. BURKETT, JR; HEATHER BURKETT; WILLIAM R. BURKETT, III; ESTATE OF DOROTHY BURKETT, (ALLEN P. DODD III AND MARTIN N. KUTE, PSC, CO-ADMINISTRATORS); ESTATE OF WILLIAM R. BURKETT, SR (ALLEN P. DODD III AND MARTIN N. KUTE, PSC, CO-ADMINISTRATORS); AND MARY ALICE RAISOR — APPELLEES

and NO. 2001-CA-002561-MR

WILLIAM R. BURKETT, III; AND HEATHER BURKETT — CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH McDONALD-BURKMAN, JUDGE
ACTION NO. 01-CI-001718

MARY ALICE RAISOR AND WILLIAM R. BURKETT, JR — CROSS-APPELLEES

OPINION
AFFIRMING IN PART
REVERSING IN PART,
AND REMANDING
** ** ** ** **

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: Heather Burkett and William R. Burkett, III, named beneficiaries in a will their grandfather executed in 1985, seek to intervene in the action their father commenced to test the validity of that will. By orders entered September 17, 2001, and October 11, 2001, the Jefferson Circuit Court denied their request. The grandchildren contend that the denial was an abuse of the trial court's discretion. We agree and so reverse and remand.

William R. Burkett, Sr., died on February 13, 2001. He was survived by his wife, Dorothy Burkett, and by his son, William, Jr. For several years prior to William Sr.'s death, he had employed a caretaker, Mary Alice Raisor, to assist him with housekeeping and with the care of Dorothy, who suffered from Alzheimer's disease. Raisor claims that in 1999 William Sr. executed trusts and a will leaving virtually all of his estate (in excess, apparently, of $600,000.00) to her. On March 9, 2001, William Jr. filed suit in Jefferson Circuit Court contesting Raisor's claim and seeking a declaration as to the validity of Raisor's alleged instruments as well as a 1985 will in which William Sr. left his estate to Dorothy if she survived

him for ninety days and otherwise to William Jr., William III, and Heather. While the suit was pending, on April 1, 2001, less than ninety days after William Sr.'s death, Dorothy died. Her estate, too, it is alleged, passes to Raisor under the 1999 instruments and to William Jr., William III, and Heather under a 1985 will the companion to William Sr.'s.

Notwithstanding the fact that upon Dorothy's death William III and Heather became beneficiaries with present interests under the 1985 wills, neither William Jr. nor Raisor moved to join them in the suit or served them with formal notice. Instead, on May 10, 2001, William Jr. and Raisor agreed to divide the estates evenly between themselves and to submit the 1985 wills to probate. By agreed judgment entered May 11, 2001, the circuit court approved the settlement.

On June 25, 2001, William III and Heather moved, ostensibly under CR 60.02, to intervene in the suit and to have the settlement vacated or at least to have their rights under the 1985 wills declared. As noted above, the trial court denied their motion. The court explained that "because Movants are not party to this action, Movants have no standing to bring a motion under CR 60.02, and the Court has no jurisdiction to determine their substantive rights." It is from that determination that William III and Heather have appealed.

As far as it goes, the trial court's ruling is correct. A non-party does not have standing to invoke CR 60.02. A non-party whose interests are sufficiently affected by a law suit may intervene in the suit, however, in some circumstances even after judgment has been entered. Intervention is governed by CR 24, not CR 60.02. Notwithstanding their invocation of the later rule, William III and Heather clearly sought intervention and duly referred to CR 24 as well. The trial court's ruling erroneously ignores their request to intervene.

CR 24.01 provides in part that

> [u]pon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

Obviously William III and Heather claim a sufficient interest in their grandfather's and his wife's estates to invoke this rule,[1] and just as obviously William Jr.'s suit solely on his own behalf did not adequately represent William III's and Heather's interests.[2] But was their application for intervention

[1] West v. Goldstein, Ky., 830 S.W.2d 379 (1992); Ambassador College v. Combs, Ky., 636 S.W.2d 305 (1982).
[2] Lischy v. Schrader, 104 Ky. 657, 47 S.W. 611 (1898).

timely, coming as it did some forty-one days after entry of the agreed judgment? Post-judgment intervenors bear "a special burden of justifying the apparent lack of timeliness."[3]

In assessing an intervention's timeliness, courts have found consideration of the following factors helpful:

> (1)the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.[4]

Here, of course, the suit has progressed to judgment, but judgment was entered only two months after the suit was filed. William III and Heather seek to prevent what they believe is the misappropriation of substantial testamentary gifts from their grandfather, a valid purpose with a firm claim.

Although William III and Heather were aware of Raisor's claims and of their father's suit challenging them, they did not, they assert, see their grandfather's 1985 will or

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[3] Monticello Electric Plant Board v. Board of Education of Wayne County, Ky., 310 S.W.2d 272, 274 (1958).

[4] Cuyahoga Valley Railway Company v. Tracey, 6 F.3d 389, 396 (6th Cir. 1993).

know of its gifts to them until after the settlement was entered, at which time they immediately sought local counsel (they are residents of Washington state) and in little over a month filed their motion to intervene. They have thus asserted their rights with reasonable promptness. Their intervention, furthermore, will not unduly prejudice either William Jr. or Raisor, both of whom should have recognized that the grandchildren's interests required express consideration.

Unlike most final judgments, moreover, which enjoy a strong presumption of correctness, this judgment is subject to KRS 394.280. A person interested in a will contest but not served or made a party to the contest may, under that statute, "within three (3) years after the final decision in the Circuit Court, by petition in equity, impeach the decision and have a retrial of the question." The general assembly, in other words, has sought to discourage settlements, such as the one before us, among only some of the persons interested in a decedent's estate by making it possible for excluded beneficiaries to reopen the matter. The statute is an unusual circumstance strongly favoring the grandchildren's intervention.

For these reasons, we conclude that William III and Heather's motion to intervene was timely and should have been granted, notwithstanding the fact that the agreed judgment was already final.

Because William III and Heather have not yet become parties in the trial court, this Court's jurisdiction extends no further than their motion to intervene.[5] We express no opinion as to the merits of their claim. Upon remand, the trial court will permit William III and Heather to file an intervening complaint, in compliance with CR 24.03, which shall then be responded to and tried according to the civil rules.

William Jr.'s former attorney, Allen Dodd, III, has also appealed from the trial court's order. William Jr. apparently agreed to pay Dodd fifty-percent of any amount William Jr. recovered. Dodd claims that William Jr.'s recovery is the half of the estate apportioned to him under the agreement with Raisor, regardless of whether William Jr. shares that half with William III and Heather. The trial court denied Dodd's motion for a ruling to that effect on the ground that William III and Heather had not been made parties. We agree with the trial court that William III and Heather are entitled to an opportunity to respond to Dodd's claim, just as they are entitled to an opportunity to respond to the purported agreement between their father and Raisor. Their intervention will give them those opportunities. In the meantime, Dodd's motion is premature.

[5] Ashland Public Library Board of Trustees v. Scott, Ky., 610 S.W.2d 895 (1981).

Accordingly, we reverse the September 17, 2001, order of the Jefferson Circuit Court denying William Burkett III and Heather Burkett's motion to intervene, affirm that order to the extent that it denies attorney Dodd's motion for fees, and remand the matter to the Jefferson Circuit Court for additional proceedings consistent with this opinion.

BAKER, JUDGE, CONCURS WITH RESULT.

GUIDUGLI, JUDGE, CONCURS.

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