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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000350-MR

TRACEY CRAMER AND PAUL B. CRAMER, III, IN THEIR INDIVIDUAL CAPACITIES AND AS CO-EXECUTORS OF THE ESTATE OF PAUL B. CRAMER, JR. — APPELLANTS

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 00-CI-00017

GAYLE L. POWELL — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE. Tracey Cramer (Tracey) and her brother, Paul Benton Cramer, III (Benton), appeal from Clark Circuit Court's judgment of January 14, 2002, in which a jury found that the document dated December 2, 1997 that had previously been probated in the Clark District Court as the Last Will and

Testament of Paul B. Cramer, Jr. (Paul), was not Paul's true Last Will and Testament.

On appeal, Tracey and Benton, Paul's children, argue that the Clark Circuit Court erred when it failed to grant either a directed verdict or a judgment notwithstanding the verdict because the record contains no evidence that Paul lacked testamentary capacity nor does the record contain evidence of undue influence. Tracey and Benton argue that the admission of attorney Turney Berry's testimony was prejudicial, that the admission of Paul's purported 1991 holographic will was prejudicial and also the admission of the settlement agreement between Tracey and Benton was prejudicial. Finding that the circuit court should have granted a directed verdict in Tracey's and Benton's favor, we reverse and remand.

As the record reveals, Paul B. Cramer, Jr. led an interesting life before his death in August of 1999 of a brain tumor. Paul was born in Virginia in 1926. During the early 1950's, he attended the University of Kentucky, and, while there, met Carol Mangione (Mangione), who became one of his life long friends. After college, Paul joined the U.S. Navy and flew jet fighters during the Korean Conflict. After he left the Navy, Paul became a commercial airline pilot. Sometime in the 1950's, Paul eventually met his first wife, Daneen. They married and had two children, Benton, born in 1958, and Tracey,

born in 1961. During the 1960's, Paul and Daneen divorced, reconciled briefly and then divorced again. During the 1970's, Paul lived on a farm in Virginia and raised horses, one of his lifelong passions. In 1977, while visiting Hamburg Place, Paul met and began a romantic relationship with Gayle Powell (Gayle). In 1987, Paul moved to Kentucky and bought a horse farm in Clark County. Gayle eventually moved into a mobile home on Paul's property, although at times she lived with Paul in the main house, and helped Paul tend his horses. In early 1998 Paul evicted Gayle from his property.

On May 29, 1995, a longtime friend, George Hastings (Hastings), and his new wife, Carol, visited Paul at his farm.[1] While there, Hastings was shot and killed. In 1996, Paul was indicted for and later convicted of manslaughter in the second degree. He was sentenced to seven years. On June 28, 1997, while free pending appeal, Paul suffered a severe stroke. As a result, he suffered from aphasia, the inability to speak. Paul, however, was able to perform many day-to-day activities, such as grocery shopping, driving and tending to his horses.

After Paul's stroke, Carol Mangione began to spend more time with Paul and helped him with certain legal matters. In November of 1997, Mangione helped Paul file eviction proceedings against Gayle. With Carol's help, Paul went to see

[1] There is no evidence in the record that Carol Hastings was the same person as Carol Mangione.

Marvin Clem (Clem), an attorney, so that he could make a will. On December 2, 1997, Mangione took Paul to Clem's Lexington office to review and execute the will. While there, Mangione attended the meeting between Paul and Clem and acted as Paul's interpreter. The record reveals that Paul read the will and signed it. In the 1997 will, Paul left his entire estate to his daughter, Tracey.

In June of 1998, this Court affirmed Paul's conviction for manslaughter, and in August of 1998, Paul began serving his seven-year prison sentence. On August 23, 1999, Paul died of an aggressive brain tumor.

On October 20, 1999, Tracey submitted the 1997 will to the Clark District Court for probate. Subsequently, Gayle came forward with an holographic will dated June 15, 1991, which also purported to be Paul's last will and testament. According to the 1991 will, Gayle was to receive Paul's entire estate, except for the needs of his stepmother, Helen Cramer, until Helen's death.

On January 12, 2000, Gayle filed suit in the Clark Circuit Court against Tracey and Benton and claimed that the 1997 will was not Paul's true last will and testament arguing that Paul lacked testamentary capacity and had been unduly influenced by Carol Mangione. After a three and half day trial, a jury found that the 1997 will was not Paul's last will and

testament. The Clark Circuit Court entered its judgment to that effect on November 6, 2001, and remanded the matter to the Clark District Court, Probate Division, presumably to take up the matter of the 1991 holographic will. This appeal followed.

On appeal, Tracey and Benton argue that the Clark Circuit Court erred when it failed to grant them a directed verdict or in the alternative, failed to grant a judgment notwithstanding the verdict regarding the issue of testamentary capacity. Citing Bye v. Mattingly, Ky., 975 S.W.2d 451 (1998), Tracey and Benton argue that Gayle presented no evidence that that Paul lacked testamentary capacity. Tracey and Benton cite the testimony of numerous lay witnesses who testified that, after the stroke, Paul was still capable of engaging in normal day-to-day activities such as driving, shopping and tending his horses and argue that since Paul could engage in such activities, he still possessed his testamentary capacity. Furthermore, according to Tracey and Benton, every physician that testified regarding Paul merely opined that he suffered from aphasia, the inability to speak. Alternatively, Tracey and Benton argue that even if Paul had been mentally ill in late 1997, he still had the necessary capacity to make a will due to the lucid interval doctrine. Although Tracey and Benton admit that Dr. Kathleen Riggs, Paul's former psychiatrist, testified that due to the stroke, Paul suffered from an organic brain

syndrome, they argue that this did not rebut the presumption raised by the lucid interval doctrine that Paul possessed testamentary capacity when the 1997 will was executed.

Also, Tracey and Benton argue that the Clark Circuit Court erred when it failed to grant a directed verdict or in the alternative, failed to grant a judgment notwithstanding the verdict regarding the issue of undue influence. According to the Supreme Court of Kentucky:

> Undue influence is a level of persuasion which [sic] destroys the testator's free will and replaces it with the desires of the influencer. In discerning whether influence on a given testator is "undue", courts must examine both the nature and the extent of the influence. First, the influence must be of a type which [sic] is inappropriate. Influence from acts of kindness, appeals to feeling, or arguments addressed to the understanding of the testator are permissible. Influence from threats, coercion and the like are improper and not permitted by law. (Citations omitted.) Bye v. Mattingly, supra at 457.

Tracey and Benton argue convincingly that Gayle presented no evidence whatsoever that Mangione did anything while in Paul's presence to influence him. Furthermore, if Mangione did do anything to influence Paul, then whatever she may have done were "acts of kindness, appeals to feeling, or arguments addressed to the understanding of the testator." Thus, whatever she may have done was appropriate as a matter of law. Id. at 457. Also, Tracey and Benton point out that Gayle presented no evidence

that Mangione threatened or coerced Paul in any way. The Supreme Court of Kentucky has set forth indicia or "badges" that indicate undue influence. According to the high court:

> Such badges include a physically weak and mentally impaired testator, a will which is unnatural in its provisions, a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, participation by the principal beneficiary in preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs. (Citations omitted.) Bye v. Mattingly, supra at 457.

Tracey and Benton argue that Paul was not mentally impaired; that the 1997 will was not unnatural; that Paul had a life long relationship with his daughter, Tracey; that Tracey did not participate in making the will; that Tracey never possessed the will; that Tracey never restricted Paul's contact with other people and that she never had any control over Paul's business affairs.

Tracey and Benton also contend that the circuit court prejudicially erred when it admitted the testimony of Turney Berry (Berry). Berry, an attorney, testified as an expert on Gayle's behalf and opined that Marvin Clem, the scrivener of the 1997 will, did not make sufficient inquiry to determine whether Paul possessed the requisite testamentary capacity. Citing Bye

v. Mattingly, Tracey and Benton insist that Berry's testimony was completely irrelevant and clearly prejudicial because it implied that Clem acted with some "nefarious" purpose in mind. They argue that Berry's testimony indeed shifted the focus of the trial from the relevant issues to Clem's performance as an attorney.

Further, Tracey and Benton argue that introduction of the 1991 will was prejudicial because Gayle's complaint focused on the invalidity of the 1997 will, not the validity of the 1991 holographic will. They also argue that the settlement agreement they signed in 1998 should not have been admitted into evidence. According to Tracey and Benton, they executed the agreement in order to avoid paying gift taxes on the portion of the estate that she intended to give to Benton. Also, they cite KRE 408, arguing that the settlement agreement is inadmissible because it was made as part of their compromise negotiations. They cite Simmons v. Small, Ky., 986 S.W.2d 452 (1998) for the proposition that introduction of a settlement agreement, which was otherwise irrelevant, for impeachment purposes was error.

Regarding the standard of review for directed verdicts, the Supreme Court of Kentucky stated:

> A motion for directed verdict admits the truth of all evidence which [sic] is favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of evidence

> or the weight it should be given, this being a function reserved to the trier of fact. Moreover, the trial court should favor the party against whom the motion is made with all inferences which [sic] may reasonably be drawn from the evidence. Upon completion of the foregoing evidentiary review, the trial court must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." If the trial court concludes that such would be the case, a directed verdict should be given. Otherwise, the motion should be denied. (Citations omitted.) NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). See also, Lewis v. Bledsoe Surface Min. Co., Ky., 798 S.W.2d 459 (1990) and Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829 (1999).

The Kentucky Supreme Court thoroughly addressed the issue of testamentary capacity in its landmark case Bye v. Mattingly. The high court stated:

> 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. Testamentary capacity is only relevant at the time of execution of a will.
>
> "Kentucky is committed to the doctrine of testatorial absolutism." 1 Ky. Prac. -- Probate Practice & Procedure, § 367 (Merritt 2d ed.). 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. The degree of mental capacity required to make a will is minimal. The

> minimum level of mental capacity required to make a will is less than that necessary to make a deed, or a contract.
>
> 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. 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. "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." (Citations omitted.) Bye v. Mattingly, supra at 455-456.

According to the record, David Cox, who knew Paul since 1991, testified that while Paul was different after the stroke, he still worked very hard to maintain his horse farm. Lynn Kelly also testified that after the stroke, Paul still rode his horses, still maintained his daily routine, still drove his car and still operated machinery on his farm. Marvin Clem, the attorney who prepared the 1997 will, testified that Paul arrived at his office on time, and that despite his inability to talk, Paul understood what Clem said and that Paul further responded to both Clem and Mangione. Clem opined that Paul possessed the requisite testamentary capacity on December 2, 1997, to execute his will.

Furthermore, Linda Scott (Scott), a social worker for the Veteran's Administration who testified on Gayle's behalf, testified that after his stroke Paul had been hospitalized in the VA's rehabilitation unit. According to Scott, the unit exists to help stroke victims regain their functioning and stresses physical, speech and occupational therapy. Scott testified that Paul did not suffer from any physical problem as a result of the stroke and that while hospitalized received speech therapy for his aphasia until he was discharged from the hospital. Susan Willard (Willard), a registered nurse who had worked at the VA hospital for twenty-seven years, testified on Gayle's behalf. Willard testified that Paul communicated by writing on a note pad. Willard testified that she could read Paul's handwriting and when asked, Paul could correctly name the medications that had been prescribed for him; although, he did not always give the correct answer.

The record reveals that Paul knew the natural objects of his bounty. As the 1997 will reflects, Paul was aware that he had two children, Tracey and Benton. Paul knew he had an obligation to them; however, he chose not to leave anything to his son, Benton. Paul knew the character and value of his estate. As the record reveals, up to the time of his imprisonment, Paul did the work necessary to maintain his horse

farm. Paul disposed of his property according to his fixed intentions. He left his entire estate to his daughter, Tracey.

Regarding a mentally ill testator, the Supreme Court has stated:

> 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. 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. 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. (Citations omitted.) Bye v. Matttingly, supra at 456.

According to the record, Dr. Kathleen Riggs, a psychiatrist who treated Paul for memory loss before the stroke, testified that when she saw Paul on August 6, 1997, in her opinion he was not competent. However, Dr. Riggs did not examine Paul on that day, but merely spoke with him for a few minutes before suggesting he seek help from the local Veteran's Administration hospital. Dr. Robert J. Fallis, a board

certified neurologist, testified that the part of Paul's brain that was responsible for processing language had been destroyed by the stroke and that this should have affected Paul's ability to perform abstract reasoning. However, Dr. Fallis never examined Paul but speculated that his mental capacity had been affected by the stroke. Given the operation of the lucid interval doctrine, neither Dr. Riggs' nor Dr. Fallis' testimony rebutted the strong presumption that Paul possessed testamentary capacity when he executed the 1997 will. Taking all the facts favorable to Gayle and making all reasonable inferences that may be drawn from it, the jury's verdict was flagrantly against the evidence. Given the operation of the lucid interval doctrine, Gayle, who had the burden of proof, did not rebut the presumption that Paul possessed testamentary capacity on December 2, 1997, when he executed his will. The circuit court erred when it denied Tracey's and Benton's motion for directed verdict.

At trial, Gayle's second argument was that Carol Mangione unduly influenced Paul. It is important to note Mangione took nothing from the 1997 will. To have undue influence, the influence must be inappropriate such as influence from threats or coercion which are not permitted by law. Id. at 457. And the influence must be so strong that it overbore the

testator's free will so that the testator disposed of his estate against his wishes. Id.

According to the record, Mangione assisted Paul in two legal matters, Gayle's eviction and the 1997 will. Regarding the will, Mangione found the attorney, Marvin Clem, who prepared the will, she drove Paul to Clem's office and also acted as Paul's interpreter. At trial, Gayle presented no evidence that Mangione influenced Paul. Gayle merely showed that Mangione had the opportunity to influence Paul. "Merely demonstrating that the opportunity to exert such influence is not sufficient to sustain the burden of proof." Id. at 458. Beyond Paul's aphasia, this case bears none of the hallmarks of undue influence. Id. at 457. Taking all the facts favorable to Gayle and making all reasonable inferences that may be drawn from it, the jury's verdict was flagrantly against the evidence, and this Court finds that the circuit court erred when it denied Tracey's and Benton's motion for directed verdict.

We disagree with Tracey and Benton that the circuit court erred when it allowed Turney Berry to testify. In Kesler v. Shehan, Ky., 934 S.W.2d 254 (1996), the Supreme Court reversed this Court after this Court had reversed a jury verdict on the grounds that an expert witness had offered an opinion going to the ultimate fact in a will contest case. In Kesler, plaintiff called an attorney as an expert witness to demonstrate

that the scrivener of the will had either failed to note or ignored various indicia of undue influence. The Supreme Court stated:

> [Plaintiff's expert] did not state that undue influence was actually present here. He merely testified that the attorney should have been on notice to do more to assure himself about the voluntariness of the client's action. Under the circumstances presented here, the jury was entitled to consider that the attorney had overlooked or ignored undue influence and therefore had failed to do enough to form a credible opinion that his client was free from undue influence. Id. at 256.

Similarly in the case sub judice, Berry never testified that Paul lacked testamentary capacity. He merely opined that the attorney could have done more to assure himself that Paul possessed the necessary testamentary capacity. In light of Kesler, Berry's testimony was admissible and the circuit court did not err.

During the trial, Tracey and Benton failed to object to the introduction of both the 1991 holographic will and the settlement agreement. "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947, 950 (1986). Since they failed to preserve these issues, we shall not address them.

Thus, for the foregoing reasons, we reverse the judgment of the Clark Circuit Court and remand the case for the circuit court to enter an order directing a verdict in favor of appellants, Tracey Cramer and Paul Benton Cramer, III.

ALL CONCUR.

BRIEF FOR APPELLANT:

Schuyler J. Olt
Pedley, Zielke & Gordinier
Louisville, Kentucky

BRIEF FOR APPELLEE:

Homer Parrent, III
Parrent & Vish
Louisville, Kentucky