

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000976-MR

JEAN O'BRIEN; WILLIAM HAMMONS;  
TOM HAMMONS; GRAHAM KASH; AND  
LEWIS KASH

APPELLANTS

v. APPEAL FROM LEE CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JR., JUDGE  
ACTION NO. 01-CI-00090

KAREN KASH WALKER; AND  
MARK A. CAREY, ESQ.,  
ADMINISTRATOR OF THE ESTATE OF  
RAYMOND B. KASH

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: Jean O'Brien, William Hammons, Tom Hammons,  
Graham Kash, and Lewis Kash (hereinafter appellants) have  
appealed from an order of the Lee Circuit Court entered on April  
9, 2002, which denied the appellants' motion to amend their  
complaint and to set aside the order dismissing their original

complaint. Having concluded that the trial court did not err in denying the appellants' motion to amend, we affirm.

Raymond B. Kash died on September 14, 2000, as a resident of Beattyville, Lee County, Kentucky. On October 23, 2000, Raymond's purported holographic will was admitted to probate by the Lee District Court.<sup>1</sup> The will was dated June 5, 1941, and provided that Homer Kash, Raymond's brother, was entitled to Raymond's entire estate.<sup>2</sup> According to the petition for probate, the estimated value of Raymond's estate was \$7,306,502.87 in personal property and over \$100,000.00 in real property.

Raymond had given his holographic will to Homer, and Homer had kept the will in his possession until he died in 1983.<sup>3</sup> Homer was survived by his wife, Ruth Kash, and a daughter, Karen Kash Walker, one of the appellees herein. After Homer's death, Ruth took possession of the will.<sup>4</sup> Since Homer was deceased at the time of Raymond's death in 2000, Karen claimed that she was

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<sup>1</sup> No. 00-P-00078.

<sup>2</sup> Raymond was never married.

<sup>3</sup> The appellants' complaint lists Homer's death as occurring in 1986. However, according to Karen's deposition testimony, her father died in 1983.

<sup>4</sup> According to Ruth's testimony, the will was in a filing cabinet in the couple's home at the time of Homer's death. After Homer died, she placed the will in her safety deposit box for a brief period, but she eventually decided to keep the will in one of her Bibles.

entitled to Raymond's entire estate. Mark A. Carey, the other appellee herein, was named administrator of Raymond's estate.<sup>5</sup>

On May 16, 2001, the appellants, who are all nieces and nephews of Raymond, filed a complaint in Lee Circuit Court alleging that Raymond's holographic will was invalid because it did not meet the requirements of KRS<sup>6</sup> 394.040.<sup>7</sup> Specifically, the appellants claimed that the will was not written entirely in Raymond's handwriting and that it had not been kept in his possession since 1941. The appellants asked for the holographic will to be set aside and for Raymond's estate to be distributed according to Kentucky's intestate succession statutes.<sup>8</sup>

On June 18, 2001, the appellees filed a motion to dismiss the appellants' complaint. In support of their motion, the appellees argued that there was sufficient expert testimony during the probate proceedings to establish that the will was

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<sup>5</sup> Carey is an attorney residing in Marietta, Georgia. Carey's wife and Karen's daughter-in-law are employed at the same law firm in Georgia.

<sup>6</sup> Kentucky Revised Statutes.

<sup>7</sup> In order for a holographic will to be valid, KRS 394.040 requires that the entire will be in the handwriting of the testator:

No will is valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction. If the will is not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two (2) credible witnesses, who shall subscribe the will with their names in the presence of the testator, and in the presence of each other.

<sup>8</sup> See KRS Chapter 391.

written wholly in Raymond's handwriting and that it therefore met the requirements of KRS 394.040. On July 23, 2001, after the appellants did not respond to the appellees' motion to dismiss, the trial court entered an order dismissing the appellants' complaint.

On July 31, 2001, the appellants filed a motion to alter, amend, or vacate the trial court's previous order dismissing their complaint. In support of their motion, the appellants argued, inter alia, that on July 9, 2001, they had agreed with the appellees to a 90-day discovery period, and that the trial court should therefore postpone ruling on the appellees' motion to dismiss. On August 8, 2001, the trial court entered an order holding the appellants' motion to alter, amend, or vacate in abeyance, and a hearing on the matter was eventually scheduled for December 5, 2001.

On November 30, 2001, the appellants filed a motion to amend their original complaint. Specifically, the appellants argued that Ruth, Homer's widow, had somehow deceived Raymond into thinking that he had no will, which according to the appellants, allowed Ruth's daughter Karen to receive all of Raymond's estate. In their brief to this Court, the appellants claim that Ruth's conduct constituted "tortious interference with an inheritance." On April 9, 2002, after finding that "the facts of this case do not support a cause of action" for

tortious interference with an inheritance, the trial court denied the appellants' motion to amend their complaint and lifted the stay on its previous order dismissing the appellants' original complaint. This appeal followed.

The appellants' sole claim of error on appeal is that the trial court erred by denying their motion to amend their complaint. In particular, the appellants argue:

Even though the [trial] court may have properly dismissed the original claim, it should have allowed the amended complaint to go forward. The [trial] court allowed discovery to go forward to serve as a basis to rule on the [m]otion to [d]ismiss. That discovery revealed that Raymond [ ] had a valid, sincere belief that he had no will and that Ruth [ ] had conspired with family members to keep that knowledge from Raymond [ ].

According to the appellants, Ruth's alleged fraudulent conduct prevented Raymond from realizing that he had a will, which led to Karen being "unjustly enriched." Thus, appellants argue that their claim for tortious interference with an inheritance should have been allowed to go forward. We disagree.

In First National Bank of Cincinnati v. Hartmann,<sup>9</sup> this Court explained that while amended complaints should be freely allowed, a trial court may deny a motion to amend where the proposed amended complaint fails to state a claim upon which relief can be granted:

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<sup>9</sup> Ky.App., 747 S.W.2d 614, 616 (1988).

Although amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself.

In the case at bar, we conclude that the appellants' proposed amendment fails to state a claim upon which relief can be granted and that the trial court therefore did not err in denying the appellants' motion to amend.

In their brief to this Court, the appellants have cited the Restatement (Second) of Torts, Section 774B as the basis for the cause of action in their proposed amended complaint. The text of that provision states in full as follows:

One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.<sup>10</sup>

In the case sub judice, the appellants do not dispute the fact that Raymond gave Homer the holographic will in question and that after Homer's death, Ruth subsequently took possession of the will. Nowhere have the appellants alleged that Raymond ever asked for the will to be returned to him or for the will to be destroyed, or that Ruth or Karen ever tortiously refused such a request. The appellants have also not

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<sup>10</sup> Restatement (Second) of Torts, § 774B (1979).

alleged that Ruth or Karen ever affirmatively misled Raymond into thinking that he had no will. In short, the appellants have not alleged any conduct on the part of Ruth or Karen which would establish a cause of action under the tortious interference with an inheritance provision of Section 774B. Rather, the appellants have merely claimed that Ruth and/or Karen remained silent after they may have learned from other people that Raymond believed he did not have a will. This silence simply does not rise to the level of tortious conduct under Section 774B. Accordingly, the trial court did not err by denying the appellants' motion to amend their complaint.

Based on the foregoing, the order of the Lee Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

H. Patrick King, Jr.  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jeffrey A. Darling  
Lexington, Kentucky