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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2002-CA-0000916-MR
& 2002-CA-002597-MR

THE ESTATE OF IRENE CARNES GILES,
BY AND THROUGH RUTH ANN GILES NICHOLSON
ITS EXECUTRIX AND
RUTH ANN GILES NICHOLSON IN HER
INDIVIDUAL CAPACITY — APPELLANTS

v.

APPEALS FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 99-CI-00404

ROBERT GILES, JR. — APPELLEE

OPINION AND ORDER
AFFIRMING IN APPEAL NO. 2002-CA-000916
AND
DISMISSING IN APPEAL NO. 2002-CA-002597

** ** ** ** **

BEFORE: COMBS, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Ruth Ann Giles Nicholson (Ruth Ann), individually and as executrix of the estate of Irene Carnes Giles, appeals from a judgment of the Madison Circuit Court invalidating a holographic will executed by Irene. She contends that the will's

contestant, Robert Giles, Jr. (Robert), failed to present sufficient evidence to support his claim that Irene lacked testamentary capacity or was subjected to undue influence when she executed the will. Although we agree with Ruth Ann that the evidence did not support a finding that Irene lacked testamentary capacity, we conclude that there was sufficient evidence to warrant submitting the undue-influence claim to the jury. Hence, we affirm the judgment confirming the jury's verdict. In a second, consolidated appeal, Ruth Ann argues that the trial court has failed to enter a judgment on her accounting claim against Robert. Because it was taken from a non-final order, Ruth Ann's second appeal must be dismissed.

Ruth Ann and Robert are the only two children of Irene Carnes Giles, (Irene), who died testate on May 19, 1998. Prior to his mother's death, Robert had served as her attorney-in-fact, and he handled most of her financial affairs. Following Irene's death on May 19, 1998, Ruth Ann sought to probate a holographic will executed by Irene on September 5, 1997. The district court admitted the will to probate and appointed Ruth Ann and Robert as co-executors. On April 2, 1999, the district court removed Robert as co-executor and appointed Ruth Ann as sole executor.

Shortly thereafter, on April 14, 1999, Ruth Ann filed a complaint in circuit court seeking an accounting from Robert for all actions which he had taken with regard to Irene's property

during his tenure as attorney-in-fact. In response, Robert filed a counterclaim challenging the validity of the September 5, 1997 will. He alleged that Irene was not competent at that time to make a will, and that the will was the product of undue influence from Ruth Ann.

Discovery proceeded on the will-contest claim, but there were significant delays with discovery in the accounting claim. Ruth Ann filed several motions to compel and a motion for default judgment after Robert failed to comply with the trial court's orders to produce an accounting. The trial court denied the motion for default judgment, and Robert eventually supplied most of the documentation and discovery requested by Ruth Ann.

The trial court assigned the case for a jury trial on all issues and scheduled the trial for February 25, 2002. However, on the day of trial, the trial court announced that it had decided to bifurcate the issues and submit only the will-contest claim to the jury. The accounting claim would be reserved for later adjudication by the court. The jury trial of the will-contest claim then proceeded over the next two days. The jury returned a verdict in favor of Robert, and the trial court entered a judgment reflecting that verdict. Thereafter, the trial court overruled Ruth Ann's motion for a judgment notwithstanding the verdict, and Ruth Ann filed the first appeal.

On April 4, 2002, the trial court ordered Ruth Ann to complete discovery and to submit a memorandum on the accounting claim within thirty days, with Robert filing his responsive memorandum thirty days thereafter. Although Ruth Ann filed her memorandum as directed by the court, Robert did not file any responsive pleading. Rather, on November 18, 2002, Robert filed a motion to dismiss the accounting claim, arguing that Ruth Ann did not have standing. In an order entered from the bench on December 12, 2002, the trial court overruled the motion to dismiss and further directed that the accounting claim be held in abeyance pending the appeal of the will-contest judgment. The trial court's order also states that "[t]hese rulings are final and appealable." Ruth Ann then filed a notice of appeal from this order.

In the first appeal, Ruth Ann argues that the trial court erred in denying her motions for a directed verdict or for a judgment notwithstanding the verdict (j.n.o.v.) on the claims that Irene lacked testamentary capacity and that her September 5, 1997, will was procured by undue influence. The purpose of a motion for j.n.o.v. is the same as that of a motion for directed verdict.[1] In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court

[1] Lovins v. Napier, Ky., 814 S.W.2d 921, 922 (1991).

is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or j.n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.[2]

The trial court separately instructed the jury on the elements for determining whether Irene had testamentary capacity and whether her September 7, 1997, will was procured through undue influence, but the interrogatory propounded to the jury combined these issues.[3] Therefore, we must consider whether the evidence supported either finding.

In Bye v. Mattingly,[4] the Kentucky Supreme Court thoroughly discussed the issues of testamentary capacity and undue influence. In that case, the testator, William Louis

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[2] Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985).

[3] The interrogatory provided as follows: "Do you believe from the evidence that at the time she signed her will, Irene Giles was not of sound mind, as defined in Instruction No. 3, or that the signing of her will was procured by undue influence on the part of Ruth Ann Nicholson, as defined in Instruction No. 4?" Ten of the twelve jurors answered "yes" to this question.

[4] Ky., 975 S.W.2d 451 (1998).

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. 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.
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> 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.
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> 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.
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> 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.[5]

In the present case, as in Bye v. Mattingly, the evidence established that Irene Giles was suffering from Alzheimer's disease. However, the medical testimony showed that she was only in the early or perhaps middle stages of the progression of the disease.[6] The evidence was uncontradicted that Irene experienced failing memory and was unable to care for herself. Indeed, by the spring of 1996, Irene's condition had deteriorated to the point that Robert and Ruth Ann had agreed to place her in a nursing home. On the other hand, both the medical

[5] Id. at 455-56.

[6] In December of 1994, Dr. James Miller initially diagnosed Irene as having Alzheimer's disease. However, Dr. Miller did not see her after that time. Ruth Ann took Irene to Dr. Timothy Coleman for a second opinion. Dr. Coleman agreed that Irene was experiencing memory loss, but doubted the diagnosis of Alzheimer's. In February of 1995, Dr. Coleman referred Irene to Dr. Patricia Barnwell. Dr. Barnwell diagnosed Irene as having "mild dementia" in 1994, but she never specifically diagnosed the Alzheimer's type of dementia. In November of 1996, Irene was admitted to Charter Ridge Hospital in Lexington where a psychiatrist, Dr. Meek, diagnosed Irene with "dementia, Alzheimer's type late onset with delusions and behavioral disturbance".

and lay testimony established that, by September of 1997, Irene still had “good” days.

On September 5, 1997, Ruth Ann picked up Irene to take her to a scheduled appointment with Dr. Barnwell. According to Ruth Ann, Irene told her that she wanted to see an attorney. Ruth Ann called her attorney, Patrick Sullivan, and scheduled an appointment for that afternoon. Ruth Ann and Irene then met with Dr. Barnwell, who testified that Ruth Ann expressed concerns about Irene’s forgetfulness. Dr. Barnwell scheduled a neurolyte brain scan and a mini-mental evaluation for Irene, but she did not evaluate Irene’s mental status that day. The scheduled tests were later cancelled.

That afternoon, Ruth Ann took Irene to Sullivan’s office, where Irene informed him that she wished to write a will. Ruth Ann had brought a number of Irene’s documents with her, including a will which Irene had executed in 1991 but not Irene’s most recent will which she had executed in 1993. Sullivan noticed that Irene was of advanced age and he wanted to ensure that she had the capacity to make a will. He spoke with Irene at length, and then tape-recorded an interview to document her capacity.

Although the tapes of that interview are no longer in existence, Sullivan had them transcribed, and Ruth Ann introduced that transcript at trial. During the interview, Irene admitted

that she had problems with her memory, and she was unsure of the date. However, she stated that she knew she had two children, Ruth Ann and Robert, but she was not certain where they lived. She was able to name their spouses and her grandchildren. She remembered that her husband had died, but she was unsure how long it had been. Irene also stated that she lived in her home, and she denied living in a nursing home. Irene recalled that she had certificates of deposit and a bank account. However, she denied that she had ever deeded her farm to Robert.[7] Irene denied ever having written a will.[8] But she stated that she wished to write one leaving her estate equally to Robert and Ruth Ann. Irene added that if Robert had already received an interest in the farm, then that interest should count against his share of the estate.

Sullivan prepared a will reflecting the devises requested by Irene. But rather than executing the will, Ruth Ann

[7] In 1988, Irene, Ruth Ann and Robert inherited 60 acres of farmland in Madison County, and the farm was later the subject of a partition action. In 1991, the Madison Circuit Court entered a judgment dividing the property into three tracts, granting one to Ruth Ann and the remaining two tracts to Robert and Irene as tenants in common. Irene later executed deeds conveying her interest in the tracts to Robert. Incidentally, Sullivan was Ruth Ann's attorney in that action.

[8] In fact, Irene had executed a will on April 3, 1991 that left all of her estate to Robert. After her estrangement from Ruth Ann over the partition action had ended, Irene executed a new will on October 25, 1993 leaving the bulk of her remaining estate to Robert and Ruth Ann equally.

took Sullivan's draft home, where Irene was spending the weekend with her. That evening, Irene copied Sullivan's draft into her own handwriting, and signed the holographic will. The following day, Ruth Ann mailed the executed will to Sullivan for safekeeping.

Under the circumstances, we agree with Ruth Ann that Robert presented insufficient evidence to rebut the presumption that Irene was competent to make a will on September 5, 1997. Although Irene was clearly confused about her current living arrangements and the property that she then owned, she knew the natural objects of her bounty, her obligations to them, the character and value of her estate, and, most importantly, she expressed a desire to dispose of her estate according to her own fixed purpose. Therefore, Ruth Ann was entitled to a directed verdict or a j.n.o.v. on Robert's claim that Irene lacked testamentary capacity.

On the other hand, the question of undue influence is more complicated. As further noted in Bye v. Mattingly:

> Undue influence is a level of persuasion which destroys the testator's free will and replaces it with the desires of the influencer. Nunn v. Williams, Ky., 254 S.W.2d 698, 700 (1953); Williams v. Vollman, Ky.App., 738 S.W.2d 849, 850 (1987). 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 is inappropriate. Influence from acts of

kindness, appeals to feeling, or arguments addressed to the understanding of the testator are permissible. Nunn, 254 S.W.2d at 700; Fischer v. Heckerman, Ky.App., 772 S.W.2d 642, 645 (1989). Influence from threats, coercion and the like are improper and not permitted by the law. Lucas v. Cannon, 76 Ky. 650 (1878). Second, the influence must be of a level that vitiates the testator's own free will so that the testator is disposing of her property in a manner that she would otherwise refuse to do. See v. See, Ky., 293 S.W.2d 225 (1956); Rough v. Johnson, Ky., 274 S.W.2d 376 (1955). The essence of this inquiry is whether the testator is exercising her own judgment. Mayhew v. Mayhew, Ky., 329 S.W.2d 72 (1959); Copley v. Craft, Ky., 312 S.W.2d 899 (1958).

In addition to demonstrating that undue influence was exercised upon the testator, a contestant must also show influence prior to or during the execution of the will. Undue influence exercised after the execution of the will has no bearing whatsoever upon whether the testator disposed of her property according to her own wishes. Bennett v. Bennett, Ky., 455 S.W.2d 580 (1970); Wallace v. Scott, Ky.App., 844 S.W.2d 439 (1992); Fischer v. Heckerman, Ky.App., 772 S.W.2d 642 (1989). The influence must operate upon the testator at the execution of the will. If the influence did not affect the testator, then such conduct is irrelevant. Bodine v. Bodine, 241 Ky. 706, 44 S.W.2d 840 (1932); Walls v. Walls, 30 Ky.Law Rep. 948, 99 S.W. 969 (1907). However, even if the influence occurred many years prior to the execution of the will, but operates upon the testator at the time of execution, it is improper and will render the will null and void. Id.

To determine whether a will reflects the wishes of the testator, the court must examine the indicia or badges of undue influence. 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 the 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. Belcher v. Somerville, Ky., 413 S.W.2d 620 (1967); Golladay v. Golladay, Ky., 287 S.W.2d 904, 906 (1955).[9]

As with lack of testamentary capacity, the burden is on the contestant to demonstrate the existence and effect of undue influence.[10] Merely demonstrating that the opportunity to exert such influence existed is not sufficient.[11] There must be some specific evidence of circumstances from which it can be reasonably inferred that undue influence was in fact exercised.[12] However, it is also recognized that undue influence is a subtle thing and can rarely be shown by direct proof.[13] Thus, where there is slight evidence of the exercise of undue influence and the lack of mental capacity, coupled with evidence of an unequal

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[9] Id. at 457

[10] Nunn v. Williams, 254 S.W.2d at 700.

[11] Id.

[12] Copley v. Craft, Ky., 312 S.W.2d 899, 900 (1958).

[13] Zeiss v. Evans, Ky. 436 S.W.2d 525, 527 (1969).

or unnatural disposition, it is enough to take the case to the jury.[14]

In this case, the evidence establishing the "badges" of undue influence was conflicting. There was evidence to show that Irene's mental state was often confused, even if that evidence was not sufficient to overcome the presumption in favor of testamentary capacity. On the other hand, the provisions of the will are not unnatural *per se*. While Irene and Ruth Ann had differences in the past, they had long since reconciled by 1997. In both her 1993 will and her 1997 will, Irene clearly wanted to ensure that Ruth Ann and Robert shared equally in her estate. It would not be unreasonable to conclude that Irene might decide that her previous gifts to Robert should count against his share.

Nonetheless, the issue of an unnatural disposition is "only to be used as an indicia [*sic*] of a jury question rather than an issue to be determined by the trial judge alone."[15] The burden of proof is on appellees, as proponents of the will, to explain the disposition.[16] There is not, however, a *per se* unnatural will.[17] Instead, it is a factual issue which can be

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[14] Gibson v. Gipson, Ky., 426 S.W.2d 927, 928 (1968).

[15] Bennett v. Bennett, Ky., 455 S.W.2d 580, 582 (1970).

[16] Gibson v. Gipson, 426 S.W.2d at 929; and Sutton v. Combs, Ky., 419 S.W.2d 775, 776 (1967).

[17] Clark v. Johnson, 268 Ky. 591, 105 S.W.2d 576, 580 (1937).

explained satisfactorily by proponents.[18] The factual issue, or more accurately the lack of such an issue, can be so clear that a trial court can properly hold that rational minds could not disagree and sustain a directed verdict.[19]

The existence of the other "badges" of undue influence should be viewed in light of all of the surrounding circumstances. Most notable is Ruth Ann's significant participation in the preparation of the will. Ruth Ann took Irene to her attorney. And while Ruth Ann testified that Irene expressed the desire to make a will while on the way to see Dr. Barnwell, Ruth Ann had brought along many of Irene's papers. Furthermore, rather than executing the will at the attorney's office, Ruth Ann took Irene to her home, and had Irene copy Sullivan's draft into her own handwriting. Ruth Ann then took possession of the holographic will and mailed it back to Sullivan.

Admittedly, these factors, even when viewed in their entirety, do not form an overwhelming case for finding that Ruth Ann exercised undue influence over Irene when she executed her September 5, 1997 will. However, we find that there was sufficient circumstantial evidence of undue influence that

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[18] Nunn v. Williams, 254 S.W.2d at 700.

[19] Id.

reasonable persons could disagree concerning whether undue influence played a role in Irene's disposition of her estate.[20] Therefore, we conclude that a directed verdict was not appropriate on the issue of undue influence.

Ruth Ann next argues that she is entitled to a new trial. She first points out that, while the trial court separately (and correctly) instructed the jury on the elements for finding lack of testamentary capacity and undue influence, the court combined those issues into a single interrogatory. She asserts that if one of those two theories should not have been presented to the jury, then she is entitled to a new trial on the remaining theory alone. We find no indication in the record that Ruth Ann objected to the trial court's use of the combined interrogatory. Because she failed to object to the interrogatory or to request separate interrogatories, Ruth Ann has waived any error in this regard.[21]

Ruth Ann next argues that she is entitled to a new trial based upon improper comments made by Robert's counsel during closing arguments. However, she failed to make any contemporaneous objection to these statements. Furthermore, we

[20] Dennison v. Roberts, Ky., 439 S.W.2d 577, 578 (1968); Sutton v. Combs, 419 S.W.2d at 777; *See also* Fischer v. Heckerman, 772 S.W.2d at 646.

[21] CR 51(3).

have reviewed the closing arguments at issue. Counsel's statements strongly and pejoratively attack both Ruth Ann's and Sullivan's credibility. While several of the comments may have presented valid grounds for objection and perhaps an admonition, when considered as a whole counsel's statements did not exceed the wide latitude accorded to closing arguments.[22]

In the second appeal, Ruth Ann argues that the trial court erred when it refused to enter a judgment in her favor on the accounting claim. As an initial matter, we note that Ruth Ann's appeal is taken from the trial court's December 12, 2002, order holding the accounting claim in abeyance pending the outcome of the first appeal. Although the trial court styled this order as "final and appealable", it clearly is not. A final and appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or is a judgment involving multiple claims made final pursuant to CR 54.02.[23] In other words, the finality of an order is determined by whether it grants or denies the ultimate relief sought in the action.

Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will

[22] Commonwealth, Department of Highways v. Reppert, Ky.. 421 S.W.2d 575, 575-76 (1967).

[23] CR 54.01.

not make it appealable.[24] The trial court's December 12, 2002, order did not resolve any portion of Ruth Ann's accounting claim. That order merely placed the matter into abeyance. The trial court's prior orders denying Ruth Ann's motions for default judgment and for summary judgment were likewise interlocutory, and were not rendered final by the court's order of December 12, 2002. Consequently, her second appeal must be dismissed.

Having said this, we note that the record does not provide any reasons why the trial court chose not to strictly enforce its discovery orders or briefing schedules against Robert.[25] Upon return of this matter to the active docket, we recommend that the trial court immediately schedule this case for a pre-trial conference. At that conference, the trial court should set dates certain for the completion of discovery (if necessary) and for submission of the matter to the court for final adjudication. Further delay by either party should not be tolerated without a compelling justification. In short, the accounting claim should be resolved as soon as possible.

[24] Hale v. Deaton, Ky., 528 S.W.2d 719 (1975).

[25] Furthermore, we do not approve of the inclusion in Robert's brief of evidence outside of the record. The correspondence of counsel relating to settlement negotiations is not properly before this Court and is not relevant to the matters presented on appeal.

Accordingly, the April 4, 2002 judgment of the Madison Circuit Court is affirmed.

The appeal from the December 12, 2002, order of the Madison Circuit Court is hereby DISMISSED as taken from a non-final order.

ALL CONCUR.

ENTERED: February 27, 2004

/s/ William L. Knopf
JUDGE, COURT OF APPEALS

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