

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000267-MR

WILLIAM SEABOLD; TIMOTHY HURST;
SCOTT HAAS; DREW OSBORNE;
TONY BALL; AND MICHAEL THOMPSON

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
CIVIL ACTION NO. 04-CI-00529

ESTATE OF FRANK MARSHALL HARBIN JR.,
BY AND THROUGH CONNIE PUGH, ADMINISTRATRIX;
CHASITY NICOLE HARBIN AND KAYLA RENEE HARBIN,
BY AND THROUGH CONNIE PUGH, THEIR GUARDIAN;
CONNIE PUGH; FRANK HARBIN SR.;
AND SHANNON JOHNS

APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

MINTON, JUDGE: This is a procedurally convoluted case in which
Appellants appeal from the Oldham Circuit Court's order

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

dismissing their declaratory judgment action. Because the law of the case doctrine bars this appeal, we must dismiss it.

On November 1, 2002, Connie Pugh filed a petition in the Oldham District Court to be appointed administrator of the estate of her deceased son, Frank Marshall Harbin Jr. On November 12, 2002, the district court held a hearing on Pugh's petition. At that time, the district court noted on the record that Pugh's petition was deficient because it did not list Harbin's heirs-at-law. Nevertheless, the district court swore in Pugh as administrator, ostensibly to avoid Pugh's having to return to Oldham County from her home in Bullitt County, and signed the order appointing Pugh as administrator of Harbin's estate. The Oldham Circuit/District Clerk stamped the order of appointment "ENTERED" on November 12, 2002.

On November 21, 2002, Pugh filed an amended petition for appointment as Harbin's administrator. On January 7, 2003, the district court held a hearing on Pugh's amended petition. Neither Pugh nor anyone opposing her motion appeared at the hearing. Despite the entry of the November order appointing her as administrator, the recording log of the hearing states that the district court gave a "final approval" to Pugh's appointment at the January 7 hearing. But there was no court order generated to reflect any action taken at the January 7 hearing. Only the fiduciary bond form, which Pugh had signed earlier and

which recited her appointment date as November 12, 2002, was filed with the clerk on January 7, 2003.

Over a year later, in March 2004, Pugh filed a motion in the district court asking that court to enter an order specifically establishing January 7, 2003, as her appointment date as administrator of Harbin's estate. Pugh sought to establish January 7 as her appointment date because the date of her appointment affected the limitation period applicable to a wrongful death action Harbin's estate sought to file against the Appellants. Lamentably, the district court granted Pugh's motion and entered an order setting January 7 as Pugh's appointment date.

Despite the fact that they were not parties to the probate proceedings, Appellants then filed a motion in the district court seeking to amend or vacate its order setting January 7 as Pugh's appointment date. Appellants argued that Pugh's appointment became effective with the entry of the order of appointment on November 12, 2002. The district court denied Appellants' motion, after which they filed both an appeal to the Oldham Circuit Court and a separate declaratory judgment action in the Oldham Circuit Court challenging the newly-fixed appointment date.

In the appeal, the circuit court issued an opinion and order affirming the district court's decision, reasoning that

the November 12 order was "erroneously entered" and, consequently, that the district court did not finally approve Pugh's appointment until January 7. That same day, the circuit court issued an order dismissing Appellants' parallel declaratory judgment action for the same reasons.

Appellants filed an appeal with this Court as a matter of right from the dismissal of the declaratory judgment. A few days later, the Appellants also filed with this Court a motion for discretionary review of the circuit court's decision in their appeal from the probate case.

In May 2005, a divided panel of this court denied Appellants' motion for discretionary review.² Before us now is the matter of right appeal from the dismissal of the declaratory judgment.

We are troubled by the district court's decision to establish January 7 as the date of Pugh's appointment as administrator of Harbin's estate. By its plain terms, KRS 395.105 provides that the appointment of a fiduciary "shall be effective with the signing of an order by the judge." Since the district court signed an order on November 12 appointing Pugh as administrator of Harbin's estate and the court's clerk

² See Case No. 2005-CA-000289-D.

³ Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488, 492 (Ky. 1998).

entered the order, under the plain meaning of KRS 395.105, to which we must adhere,³ Pugh's appointment became effective on that day.

The fact that Pugh's original petition did not meet KRS 395.015(1)'s requirement that all the deceased's heirs-at-law be listed on the petition made the November 12 order simply voidable, not void.⁴ Thus, although we must decline to express our definitive opinion on the matter, we believe that the lower courts have erred by finding that Harbin's appointment was not effective until January 7. Nevertheless, we are prohibited from reviewing those potential errors on the merits due to the application of the law of the case doctrine.

Closely related to the doctrine of res judicata, the law of the case doctrine is a rule under which "a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation" ⁵ So when the circuit court ruled on Appellants' appeal from the ruling in

⁴ 60 C.J.S. *Motions and Orders* § 75 (2005) ("[a]n order made without jurisdiction or authority is void and of no force or effect but an erroneous or irregular order issued within the court's jurisdiction is voidable and cannot be disregarded until reversed or set aside Where jurisdiction exists both of the subject matter and of the parties, as well as jurisdiction to make the particular order in question, however, an order is not void, but voidable, even though it is erroneous or irregular.").

⁵ Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982) (quoting 5 Am.Jur.2d, *Appeal and Error*, § 744.).

the probate case, the circuit court was functioning as an appellate court. That circuit court appellate decision became final and binding when we, regrettably, denied discretionary review of it. And because the case before us on appeal is squarely on all fours with the facts, the parties, and the issues involved in the probate case, we are bound by the circuit court's appellate opinion, erroneous though we believe it may be.⁶ Consequently, we must dismiss this appeal.

For the foregoing reasons, it is ORDERED that this appeal is dismissed.

VANMETER, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, CONCURS IN RESULT ONLY.

ENTERED: April 14, 2006

/s/ John D. Minton, Jr.
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANTS:

Amy V. Barker
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Wendi Swinson Wagner
Louisville, Kentucky

⁶ Union Light, Heat & Power Co. v. Blackwell's Adm'r, 291 S.W.2d 539, 542 (Ky. 1956) ("[i]t is an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.").