

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000166-MR

SHERMAN HATTER

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 04-CI-00158

KENTUCKY TRUST COMPANY, AS CONSERVATOR¹
OF MINNIE MAYNE, DISABLED

APPELLEE

AND

NO. 2005-CA-000660-MR

KENTUCKY TRUST COMPANY,
CONSERVATOR OF MINNIE MAYNE

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 04-CI-00158

SHERMAN HATTER

APPELLEE

OPINION

AFFIRMING AS TO 2005-CA-000166

AND

VACATING AND REMANDING AS TO 2005-CA-000660

** ** * * *

¹ Motion having been made, the court has substituted John S. Hatter as a party as the Administrator of the Estate of Minnie Hatter Mayne.

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; POTTER,² SENIOR JUDGE.

COMBS, CHIEF JUDGE: Sherman Hatter appeals from an order of the Casey Circuit Court in favor of Kentucky Trust Company, the court-appointed conservator of Minnie Mayne's estate. Hatter contends that the circuit court erred by concluding that the power of attorney purportedly executed by Mayne in his favor was of no force and effect and that a deed executed by him as Mayne's attorney-in-fact was void. In a separate appeal, Kentucky Trust Company contends that the court erred by failing to sanction Hatter and his counsel. We affirm the judgment with respect to Hatter's appeal and vacate and remand on the conservator's appeal.

Minnie Mayne, now eighty years of age, has been diagnosed as mentally ill. She has been treated with medication for many years and has been hospitalized on several occasions. On January 7, 1994, Mayne was admitted to the psychiatric unit at Good Samaritan Hospital in Cincinnati, Ohio. She was diagnosed as grossly psychotic and remained hospitalized until February 3, 1994, when she was placed at the West Park Nursing Home in Cincinnati.

On April 30, 1994, over her doctor's objections, Garrett Hatter, the brother of the appellant, removed Mayne to

² Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)b) of the Kentucky Constitution and KRS 21.580.

Casey County, Kentucky. Shortly later, Mayne's brother, John S. Hatter petitioned the Casey District Court for the appointment of a conservator. On July 12, 1994, the court appointed the Casey County Bank to act as Mayne's conservator. The Bank was ordered to take possession of all of Mayne's assets, including her real and personal property, and was charged with protecting and preserving her estate. Sherman Hatter, a nephew, was appointed to act as Mayne's limited guardian.

In 1996, the Casey County Bank withdrew as Mayne's conservator, and a jury was empanelled to determine if Mayne remained disabled pursuant to the provisions of KRS³ Chapter 387. Following its inquest, the jury unanimously found that Ms. Mayne was disabled and that she continued to be in need of a conservator. On June 7, 1996, Kentucky Trust Company ("Kentucky Trust"), was appointed Mayne's conservator, and it immediately took charge of Mayne's financial affairs. Approximately one year later, the authority of Sherman Hatter to act as Mayne's limited guardian was revoked. Mayne's brother, John S. Hatter, was appointed by the court to serve in his stead as limited guardian.

In the summer of 2003, it was determined that Mayne should be moved to an assisted-living facility in Casey County. Several months later, Kentucky Trust filed a motion requesting

³ Kentucky Revised Statutes.

the court's authorization to sell two parcels of Mayne's real property. Following a hearing before the Casey District Court, an order was entered on February 17, 2004, directing the sale to proceed.

On March 16, 2004, Sherman Hatter filed a motion to suspend the sale, and the court stayed its previous order pending a review of Hatter's contentions. Following a hearing on July 6, 2004, the district court re-authorized the sale of the two identified parcels of Mayne's real property.

The sale of the Mayne property was scheduled and advertised for September 11, 2004. Two days before the sale, Sherman Hatter, purportedly acting on Ms. Mayne's behalf, transferred the subject properties to himself. The deed, recorded September 10, 2004, indicated that Hatter, as grantor, was acting as Mayne's attorney-in-fact by appointment pursuant to a durable power of attorney executed by Mayne on March 1, 1995. Despite the uncertainty of the title conveyed, the subject properties were sold by Mayne's conservator for more than their appraised value.

On September 20, 2004, Kentucky Trust filed a declaratory judgment action against Sherman Hatter. Kentucky Trust sought a declaration that Hatter's purported power of attorney was void and consequently that his attempt to transfer Mayne's property to himself was invalid. In his answer, Hatter

contended that Mayne had appointed him as her power of attorney some fifteen months prior to the 1996 competency hearing in which she was adjudicated as disabled. He argued that the power of attorney superseded the appointment of a conservator and claimed that the conservator's decision to sell the properties "frustrated and upset" Minnie Mayne's entire testamentary plan.

On November 17, 2004, Kentucky Trust filed a motion for summary judgment. An extensive memorandum in support of the motion was attached and properly served. A hearing was scheduled for December 13, 2004. Following the hearing, the circuit court concluded that Kentucky Trust was entitled to summary judgment. Relying on the decision of the Supreme Court in Rice v. Floyd, 768 S.W.2d 57 (Ky. 1989), the court determined that the power of attorney purportedly executed by Minnie Mayne in 1995 had been terminated by operation of law as soon as a conservator was appointed and charged with the duty to manage her estate. The court concluded that Sherman Hatter had no authority whatsoever to convey the property to himself or to anyone. The deed was declared void. After Hatter's motion for relief from the judgment was denied by the court, he filed a timely notice of appeal.

On January 12, 2005, and with leave of court, Kentucky Trust filed a memorandum in support of its motion for sanctions and an award of attorney fees. Kentucky Trust contended that

since Sherman Hatter had no legal basis to claim an interest in Mayne's property, an award of attorney fees was authorized both under the provisions of CR⁴ 11 and pursuant to the plenary power of the trial court. Hatter denied that he had intended to cause an unnecessary delay in the proceedings and contended that he had acted in the good faith belief that his authority under the durable power of attorney had been revived by relevant changes in legislation.

By order entered March 11, 2005, the trial court denied the conservator's motion for attorney fees. Kentucky Trust filed a timely notice of appeal, and on September 6, 2005, this court ordered that the separate appeals be consolidated and considered together.

We shall discuss Hatter's appeal first. Hatter contends that the trial court failed to grant him an adequate opportunity to respond to the conservator's motion for summary judgment. We disagree.

CR 56.03 provides that a summary judgment motion shall be served at least ten (10) days before the time set for a hearing. In this case, the conservator's motion was filed on November 17, 2004, and was properly served. No response from Hatter's counsel was forthcoming, and no opposing affidavits were filed. At the hearing, which occurred nearly thirty (30)

⁴ Kentucky Rules of Civil Procedure.

days later, the trial court was convinced that the conservator was entitled to judgment as a matter of law. Despite his contention to the contrary, Hatter was given sufficient opportunity to challenge the motion for summary judgment and to present his case. There was no error in the court's prompt disposition of the motion.

Hatter next contends that the trial court erred by concluding that the power of attorney executed by Mayne terminated upon the appointment of a fiduciary to manage her affairs and that it was not revived by later legislation. We disagree.

In Rice v. Floyd, 768 S.W.2d 57 (Ky. 1989), the Supreme Court of Kentucky held that the existence of a durable power of attorney cannot prevent the institution of guardianship proceedings. The court also noted that once a fiduciary is appointed to represent the interests of a disabled person, the power of attorney-in-fact terminates as a matter of law. This case was decided while the 1972 version of KRS 386.093(5) was in effect. At that time, the statute provided as follows:

All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive, have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. **If**

a fiduciary is thereafter appointed by the court for the principal the power of the attorney in fact shall thereupon terminate and he shall account to the court's appointed fiduciary. (Emphasis added.)

Hatter acknowledges that this version of the statute was in effect when Mayne executed the power of attorney in his favor. The power of attorney executed on March 1, 1995 (if it were arguably effective) was terminated in June 1996 when Kentucky Trust was appointed conservator of Mayne's estate. There is no ambiguity in the statute or in the timing of the sequence of events governed by the statute. The court did not err by concluding alternatively: (1) either that as a ward of a conservator (the Casey County Bank at the time), Mayne had had no legal ability to appoint an attorney-in-fact in 1995; or (2) that the putative power of attorney had terminated as a matter of law upon the subsequent appointment of Kentucky Trust as conservator.

It is true that KRS 386.093(5) was amended in 1998 deleting the language that had automatically terminated the power of a validly appointed attorney-in-fact upon appointment of a fiduciary by a court. However, that later amendment has no bearing on the issue before us. Hatter's alleged appointment was terminated -- as a matter of law -- no later than June 1996 (even though it was not formally revoked until approximately one year later). The lapsed appointment could not have been revived

by a subsequent change in the law some two years later, and Kentucky Trust remained the only legally authorized entity with the authority to convey real property on Mayne's behalf.

Finally, we cannot agree that Mayne's testamentary plan has any bearing whatsoever on the resolution of Hatter's appeal. The obligation of the conservator is separate, subsequent, and superior to any testamentary plan that pre-dated its appointment. We find no error in the court's grant of summary judgment.

We shall now consider the conservator's appeal. Kentucky Trust contends that the court erred by concluding that it lacked the authority to sanction Hatter and/or his counsel by awarding its attorney fees. We agree that it erred and vacate and remand on this appeal.

Before the trial court, Kentucky Trust argued that there was no legal basis for Hatter to believe that he had any right to rely on a power of attorney that had terminated as a matter of law. Kentucky Trust contended that Hatter's attempt to transfer the property to himself and his decision to record the deed amounted to bad faith conduct. After considering the motion, the court was inclined to grant the motion and to sanction Hatter, but it concluded that it lacked the necessary authority to do so.

In Lake Village Water Assoc. v. Sorrell, 815 S.W.2d 418, 421 (Ky.App. 1991), we held that the courts of the Commonwealth have:

inherent power to impose attorney's fees and related expenses on a party as a sanction for bad faith conduct, regardless of the existence of statutory authority or remedial rules.

This has long been the rule in the federal system as well. See Wright and Miller, Fed. Prac. & Proc. Civ. 3d §2675 ("it has uniformly been held that fees can be assessed because of the oppressive conduct or bad faith of the opposing litigant...") Consequently, we believe that the circuit court possessed the authority and discretion to impose attorney fees on Hatter for conduct that it believed to have been undertaken in bad faith.

We affirm the judgment in Hatter's appeal against Kentucky Trust. We vacate the judgment in the conservator's appeal against Hatter and remand for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT/APPELLEE
HATTER:

Theodore H. Lavit
Joseph R. Stewart
Lebanon, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE/APPELLANT KENTUCKY
TRUST COMPANY:

Denise H. McClelland
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLANT/APPELLEE HATTER:

Joseph R. Stewart
Lebanon, Kentucky