

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000308-MR

CAROL KAY HUGHES; DAVID FULMER;
DENNIS FULMER; AND TONY FULMER

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 03-CI-01264

LANNY ROSS HUGHES; WILLIAM HUGHES;
GREGORY HUGHES; AND CARL HUGHES

APPELLEES

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

COMBS, CHIEF JUDGE: Carol Kay Hughes, individually as daughter and as the trustee of the Naomi Hughes Living Trust; and Carol's nephews, David Fulmer, Dennis Fulmer, and Tony Fulmer, as heirs to the estate of Naomi Hughes, appeal from a judgment of the Kenton Circuit Court entered on December 10, 2004. The court concluded that Naomi Hughes possessed sufficient capacity to validly execute several deeds and a will. It also found that her actions did not result from any undue influence exerted upon

her by her sons, the appellees. After reviewing the record and the applicable law, we affirm.

Carol Hughes and the appellees, Gregory T. Hughes, Lanny Ross Hughes, and Carl R. Hughes, survived their mother, Naomi Hughes. Naomi died on November 9, 2002, at the age of eighty-two. Although William E. Hughes survived his mother, he died suddenly on August 10, 2005. The Fulmers are the sons of Patricia Fulmer, a deceased daughter of Naomi Hughes and sister of Carol.

Naomi was chronically ill during the last years of her life. She suffered from diabetes, hypertension, and congestive heart failure. She needed help with walking and bathing; she also needed someone to prepare her meals. Naomi's family cooked, cleaned, and otherwise cared for her.

At the end of December 1999, Naomi executed a living trust agreement. Her daughter, Carol, a paralegal, was to act as trustee. Pursuant to the terms of the trust, Naomi deeded her home at Birch Drive in Erlanger, Kentucky, to Carol in her capacity as trustee. Carol was given sweeping authority over the corpus of the trust and was appointed to act on her mother's behalf in the event that Naomi became incapacitated. Upon her mother's death, and after deducting her fees and expenses from the trust assets, Carol was to distribute the trust assets to Naomi's children in equal shares.

By the summer of 2002, it became apparent that Naomi's health was rapidly deteriorating. On August 21, 2002, Naomi executed a durable power of attorney naming her son, Greg Hughes, to act as her attorney-in-fact. She also executed a will drafted by Greg, an attorney practicing in Ludlow, Kentucky. In her will, Naomi made specific bequests to two grandchildren and to each of her six children. She also identified substantial sums that she had loaned to her son, Greg, and to her daughter, Patricia. The will provided that her estate was to collect \$10,000.00 from each of these two children as repayment for the loans. Naomi clearly intended for her children to take an equal share of her estate. Naomi's eldest son, Ross, was appointed executor of the estate. Naomi acknowledged her will before two of her neighbors, and they witnessed its execution.

In September 2002, under his authority as Naomi's attorney-in-fact, Greg took control of his mother's checking and investment accounts. On October 11, 2002, Naomi executed a deed purporting to transfer her home at Birch Drive to her sons Bill, Carl, and Greg.

On October 26, 2002, Naomi was admitted to a local hospital with little hope for survival. On October 30, 2002, she revoked some of the terms of the 1999 trust agreement and executed a new deed transferring her home at Birch Drive to sons

Bill, Greg, and Carl -- invalidating her previous deed to Carol as trustee. Naomi was eventually transferred to a local hospice center where she lived out her final days.

In a complaint filed on May 12, 2003, Carol and the Fulmers alleged that Greg, Ross, Carl, and Bill began to isolate and to exert control over Naomi as of October 2002. They contended that the deeds executed by Naomi after this date were the result of her diminished capacity and the undue influence of her sons. Therefore, they argued that the deeds should be set aside. They also sought to invalidate the other transfers of Naomi's assets that pre-dated her death on November 9, 2002.

Following a bench trial, the Kenton Circuit Court found that Naomi possessed requisite mental capacity when she executed the challenged deeds and the power of attorney, holding that she had not been induced to execute the documents because of any undue influence by her sons. The court determined that Naomi's revocation of the trust agreement and the other transfers of property were wholly proper. Its judgment was entered on December 10, 2004, and this appeal followed.

Carol and the Fulmers contend that the trial court erred by finding that Naomi retained the capacity to understand the nature and ramifications of the documents that she executed in the last few weeks of her life. They argue that convincing evidence established that Naomi did not understand what she was

doing and that Greg Hughes unduly influenced his mother to transfer nearly all of her assets to the appellees before her death. We disagree.

This case was tried by the court sitting without a jury. In a bench trial, the findings of the trial court may not be set aside unless they are clearly erroneous -- with due regard being given to the opportunity of the court to consider the credibility of the witnesses. CR¹ 52.01. Findings of fact are not clearly erroneous if they are supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky. 1964). Evidence is deemed substantial if it has sufficient probative value to induce conviction in the mind of a reasonable person. Kentucky State Racing Comm'n. v. Fuller, 481 S.W.2d 298 (Ky. 1972).

In October 2002, Carol made an allegation of caretaker neglect concerning Naomi's care. The Cabinet for Families and Children undertook an extensive adult protection investigation centering on Naomi Hughes. The evidence presented at trial included a comprehensive narrative and assessment form prepared by the social services worker who handled the case.

In the report prepared following a visit to Naomi's home on October 25, 2002, the social services worker remarked as follows:

¹ Kentucky Rules of Civil Procedure.

Allegations are that Ms. Hughes is being isolated from her family by her sons and that they would not allow her two daughters to be alone with her. One of the daughters mentioned in the report, Patricia Fulmer, was at the residence when I visited with Ms. Hughes and she stated that this was untrue. Naomi Hughes also denied this. Additionally, I made an unannounced visit and discovered eight family members there which certainly negates the allegations of Ms. Hughes being isolated.

Another allegations [sic] was that Naomi Hughes recently re-wrote her will changing the executor from her daughter, Carol, to another son who lives in Wisconsin. Ms. Hughes stated that she did this on her own accord because she felt that her daughter, Carol, would not be fair to the other children. Ms. Hughes has never been adjudicated in a court of law to be incompetent so she has a right to do this. Moreover, I found Ms. Hughes to be very alert and oriented and able to verbalize her wishes.

I found that the allegation that Ms. Hughes is not being properly cared for and needs twenty-four-hour around the clock supervision to be unsubstantiated. Actually, it is better for her to have someone there at all times and it appears that the family is providing for that. According to the family, Ms. Hughes is never alone and there is even a schedule for family members on the refrigerator to ensure that someone is with her at all times. The allegation that her daughter, Carol, is not allowed to be alone with Ms. Hughes is true. However, according to Ms. Hughes and her family this is because Carol recently verbally abused her mother when she found out that she had been removed as the executor of her estate.

The social services worker observed further as

follows:

Although Ms. Hughes is physically ill, she appeared to be alert, oriented and in sound mind during my conversation with her. She knew where she was, her birth date, her doctor's [sic] names and when her next appointment was. She was able to tell me specific details about recent incidents. However, her family does report that when her ammonia level becomes high, she does get confused. The increases in ammonia levels are a result of her liver illness.

* * * *

Ms. Hughes tells me that she is being well cared for by her children and that it was her decision to change her will.

* * * *

I asked Ms. Hughes if she could tell me what happened between she [sic] and Carol. Ms. Hughes explained to me that recently she changed the executor of her will from her daughter Carol to another child, a son who lives in Wisconsin. She said that when she told Carol of this Carol became very angry, got into her face and yelled at her. Ms. Hughes added that Carol was so angry her chest was heaving. I asked Ms. Hughes why she had changed her will to name another child as her executor and she replied that she felt her daughter, Carol, would not be fair to her other children. She stated that this was her decision to do this.

At this point, Mr. Gregory Hughes asked me what date the report was made to our office and I told him it was on Friday October 18. He then informed me that this sister, Carol, had brought an attorney to the house that Friday morning who tried to say that their mother was incompetent.

Following her investigation, the social services worker concluded that Carol's allegations were patently false. Since the allegations were not substantiated, the Cabinet's investigation was promptly closed.

The testimony offered by Bill Hughes, Ross Hughes, and Greg Hughes also indicated that Naomi retained the ability to understand her circumstances and that she continued to exercise her free agency despite her deteriorating physical condition and eventual hospitalization. Carol's testimony was the only

evidence presented at trial in support of her allegations against the appellees.

We have carefully reviewed the record in this case. The court's findings and conclusions were more than adequately supported by evidence demonstrating that Naomi Hughes retained testamentary capacity at the time of the execution of her will; that she retained the capacity necessary to revoke the trust agreement and subsequently to convey property to her sons through *inter vivos* gifts; and that her free will was not overborne by anyone's undue influence. Consequently, we have no basis to disturb the judgment.

We affirm the judgment of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Ruth A. Sebastian
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BRIEF FOR APPELLEES:

Karen Hoskins Ginn
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