RENDERED: NOVEMBER 17, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001009-MR

LISA HICKS; TAMMY MAYES;
AND JILL ABRAMS — APPELLANTS

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 01-CI-00999

MICHAEL F. EUBANKS, EXECUTOR
OF THE ESTATE OF MARY F.
HENDRICKS, DECEASED; AND
JEREMY WAYNE HENDRICKS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JUDGES; BUCKINGHAM AND HUDDLESTON, SENIOR JUDGES.[1]

GUIDUGLI, JUDGE: This appeal arises from a will contest case filed in the Madison Circuit Court contesting the Last Will and Testament executed by Mary Hendricks on March 15, 2001, leaving virtually all of her estate to her only grandson, Jeremy Wayne

[1] Senior Judges David C. Buckingham and Joseph R. Huddleston, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Hendricks. Appellants, Lisa Hicks, Tammy Mayes, and Jill Abrams, who are the granddaughters and heirs of Mary, contend that the trial court incorrectly granted a directed verdict in favor of the Appellees, Jeremy and the executor of Mary's estate, Michael Eubanks. Because the trial court properly entered a directed verdict for the Appellees, we affirm.

On November 27, 1991, Mary executed a will naming her husband, Arnold Hendricks, as the primary beneficiary. The will also contained a provision stating that should her husband predecease her, or should they die simultaneously or under such circumstances as to render it impracticable to determine which survived the other due, or due to a common disaster within thirty days of each other, her estate was to be split equally among her four grandchildren, Lisa, Tammy, Jill, and Jeremy. All four are the children of Mary's son, Wayne Hendricks. Lisa, Tammy and Jill's mother, Barbara, passed away when they were young. Wayne later married Jan Hendricks, who is Jeremy's mother. On July 16, 2000, Mary's husband, Arnold, died. As a result, Mr. Eubanks was hired as an attorney to represent Mary as the Executor of her husband's estate. On November 20, 2000, Mary went to Mr. Eubank's office to discuss her husband's estate. During this meeting, Mary also expressed her desire to change her will and to leave her entire estate to her grandson, Jeremy. However, Mary did not change her will at this time.

A couple of months later, Mary was admitted to the Pattie A. Clay Hospital to have her leg amputated. On January 22, 2001, Mary was transferred to the Madison Manor Nursing Home. From this time until the date of her death, Mary was either a patient at the Madison Manor Nursing Home or the Pattie A. Clay Hospital.

On February 27, 2001, Mr. Eubanks received a phone call from Jan Hendricks asking him to visit Mary at the Madison Manor Nursing Home to discuss her husband's estate and her will. Mr. Eubanks met with Mary on that same day, and he made notes on Mary's previous will to reflect what Mary intended to change. Neither Jan nor Jeremy was present during this discussion between Mary and Mr. Eubanks.

After meeting with Mary, Mr. Eubanks prepared a new will. On March 15, 2001, Mr. Eubanks took the new will to Mary at the Madison Manor Nursing Home for execution. The execution was witnessed by Lora House and Gladys Fugate, who worked in Mr. Eubank's office. The will was also witnessed by Jeff Rager, who was another attorney in Mr. Eubank's office. The will left the sum of $25.00 to each granddaughter, and the remainder of the estate was left to Jeremy. Again, neither Jan nor Jeremy was present during the execution of Mary's will.

Mary died testate in Madison County on June 2, 2001. Her March 15, 2001, will was admitted to probate on June 14,

2001, and Mr. Eubanks was appointed the Executor of Mary's estate. On September 28, 2001, the three granddaughters filed suit contesting the validity of the March 15, 2001, will. The granddaughters contended that Mary did not have the requisite testamentary capacity to execute the March 15, 2001, will, and that the will was the result of undue influence exerted by Jeremy's mother, Jan.

On August 6, 2003, the Madison Circuit Court granted the Appellees' motion for summary judgment on the issue of testamentary capacity. The issue of undue influence was tried before a jury. However, at the conclusion of all the testimony, the Madison Circuit Court granted a directed verdict in favor of the Appellees on April 15, 2005.

On appeal, the Appellants contend that the trial court incorrectly granted a directed verdict in favor of the Appellees regarding the issue of undue influence. Claiming that there was sufficient evidence to show that Mary was unduly influenced by Jeremy's mother, Jan, to change her will, the Appellants contend that the trial court's granting of the Appellees' motion for directed verdict was improper.

When reviewing a motion for directed verdict, a trial court must consider the evidence in the strongest possible light in favor of the party opposing the motion. Taylor v. Kennedy, 700 S.W. 2d 415, 416 (Ky.App. 1985). Furthermore, "a trial

judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." Bierman v. Klapheke, 967 S.W.2d 16, 18-19 (Ky. 1998). "On appeal the appellate court considers the evidence in the same light[,]" Sutton v. Combs, 419 S.W.2d 775, 777 (Ky. 1967), and it may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. Bierman, 967 S.W.2d at 18.

The focus of the Appellants' argument is that Jeremy's mother, Jan, unduly influenced Mary to change her will and to essentially disinherit the Appellants. Although the Appellants do not contend that Jeremy unduly influenced Mary, "undue influence which invalidates the entire will may be that of any one or more of the beneficiaries or a third person." Raymond v. Schloemer, 409 S.W.2d 809, 812 (Ky. 1966). Contending that Jan unduly influenced Mary to change her will, the Appellants allege that Jan made disparaging remarks about the Appellants in order to manipulate Mary. Specifically, the Appellants allege that Jan told Mary that Tammy had taken her pain pills, that Tammy was not coming to visit her when she really was, and that she told Mary that the granddaughters were always fighting. Thus, the Appellants contend that the alleged remarks that Jan made

about the Appellants to Mary unduly influenced Mary to change her will and exclude the Appellants.

As stated in Bye v. Mattingly, 975 S.W.2d 451, 457 (Ky. 1998), "[u]ndue influence is a level of persuasion which destroys the testator's free will and replaces it with the desires of the influencer." In determining whether the testator was unduly influenced, the court must first examine whether the influence was inappropriate. Id. Furthermore, the court must examine whether the testator was exercising her own judgment when she executed the will. Id. Therefore,

> [t]o 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 the testator's business. Blecher v. Somerville, Ky., 413 S.W.2d 620 (1967); Golladay v. Golladay, Ky., 287 S.W.2d 904, 906 (1995).

Bye, 975 S.W.2d at 457. When applying these badges, or tests, to the March 15, 2001, will, it is clear that the trial court correctly determined that there was not sufficient evidence to

show that undue influence played a role in Mary's disposition of her estate.

First, it is clear that while Mary may have been physically weak due to her leg amputation, there was not sufficient evidence presented to show that she was mentally weak. Additionally, the record was also clear that Jan did not have absolute control of Mary's business affairs, because Mary's sister, Beulah, continually helped Mary with paying her bills and writing her checks. Although Jan and Mary may have experienced a "difficult" relationship, the trial court judge correctly determined that the relationship was not a "recently developed and comparatively short period of close relationship." Bye, 975 S.W.2d at 457. As noted by the trial judge, there was some relationship between Mary and Jan because of Jeremy. Furthermore, there was evidence presented that when Mary's husband, Arnold, had open heart surgery in Louisville in the summer of 2000, Jan was present with Mary for the entire week. Thus, a relationship did exist between Mary and Jan and it continued to exist until Mary's death.

Additionally, no evidence was presented to show that Jan participated in the preparation of Mary's will. Although the Appellants point out that Jan called Mr. Eubanks to come to the Madison Manor Nursing home to talk to Mary about her will in February of 2001, Jan was not present when Mr. Eubanks and Mary

reviewed her old will and discussed making the revisions. Furthermore, there is no evidence that Jan was present when Mary executed her will on March 15, 2001. Accordingly, Jan did not participate in the preparation of Mary's will. Furthermore, Jan did not have possession of the will, nor do the Appellants contend that she did.

The next test is whether the will was unnatural in its provisions. The issue of unnatural disposition is "only to be used as an indicia of a jury question rather than an issue to be determined by the trial judge alone." Bennett v. Bennett, 455 S.W.2d 580, 582 (1970). However, it is a factual issue which can be satisfactorily explained by the proponents of the will. Id. Thus, the burden of proof is on the proponents of the will to explain the disposition. Gibson v. Gipson, 426 S.W.2d 927, 929 (1968). Based on the evidence that Mary's grandson, Jeremy, regularly cared for and visited Mary and that they had a long and loving relationship, there was sufficient evidence to show that the will was not unnatural in its provisions.

The only questionable test of undue influence presented was whether Jan prevented the Appellants from having contact with Mary. While there was evidence presented that the Appellants were restricted at times from seeing Mary, there was sufficient evidence presented to show that it was Mary, and not Jan, who requested that the Appellants not be admitted to her

room. Specifically, there was documentation that Mary made a request to the staff at the Madison Manor Nursing Home that she would rather the Appellants not visit, "because they are always making trouble." Additionally, there were nurses' notes presented on days when Mary was considered oriented and communicative, in which she expressed outside of Jan's presence a desire not to have the Appellants visit. Accordingly, there was not sufficient evidence presented to show that Jan prevented the Appellants from having contact with Mary.

Based on the analysis of the tests of undue influence, the Appellants failed to show that Jan influenced Mary in such a way as to prevent her from exercising her own judgment when she executed her will on March 15, 2001. Additionally, the Appellants did not present adequate evidence to show that Jan influenced Mary by threats or coercion, or that any influence made by Jan was inappropriate. Bye, 975 S.W.2d at 457. Because "it is not sufficient for the contestant to show that there was opportunity to exercise undue influence or that there was a possibility that it was exercised," the Appellants did not meet their burden of proof. Stutiville's Ex'rs v. Wheeler, 187 Ky. 361, 219 S.W. 411, 416 (1920). Accordingly, we conclude that there was not sufficient evidence on which reasonable persons could disagree concerning whether undue influence played a role in Mary's disposition of her estate.

The Appellants further contend that the directed verdict was improper because "when slight evidence of the exercise of undue influence and the lack of mental capacity is coupled with evidence of an unequal or unnatural disposition, it is enough to take the case to the jury." Gibson v. Gipson, 426 S.W.2d 927, 928 (Ky. 1968). However, because the issue of mental incapacity was already decided at the summary judgment stage and is not being contested in this appeal, there was insufficient evidence to take the case to the jury.

Additionally, the Appellants contend that the trial court erred in basing its ruling on the lucid interval doctrine because it applies to mental incapacity, which was not at issue in this case. However, after reviewing the trial judge's oral ruling, it is clear that she was not basing her ruling on this doctrine and was simply using it as an example. Accordingly, we conclude that the directed verdict was appropriate.

For the foregoing reasons, we affirm the judgment of the Madison Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Walter G. Ecton, Jr.
Richmond, Kentucky

BRIEF FOR APPELLEES:

James T. Gilbert
Richmond, Kentucky