RENDERED: MAY 16, 2008; 10:00 A.M.
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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001911-MR

DWIGHT O'HAIR,
INDIVIDUALLY AND AS
EXECUTOR OF THE ESTATE
OF TAYLOR O'HAIR — APPELLANT

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 06-CI-00006

LINVILLE O'HAIR; MAXINE
O'HAIR; JANI MANDELLI; MIKE
O'HAIR; VICKY TWISS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Dwight O'Hair, Individually and as the Executor of the Estate of Taylor O'Hair, appeals from an order of the Powell Circuit Court which, among other things, interpreted Taylor's will to not bequeath to the appellant Taylor's intangible personal property such as cash, bank accounts, and certificates of deposit. For the reasons stated below, we affirm.

[1] Senior Judge John W. Graves 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.

On November 15, 2002, Taylor executed a will prepared by attorney John Cox. As relevant to this appeal, the will stated as follows:

> ITEM II.
>
> It is my will and desire that any furnishing and or appliances shall descend to and become the property of my grandson, Dwight O'Hair, equally, absolutely and in fee simple.
>
> ITEM III.
>
> It is my will and desire that my property located on 999 Virden Ridge Road, Clay City, Kentucky including mobile home situated on said property shall descend to and become the property of my grandson, Dwight O'Hair, absolutely and in fee simple.
>
> In the even of that [sic] Dwight pre-deceases Taylor O'Hair that all my property real and personal go to Carol Sue Hollon, absolutely and in fee simple.

Item IV. named Dwight as executor of the will. On April 15, 2005, Taylor executed a codicil to his will revoking the contingency provision contained in Item III to his will. The codicil stated as follows:

> Comes Taylor O'Hair and says that he executed a Will on or about the 15th day of November 15, 2002 [sic].
>
> I hereby affirm all that I said in that will except that I wish to change Item 3 [sic] of said of said [sic] will to delete the second paragraph of item 3 [sic] which says that if Dwight O'Hair predeceases Taylor O'Hair all of his real estate and personal property go to Carol Sue Hollon be deleted and is no longer a part of my Last Will and Testament.

Taylor died on September 16, 2005. He was in his late eighties. The will was timely probated in Powell District Court and Dwight was named as Executor of the Estate. As Executor, Dwight took the position that all of Taylor's property should pass to him under the will, including intangible personal property such as cash, bank accounts, and certificates of deposit.[2]

[2] It appears that the total of these items was approximately $120,000.00.

On January 6, 2006, the above captioned appellees, Taylor's children, filed a Petition for Declaration of Rights in Powell Circuit Court challenging Dwight's construction of the will. The appellees first alleged that Taylor's use of the terms "will and desire" in Item II and Item III of the will should be construed as expressing merely a preference on the part of the testator and not a mandatory obligation. In the alternative, the appellees sought that it be adjudged that the will not be construed as bequeathing intangible personal property such as cash, bank accounts, and certificates of deposits to Dwight. The petition further sought the removal of Dwight as Executor of Taylor's estate. In his answer, Dwight argued that the will should be construed as leaving the entire estate to him.

In the course of the litigation, the deposition of John Cox, the drafter of the will was taken. In his deposition he unequivocally indicated that it was Taylor's intent to leave all of his estate to Dwight, and that he had Taylor sign the will without having checked it as carefully as he should. In his deposition, Dwight testified that he had been in attendance on the occasion when Taylor executed his codicil, and he understood Taylor's intent to be that the entirety of his estate should be left to Dwight.

In due course the appellees moved for summary judgment. On August 14, 2007, the trial court entered an order adjudging that the terms "will and desire" in Item II and Item III properly conveyed Taylor's intent to bequeath the property as stated therein.[3] The court further adjudged, however, that the bequests to Dwight contained in the will did not include intangible personal property such as cash, bank accounts, and certificates of deposit, and determined that such property should be distributed pursuant to the laws of intestacy. On August 24, 2007, Dwight filed a motion to alter, amend, or vacate, which was denied by order of September 5, 2007. This appeal followed.

[3] The appellees do not appeal that determination.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[4] 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

In his enumerated Argument I Dwight contends that summary judgment was improper because there are genuine issues of material fact concerning Taylor's intent related to the will. He does little to flesh out this argument, however. In sum, he states

> Dwight relies on the deposition of John Cox and the deposition of Dwight O'Hair to show there were genuine issues of material facts, that being the intention of the testator at the time of the execution of the will and codicil.
>
> These depositions clearly show that Dwight would have been able to introduce evidence in support of testator's intentions, in support of his position as to the construction of the language of the instruments at a trial in this matter. This evidence could produce a judgment in Dwight's favor.

Implicit in this argument is that Cox and Dwight would testify regarding statements made by Taylor which led them to understand his alleged intentions. However, the general rule is that if a will is unambiguous, no construction is called for, and extrinsic evidence may not be introduced as an aid to construction. *Dils v. Richey*, 431 S.W.2d 497, 498 (Ky. 1968). "If [a will] is not [ambiguous], the will must be allowed

[4] Kentucky Rules of Civil Procedure.

to speak for itself without the aid of anything outside the document." 2 Ky. Prac. Prob. Prac. & Proc § 1106 (2d ed.). As further discussed below, we do not construe the terms of the will to be ambiguous. As such, we do not believe that the extrinsic evidence contained in Cox's and Dwight's deposition testimony is competent evidence to defeat summary judgment.

Dwight's second argument is that reversal is required because "[i]n its order of summary judgment, the court references that a copy of the will and codicil were attached to the judgment. However, a review of the record of the court's order [] reveals that neither the will nor the codicil were attached to the court's order." Based upon this, Dwight surmises that the trial court failed to properly consider the codicil in reaching its decision. However, the codicil is otherwise contained in the record,[5] and we are unpersuaded that because the trial court's order stated that a copy of the will and codicil were attached, when in fact they were not, evidences that the trial court did not consider the codicil in his summary judgment decision.

In any event, we are further unpersuaded by Dwight's argument concerning the codicil upon the merits. As noted above, the codicil states as follows:

> I hereby affirm all that I said in that will except that I wish to change Item 3 of said of said [sic] will to delete the second paragraph of item 3 which says that if Dwight O'Hair predeceases Taylor O'Hair all of <u>his</u> real estate and personal property go to Carol Sue Hollon be deleted and is no longer a part of my Last Will and Testament.
> (Emphasis added).

Dwight argues that "the pronoun <u>his</u> refers to Dwight O'Hair and that the decedent understood that all Taylor's real and personal property was to be Dwight O'Hair's." In support of this interpretation, Dwight argues that the use of "his" in the codicil "is important because in Article [sic] III of the will he uses the pronoun <u>my</u> indicating that the decedent viewed the property of being that of Taylor O'Hair."

[5] Record on Appeal, pg. 62 (as an exhibit to John Cox's deposition), for example.

We do not believe there is any ambiguity in Taylor's use of the pronoun "his" in the codicil. The only reasonable reading of the language is that the pronoun refers to Taylor, not Dwight. First, that is the most natural and logical reading of the language. Second, the interpretation urged by Dwight produces a ludicrous result. The codicil references back to the contingency clause contained in Item III of the will, which is a clause which would have been applicable only in the event Dwight predeceased Taylor. As in this event Dwight would never have inherited under the will and thus would never have came into ownership of any of the property at issue, it would make no sense to refer to the property as Dwight's property in the codicil. As such, we do not believe this argument defeats summary judgment.

Dwight's final argument is that the rule of presumption against partial intestacy should be applied so as to find that he inherits the entire estate under Taylor's will. He notes that if the will is construed as written, it will not have disposed of his intangible personal property. He further notes that since the original contingency clause left his entire estate to Carol Sue Hollon, he must have also have intended to leave Dwight his entire estate as the primary beneficiary.

Every reasonable presumption will be indulged against partial intestacy, but the presumption cannot be applied to supply a disposition which was not made or intended. *Pimpel v. Pimpel*, 253 S.W.2d 613, 614 (Ky. 1952). In other words, the presumption vanishes when the fact becomes apparent that some part of the estate was not disposed of. *Id.*

The plain terms of the will provide that Dwight is to inherit Taylor's real property on Virden Ridge Road, the mobile home situated thereon, and all of Taylor's furnishing and appliances. The will does not provide that Dwight will inherit Taylor's intangible personal property such as cash, bank accounts, and certificates of deposit.

No rule of construction can be used to write something into a will which the testator did not himself put in it. *Robinson v. Von Spreckelsen*, 155 S.W.2d 30, 32 (Ky. 1941). Thus we are not persuaded that this argument defeats summary judgment.

In summary, while the testimony of the drafter of the will, John Cox, reflects that the will as written does not express the true intent of Taylor O'Hair in disposing of his property, the well established rules of construction as set forth above prevent us from varying the plain language of the will to obtain the result urged by Dwight. Moreover, Dwight cites us to no authority under which the extrinsic evidence he seeks to present through Cox would be admissible at trial. The rule is that such evidence may not be introduced to contradict an unambiguous will. Moreover, the plain language of the will is unambiguous. As such, and though this may produce a harsh result, the will must be enforced as written.

For the foregoing reasons the judgment of the Powell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leah Hawkins
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE:

Brian N. Thomas
Christopher M. Davis
Winchester, Kentucky