RENDERED: JUNE 20, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001363-MR

ETTA MAE HARRIS — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 05-CI-00368

NELSON SPARKS, EXECUTOR OF THE ESTATE OF A. BLANKENSHIP, JR.; DEAN BRADLEY; RUTH NAPIER; AND JAMES E. BRADLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Etta Mae Harris appeals from summary judgment entered in favor of Nelson Sparks, Executor of the Estate of Arthur Blankenship, Jr.; Dean Bradley; Ruth Napier; and James E. Bradley. After careful review, we affirm.

Arthur Blankenship, Jr., (hereinafter "Arthur") was born on December 3, 1913, and died testate on March 12, 2002, with his last will and testament dated

July 28, 1998. Etta Mae Harris (hereinafter "Etta") is the only child of Arthur and is the appellant herein. Appellees Dean Bradley, Ruth Napier, and James E. Bradley are beneficiaries under Arthur's will and are Arthur's nieces and nephews, the children of Arthur's sister. Initially, Arthur executed a will on September 9, 1997, which provided a portion of the residuary estate for his daughter, Etta. The will further provided portions of the residuary estate to Dean Bradley and James E. Bradley. In July 1998 Arthur executed a subsequent will, which left the remaining portion of his estate to his niece, Ruth Napier, rather than his daughter, Etta.

The relationship between Etta and Arthur had been strained since the divorce between Arthur and Etta's mother, Opal Workman. Etta and Arthur had very limited contact, and Etta testified that she had not seen her father since 1987 and had only seen him two or three times since she turned seven years of age. In July 1998, Arthur approached his attorney, Michael Hogan, and expressed his desire to change his will to disinherit Etta and include his niece, whom he had lived with briefly and with whom he would later live with for some time in 2000 due to health problems. Michael Hogan testified that he had previously represented Arthur regarding property and social security disability issues and that at the time Arthur approached him to modify the will, he had no reason whatsoever to question Arthur's mental condition or abilities. Hogan also testified that Arthur explained that because he did not have a close relationship with Etta, he desired to change his will.

When Arthur initially executed the September 1997 will, he also provided his nephew, Dean Bradley, a limited power of attorney granting the "limited power to transfer funds from [his] savings account to [his] checking account, at [his] direction, and withdraw funds from any of [his] bank accounts in order to pay any medical bills or utility bills for which [he] became indebted." Dean Bradley assisted Arthur with his financial responsibilities and it generally appears that he had a close personal relationship with Arthur, driving him to appointments and assisting Ruth Napier with Arthur's care subsequent to the execution of his wills. When the July 1998 will was executed, Dean Bradley accompanied Arthur to Michael Hogan's office and was requested to wait outside while discussions as to Arthur's wishes took place between Arthur and Hogan. The will was witnessed by Michael Hogan and Kathleen Short and was notarized by Michael Hogan's secretary, Della Savage.

Two years after the execution of the July 1998 will, Arthur had an esophageal injury and required a feeding tube. In July 2000, he moved in with Ruth Napier and paid her rent for her assistance with his care. Arthur died on March 12, 2002. His last will and testament named Dean Bradley as the executor of the estate. The Lawrence District Court, however, appointed Nelson Sparks as executor of the estate to avoid a conflict of interest because Dean Bradley was also a beneficiary under the will. Etta filed a complaint, alleging that Arthur's will was legally insufficient because Arthur was not of sound mind and was mentally incapable of making a will at the time of the execution. She further alleged that

Arthur was mentally incapacitated to make a will, because he was coerced into signing the document by the undue influence of Dean Bradley, Ruth Napier, and James E. Bradley. She alleged that the will was procured by fraud and undue influence and that the writing was not the last will and testament of Arthur because it made no provisions for her, his daughter.

Prior to filing this complaint, Etta filed a previous action in the Lawrence Circuit Court demanding that Dean Bradley provide a full accounting of his actions as power of attorney for Arthur. The depositions of Dean Bradley and Etta were taken in that action. Subsequently, the depositions of Nelson Sparks, James Bradley, Ruth Napier, and Michael Hogan were taken in the instant case. Several extensions were granted to Etta to complete discovery. At the close of discovery, Etta had not disclosed any expert witnesses nor had she taken any expert discovery. The appellees filed a motion for summary judgment, and Etta was permitted an extension of time in which to respond. Ultimately, Etta filed her response on June 4, 2007. The Lawrence Circuit Court entered an order granting summary judgment to the appellees on June 12, 2007. This appeal followed.

"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); CR 56.03. We are mindful that "[t]he 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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The trial court in the instant case found that Etta Harris had simply failed to provide any proof whatsoever to show that Arthur Blankenship was mentally impaired, incapacitated, or was subject to undue influence or fraud. Instead, the court found that Etta had not seen her father since 1987 and had no knowledge of what he had been doing since 1990. The court also found that the medical records from 1998, when Arthur executed his last will and testament, indicated that Arthur was alert and well oriented and was able to provide history and understand instructions. The only evidence even suggesting any mental capacity issues were medical records dated in the year 2000, two years *after* the execution of the will at issue. Finally, the court found that Etta had not provided any evidence suggesting undue influence, nor had she identified any medical or handwriting experts who might testify regarding capacity or the validity of the will. The court concluded that there were simply no facts from which a jury could draw a conclusion that the will of Arthur Blankenship was invalid and accordingly granted summary judgment in favor of the appellees.

Etta argues on appeal that the burden of proof is lowered when a complaint alleges undue influence coupled with unequal or unnatural disposition, mental incapacity, or will invalidity and that such allegations automatically require submission of the case to a jury. Etta essentially argues that when the question is one of intent, summary judgment is not appropriate and cites *Brown Foundation v.*

St. Paul Ins. Co. 814 S.W.2d 273 (Ky. 1991) and *Perry v. Motorists Mutual Ins. Co.*, 860 S.W.2d 762 (Ky. 1993). Etta argues that where different inferences can be drawn from undisputed facts, there is a question of fact and not of law and the factual determination should be made by a jury.

We agree that when different inferences can be drawn, there is a question of fact and the case must be submitted to a jury for determination. Further, when allegations of undue influence are coupled with mental incapacity, it is logical that the proof for each allegation could be lessened and a jury could conclude that both exist and invalidate a will accordingly. However, the allegations Etta has made in her complaint, unsupported by the evidence at the close of discovery, do not automatically require submission to a jury and must instead surpass summary judgment. The lower court found, and we agree, that Etta has not provided any proof thus far from which a jury could draw different inferences from undisputed facts. Instead the court found that there was *no* evidence of undue influence, mental incapacity, unnatural disposition, or problems with the face of the will and properly noted that there are simply no facts in which a jury could draw a conclusion that the will was invalid. Absent any proof at the close of discovery, it would be impossible for Etta to succeed at trial, and summary judgment was appropriate.

For the foregoing reasons, the decision of the Lawrence Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David O. Welch
Law Offices of David O. Welch
Ashland, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill, Jr.
Ashland, Kentucky