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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000430-MR

BOBBY GENE JUSTICE, INDIVIDUALLY
AND AS EXECUTOR FOR THE ESTATE
OF JOSEPH A. JUSTICE — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CI-00522

KATHERINE JUSTICE ADKINS
AND CAROL JUSTICE STEVENS — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: COMBS, DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Bobby Justice (Bobby), individually and as the executor of the estate of Joseph Justice (Mr. Justice), appeals from the Pike Circuit Court's judgment interpreting Mr. Justice's will. Bobby also appeals from the court's orders denying his motion to recuse; denying his motions and amended motions to

alter, amend, or vacate; denying his motion for relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02; requiring him to file "an updated Final Settlement;" and requiring him to make a final distribution of the estate's assets. Kathryn[1] Justice Adkins (Kathryn) and Carol Justice Stevens (Carol) (collectively, the Appellees) argue that the trial court's orders were correct and that Bobby's appeal should be dismissed as untimely filed. We agree that Bobby failed to timely file his notice of appeal. Therefore, we must dismiss the above-styled appeal.

This is the second time litigation regarding Mr. Justice's estate has come before this Court. For our recitation of the facts, we shall rely upon the facts as set forth in our prior opinion:

> At age ninety and suffering from Alzheimers related dementia, Joseph A. Justice executed a codicil to his 1992 will. The codicil left the bulk of his substantial estate to his son, appellant Bobby Justice. The devise by the codicil was of property the 1992 will had divided equally among Bobby and his sisters, the appellees. Bobby's appeal is predicated upon the contention that it was error to set the codicil aside as having been the product of undue influence. We disagree and affirm.
>
> Joe Justice and his wife, Martha Ellen Justice, had four children, appellant Bobby Justice, appellees Carol Stevens and Kathryn Adkins, and Wanda Harrelson, who predeceased both her mother and father. Mrs. Justice died on May 25, 2001. Although Bobby and Kathryn made their homes in Michigan during their adult married lives, Carol made her home in Pike County and was thus continuously available to assist her parents. As Joe's and Martha's needs increased due to their advancing age, Carol and her husband Larry moved into her parent's home in order to assist them with their daily activities. In

[1] There appears to be some confusion in the record regarding the correct spelling of this party's name. We shall use the spelling "Kathryn."

1997, Bobby returned to Pike County and took control of his parents' affairs. It is at this point the parties' versions of events diverge drastically.

Carol and Kathryn maintain that immediately upon Bobby's arrival, he began preventing them and other family members from seeing their parents. They allege that in 1998 they became so concerned over their parents' well-being that they were forced to file an application for an emergency appointment of a fiduciary for their father and petitioned the district court for specific visitation with their mother. Mrs. Justice was found to be "disabled" on April 3, 2000. After her death in May 2001, and due to both physical and mental health concerns, Mr. Justice became a resident of Parkview Nursing Home in October of that year. The codicil in issue was executed on November 6, 2001.

Bobby, on the other hand, maintains that neighbors of his parents called him because of concern they were not receiving proper care from Carol. It is his contention that the litigation to have his parents declared incompetent was the source of the hostilities between his parents and his sisters, and that it was the Pike Circuit Court that denied appellees visitation with their father. He also insists that his father was entirely competent to manage his affairs with "benevolent assistance," as was noted by Dr. Robert Granacher, who evaluated Mr. Justice in 1999, and that he provided such assistance. Concerning the execution of the codicil, Bobby states that it was Mr. Justice who requested an attorney for "estate planning", [sic] and that William Rigsby was engaged for that purpose. Finally, he maintains that despite the fact his father was suffering from dementia, he still had lucid intervals, and that he was having one of those "good days" at the time he signed the codicil.

At trial the jury had before it conflicting lay and medical testimony as to Mr. Justice's mental condition as well as to the care he received from both Bobby and Carol. After hearing that evidence, along with testimony from the attorneys involved in the preparation and execution of the codicil, the jury unanimously concluded

> that the codicil should be set aside because of undue influence or lack of capacity on the part of Mr. Justice.

Justice v. Stevens, 2005-CA-001218-MR, 2006 WL 2988221 at *1 (Ky. App. Oct. 20, 2006). This Court affirmed the judgment on appeal, and the Supreme Court denied the motion for discretionary review.

Thereafter, the parties continued to raise and litigate issues regarding Mr. Justice's estate. The issue giving rise to his appeal involves the interpretation of language in Mr. Justice's will. In Item III of his will, Mr. Justice specifically devised three parcels of real estate to three of his children; namely, Kathryn, Wanda Harrelson, and Bobby. Furthermore, Mr. Justice stated that, "No conveyance of real property is made under this Last Will and Testament to my daughter, CAROL STEVENS, as she has already received a conveyance of real property."

In Item IV of his will, Mr. Justice provided that:

> In the event my wife should predecease me, or should we die simultaneously, all the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situated, which remains after conveyance of the above specific bequests, which I shall own or have an interest in at the time of my decease, I do hereby give, bequeath and devise to my four children KATHRYN ADKINS, WANDA HARRELSON, BOBBY GENE JUSTICE, and CAROL STEVENS, share and share alike, in fee simple absolute.

Bobby believed that the provision in Item III, stating that Carol would not receive a conveyance of real property, controlled and that any statement in Item IV to the contrary was incorrect. The Appellees believed that Item III was not a

statement contradicting Mr. Justice's devise of a proportionate share of the residual real property to Carol, but an indication that Mr. Justice wanted to make it clear why he was not making a specific devise of real property to her. Thus, Bobby believed that he and Kathryn would split the residual real property with Carol taking nothing, while the Appellees believed that the three should equally share in the residual real property.

In a supplement to the final settlement, Bobby made his belief clear that the residual real property was being split equally between him and Kathryn. The Appellees filed exceptions, arguing that Bobby's proposed disposition ignored the plain meaning of Item IV of Mr. Justice's will. The court scheduled an evidentiary hearing[2] on this issue, and in an order entered on June 30, 2010, determined that the residual real property should be divided three ways. In doing so, the court determined that the most reasonable interpretation of the two diverse items was that Mr. Justice intended that any real property that remained after the specific devises would be divided equally among all of his children.

Bobby timely filed a motion to alter, amend, or vacate the June 30, 2010, order. In his motion, Bobby argued that the court had previously indicated during a hearing that the residual property did not need to be divided three ways. Bobby stated he believed that was the court's order regarding interpretation of the will, and he argued that the court had altered its interpretation without giving the parties an adequate opportunity to present evidence on the issue. Therefore, he asked the

[2] A copy of that hearing is not in the record on appeal.

court to vacate the order and to schedule a hearing. The Appellees argued that the parties were well aware of the existence of the issue. Furthermore, they noted that the parties had presented evidence and argued their positions at a hearing on August 3, 2009.[3]

On September 10, 2010, the court entered an order denying Bobby's motion to alter, amend, or vacate the June 30, 2010, judgment. Thereafter, the Appellees filed a motion for final distribution, which the court granted. Bobby filed a motion to alter, amend, or vacate the final distribution order, arguing that his motion to alter, amend, or vacate the June 30, 2010, order was still pending. In their response to Bobby's motion, filed December 7, 2010, the Appellees pointed out that the court had denied Bobby's motion to alter, amend, or vacate the June 30, 2010, order on September 10, 2010. Bobby then filed motions for relief under CR 60.02, to "restore the status quo ante," and asking the judge to recuse. In his CR 60.02 motion, Bobby argued that he had not received the order denying his motion to alter, amend, or vacate the June 30, 2010, order. In his recusal motion, Bobby argued that the judge, as a shareholder in a corporation with his brothers, had an interest in a portion of the real property that was in dispute. The judge denied all of Bobby's motions.

It is from the court's June 30, 2010, findings of fact, conclusions of law, and judgment, as well as its orders denying his motions to alter, amend, or vacate; his motion for CR 60.02 relief; and his motion to recuse that Bobby now appeals.

[3] A copy of that hearing is not part of the record on appeal.

Because we believe it is dispositive of the other issues on appeal, we shall first address the trial court's denial of Bobby's motion for CR 60.02 relief, in conjunction with the Appellees' motion to dismiss, which was passed to the merits panel.

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000) (citation in footnote omitted); *see also Kurtsinger v. Bd. of Trustees of Kentucky Ret. Systems*, 90 S.W.3d 454, 456 (Ky. 2002); and *Brown v. Commonwealth,* 932 S.W.2d 359, 362 (Ky. 1996). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a "flagrant miscarriage of justice," the trial court's order will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

In his CR 60.02 motion, Bobby requested the court to set aside its September 10, 2010, order denying his motion to alter, amend, or vacate the June 30, 2010, judgment. In support of his CR 60.02 motion, Bobby argued that neither he nor his attorney had received the court's September 10, 2010, order. However, the order contains a certification from the clerk that it was served on the "Hon. Jonah Stevens, P.O. Box 1286, Pikeville, KY 41502" and the "Hon. Michael de Bourbon, P.O. Box 339, Pikeville, KY 41502." The address for Bobby's attorney (Jonah L. Stevens) is correct on the clerk's certification. Therefore, it appears that

the order was forwarded to Bobby's attorney at the correct address. In light of the clerk's certification that the order was mailed to the correct address, the court was free to deny Bobby's motion.

We recognize Bobby's argument that, pursuant to *Kurtsinger*, the court had the discretion to vacate its September 10, 2010, order. 90 S.W.3d at 456-57. However, nothing in *Kurtsinger* or CR 60.02 compelled the court to do so. Bobby states that he was not aware of the September 10, 2010, order until a January 2011 hearing. However, as noted by the Appellees, they made reference to the September 10, 2010, order in their December 7, 2010, response to one of Bobby's motions to alter, amend, or vacate. Therefore, Bobby's argument is not persuasive.

Based upon our holding that the court did not commit any error or abuse its discretion in denying Bobby's CR 60.02 motion, the June 30, 2010, judgment became final when the court denied Bobby's motion to alter, amend, or vacate that judgment. Therefore, Bobby was required to file his notice of appeal within thirty days, which he failed to do. Because Bobby did not timely file his notice of appeal, we must dismiss his appeal. *See Stewart v. Kentucky Lottery Corp.,* 986 S.W.2d 918, 921 (Ky. App. 1998).

The preceding disposes of this matter on appeal and renders the additional issues raised by Bobby moot. However, we shall briefly address Bobby's argument that the trial judge should have recused. A judge is required to recuse if he has a personal bias or prejudice, if his impartiality might be reasonably questioned, if he knows that he has more than a *de minimus* interest "in the subject

matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding[,]" or if one of his relatives has such an interest in the subject matter. Kentucky Rules of the Supreme Court (SCR) 4.300, Canon 3E(1).

Bobby presented proof, after the court had entered its judgment and after that judgment became final, that both C. Corporation and the estate potentially had an interest in the same parcel of real property. According to Bobby, the trial judge, as a shareholder in C. Corporation, had an inherent conflict because of those potentially competing interests. We disagree for four reasons.

First, we note that the evidence that the estate and C. Corporation had competing interests in the same parcel of real property is less than clear. Second, even if they both claim an interest in the same parcel of real property, there is no evidence that either the estate or C. Corporation has attempted to assert a claim adverse to the other. Third, there is no evidence that the trial judge or anyone at C. Corporation knew that the estate and the corporation had competing interests. Fourth and finally, Bobby has offered no proof that any rulings by the trial judge had any impact on any competing interests.

The controversy before the court was one among Mr. Justice's heirs. The resolution of that controversy would not impact any claims Mr. Justice's heirs have or could have against C. Corporation. We recognize Bobby's argument that his sisters might be less averse to litigating any competing claim with C. Corporation than he would. However, we are not persuaded by that argument. Bobby has argued throughout these proceedings that his sisters were so intent on getting Mr.

Justice's money that they attempted to gain control of his assets by seeking an emergency appointment of a fiduciary. That argument is inconsistent with his argument that these same sisters would fail to protect their interests against a third-party corporation. Therefore, even though we are not required to address the issue, we discern no error in the trial court's refusal to recuse.

Because Bobby did not timely file his notice of appeal, it is hereby ordered that the Appellees' passed motion to dismiss is GRANTED and Bobby's appeal is dismissed.

ALL CONCUR.

ENTERED: JUNE 28, 2013

/s/ James H. Lambert
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Jonah L. Stevens
James L. Hamilton
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Michael de Bourbon
Pikeville, Kentucky