RENDERED: NOVEMBER 22, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001333-MR

BETTY HOSKINS REVIS — APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 10-CI-00027

WILLIAM RUSH HOSKINS, Individually and as Executor of the ESTATE OF LUCILLE BRANNON, Deceased; JILL FRITZ; MATTHEW FRITZ; and DAVID FRITZ — APPELLEES

OPINION AND ORDER
AFFIRMING AND
GRANTING PARTIAL DISMISSAL

** ** ** ** **

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

MOORE, JUDGE: Lucille Brannon passed away at the age of 86 on July 26, 2009. Shortly thereafter, an instrument purporting to be her last will and testament was probated in Leslie District Court; it named her brother, William Rush Hoskins, as the executor of Lucille's estate; it named her niece (Jill Fritz) and her niece's

two sons as beneficiaries; and, it omitted her sister, Betty Hoskins Revis. On February 2, 2010, Betty filed an action in Leslie Circuit Court to contest Lucille's will, alleging that her sister had lacked the requisite mental capacity to make a will at all relevant times, that Lucille's will had been improperly executed, and that Lucille's will was the product of undue influence. Betty now appeals a summary judgment entered by the Leslie Circuit Court in favor of the above-captioned appellees. The appellees have moved to dismiss her appeal. For the following reasons, we dismiss part of Betty's appeal and otherwise affirm the judgment of the circuit court.

MOTION TO DISMISS

Shortly after Betty filed her appeal, the appellees moved to dismiss it as untimely. Betty filed a response to the appellees' motion and, thereafter, it was overruled by a three-member motion panel of this Court. Now that Betty's appeal has been assigned to this merits panel, the appellees have renewed their motion to dismiss.

As an aside, while the appellees' brief discusses this issue, Betty's brief largely ignores it; instead, Betty merely asserts that the appellees are prohibited from renewing their motion here because the motion panel has already overruled it. This is a common misconception. The motion panel's order overruling the appellees' motion to dismiss did not finally dispose of any aspect of this case. "This Court retains authority to review decisions on motion panel that do not finally dispose of the case when the case is considered by a full-judge panel to

which it is assigned." *Commonwealth Bank & Trust Co. v. Young*, 361 S.W.3d 344, 350 (Ky. App. 2012).

With that said, the appellees' motion to dismiss is based upon Kentucky Rule of Civil Procedure (CR) 73.02. The appellees point out that the circuit court entered summary judgment on March 7, 2012, which they argue became final on June 4, 2012. They argue that because Betty filed her notice of appeal on July 16, 2012, Betty filed it outside of the 30-day appellate window specified in CR 73.02(1)(a) and dismissal is therefore mandated pursuant to CR 73.02(2). *See City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

When Betty responded to the appellees' motion, Betty disagreed and asserted that the circuit court's March 7, 2012 summary judgment did not become final and appealable until the circuit court subsequently entered an "order clarifying" on July 11, 2012. This July 11, 2012 order provides in relevant part as follows:

> WHEREAS, the Plaintiff through counsel had filed three motions with the Court after the Court had ruled that the Motion for Summary Judgment was dismissed [sic], the Court had filed two orders related to those three motions, and Plaintiff's counsel had filed a MOTION TO CLARIFY asking the Court to clairify [sic] the status of the above case; it is ORDERED AND ADJUDGED AS FOLLOWS:
>
> 1. The MOTION TO ALTER, AMEND OR VACATE A JUDGMENT scheduled for hearing on May 2, 2012 was DENIED.

2. The MOTION TO STRIKE AND DELETE HEARSAY IN AFFIDAVIT scheduled for hearing on May 2, 2012 is DENIED.

3. The MOTION TO ALTER, AMEND OR VACATE A JUDGMENT FOR LACK OF WILL, filed May 29, 2012, and heard June 6, 2012 was DENIED.

IT IS SO ORDERED this 11 day of July, 2012.

Whether this July 11, 2012 order had any impact upon Betty's time for filing an appeal is questionable. It relates to three post-judgment motions Betty filed in this matter, but does not dispose of two of them; rather, it merely indicates that two of those motions had *already* been denied (*i.e.*, the "motions to alter, amend, or vacate" described in paragraphs "1" and "3").[1] Moreover, if the motion described in paragraph "2" was simply a motion to strike evidence from the record, as opposed to a motion filed pursuant to CR 52.02 or 59.05,[2] any failure of the circuit court to make a ruling on it up to the point of the July 11, 2012 order would not have prevented a judgment previously entered by the circuit court from becoming final and appealable; nor would it have otherwise extended the time for appealing such a judgment. *See, e.g., Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184 (Ky. App. 1987) ("[T]he appellant failed to pursue the motion and did not

[1] Indeed, this "order clarifying" was entered in response to a *third* "motion to alter, amend, or vacate" that Betty filed on June 11, 2012, in which Betty simply asked the circuit court "to clarify whether the above matter is still pending before the Court, and the disposition of each of the above three described Motions filed on behalf of the Plaintiff."

[2] In full, CR 52.02 provides: "Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59." As with motions pursuant to CR 59 and CR 50.02, the running of the time for appeal is likewise terminated by a timely motion pursuant to 52.02. *See* CR 73.02(1)(e).

obtain a ruling by the trial court. Any objection to the testimony is accordingly waived.").

With this in mind, we will review each of these motions and the procedural history surrounding them to determine the timeliness of Betty's appeal.

1. Motion described in paragraph "1" of the "order clarifying"

Betty filed the motion described in paragraph "1" of the "order clarifying" on March 12, 2012. It was by its own explicit terms a CR 59.05 motion. Betty raised two overarching arguments. Her first argument was that a genuine issue of material fact existed regarding whether her sister, Lucille Brannon, had the requisite mental capacity to execute her will that was at issue in this matter. To that effect, much of this motion is dedicated to summarizing a number of affidavits and medical records which, Betty asserted, stood for the proposition that Lucille lacked the requisite mental capacity. Betty's second argument was that the circuit court's order of summary judgment contained a patent error because it appeared to rely upon hearsay contained in an affidavit filed of record by the appellees. The affidavit in question was that of Leonard Brashear, the attorney who prepared Lucille's will. The hearsay contained in this affidavit concerned a conversation Brashear had with Lucille's treating physician, Dr. Roy Varghese. And, the circuit court's March 7, 2012 summary judgment order noted the substance of this hearsay as follows:

> Prior to preparing the Will for Lucille Brannon, Mr. Brashear said he discussed her condition with her long time treating physician, Dr. Roy Varghese, at the Mary

> Breckinridge Hospital. The decedent's home was within the immediate vicinity of the hospital, and, as a result, Dr. Varghese stopped by her home on frequent occasions. He would visit her at least once a week. Dr. Roy Varghese, her treating physician, told Leonard Brashear, the decedent was certainly capable of making a will. He said Lucille Brannon had significant physical frailties, but mentally was competent and able to know what was going on and transact business. Mr. Brashear stated that after visiting with Lucille Brannon, although not a medical doctor himself, he was of the same opinion as Dr. Varghese.

The latter of these two arguments is relevant in the context of our discussion, immediately below, regarding Betty's "motion to strike and delete hearsay in affidavit" (referenced in paragraph "2" of the circuit court's July 11, 2012 order), which Betty filed contemporaneously with this CR 59.05 motion. That aside, the record clearly demonstrates that the circuit court considered this CR 59.05 motion and overruled it on June 4, 2012. Therefore, if this was the only motion that Betty filed capable of extending her time for appealing this matter, Betty's July 16, 2012 notice of appeal was untimely.

2. Motion described in paragraph "2" of the "order clarifying"

As discussed above, Betty filed her two-page "motion to strike and delete hearsay in affidavit" on March 12, 2012, contemporaneously with her CR 59.05 motion. The only relief she requested is specified in the following two sentences within this motion:

> The [March 7, 2012 summary judgment] order relies upon the hearsay allegations of the Affidavit of Leonard Brashear in which he states that he did hear Dr. Roy Varghese say certain statements and he does repeat that

> alleged hearsay of Dr. Roy Varghese in the Affidavit of Leonard Brashear, which alleged statements of Dr. Roy Varghese are inadmissible hearsay, have not been sworn by Dr. Roy Varghese, and should be disregarded by the Court in the Motion for Summary Judgment.
>
> WHEREFORE, the Plaintiff BETTY HOSKINS REVIS respectfully moves that the portion of the Affidavit of Leonard Brashear referring to and repeating the alleged statements of Dr. Roy Varghese be ordered disregarded, struck and deleted from the Court Record.

The motion panel of this Court seems to have focused upon this motion in its two-paragraph order overruling the appellees' motion to dismiss this appeal. As to why, the extent of the order's reasoning is only contained within a brief concurrence:

> Appellant strains the reading of CR 52.02 to embrace his [sic] "Motion to Strike and Delete Hearsay in Affidavit." In my opinion, the motion can only be considered one pursuant to CR 52.02 by implication. There was no motion to amend the order *per se*. I reluctantly concur with the decision to deny the motion to dismiss.

As the motion panel's order indicates, Betty had responded to the appellees' motion to dismiss by arguing that her "motion to strike and delete hearsay in affidavit" should actually be characterized as a CR 52.02 motion and that her motion therefore should have operated to toll the applicable period of time for filing an appeal until the circuit court purported to overrule it on July 11, 2012.

Upon further review, with the benefit of the entire record before this merits panel, we respectfully disagree with the motion panel's resolution of this issue. A plain reading of this motion reflects that it cannot be construed as a CR

52.02 motion. Like CR 59.05, CR 52.02 only relates to the *amendment of judgments*. By its own terms, this motion was concerned exclusively with *striking parts of an affidavit*.

Moreover, even if this could be perceived as a CR 52.02 motion, the circuit court would have lacked jurisdiction to make a ruling on it in the situation presented by this case. To explain, where a CR 59.05 motion is filed asking a circuit court to reconsider a prior decision to overrule a previous CR 59.05 motion, the circuit court does not retain jurisdiction to entertain such a motion. *See Mingey v. Cline Leasing Serv., Inc.*, 707 S.W.2d 794 (Ky. App. 1986). Likewise, no authority supports that a circuit court retains jurisdiction to entertain a CR 52.02 motion that also asks the circuit court to reconsider a prior decision to overrule a previous CR 59.05 motion. Here, interpreting Betty's "motion to strike and delete hearsay in affidavit" as a CR 52.02 motion would implicate this rule; it would lead to the conclusion that Betty intended to raise the same argument in two separate and contemporaneously-filed post-judgment motions for the purpose of requiring the circuit court to not only consider this argument, but to immediately *reconsider* this argument in the event that the circuit court rejected it. This is because the only argument that could have been distilled from Betty's "motion to strike and delete hearsay in affidavit," for the purpose of CR 52.02, would be that the circuit court's order of summary judgment contained a patent error inasmuch as it appears to have relied upon inadmissible hearsay from Dr. Roy Varghese.[3] As we have discussed

[3] In Betty's response to the appellees' motion to dismiss, this is exactly how Betty characterized the "CR 52.02" argument she purports to have raised in this motion.

supra, this was *already* one of the arguments Betty raised in her contemporaneously-filed CR 59.05 motion, which the circuit court overruled on June 4, 2012.

In sum, it would be inappropriate to interpret Betty's "motion to strike and delete hearsay in affidavit" as a CR 52.02 motion; and, even if it were susceptible of such an interpretation, doing so would not have extended Betty's time for filing an appeal under the circumstances of this case because the circuit court would not have been authorized to address it.

3. Motion described in paragraph "3" of the "order clarifying"

On May 29, 2012, Betty filed her motion referenced in paragraph "3" of the circuit court's July 11, 2012 "order clarifying." This motion does not provide that it was filed pursuant to any civil rule, but Betty styled it as a "motion to alter, amend, or vacate a judgment for lack of will." As the title indicates, the sole argument Betty raised in this motion was that error occurred because the appellees had failed to place Lucille Brannon's original will into the record before the circuit court had entered summary judgment in their favor on March 7, 2012.

The appellees regarded Betty's May 29, 2012 motion as one filed pursuant to CR 60.02[4] and responded to it as such. In a June 27, 2012 order, the

[4] CR 60.02 provides:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f)

circuit court treated it as a CR 60.02 motion and overruled it. On appeal, Betty argues that her May 29, 2012 motion was nevertheless a CR 59.05 motion, and that it accordingly tolled the period of time she had for directly appealing the circuit court's March 7, 2012 summary judgment.

We disagree that Betty's motion would have been authorized or timely under CR 59.05. If Betty's May 29, 2012 motion were construed as either a CR 59.05 motion or as an attempt to append additional arguments to her earlier March 12, 2012 CR 59.05 motion, Betty would only have been permitted to file it within 10 days after the entry of the circuit court's March 7, 2012 final judgment. This is because under our articulation of CR 59.05 in *Matthews v. Viking Energy Holdings, LLC*, 341 S.W.3d 594 (Ky. App. 2011), "litigants are required not only to file the motion, but also to identify and articulate the reasons which merit disturbing the judgment within this short time." *Stanley v. C & R Asphalt, LLC*, 396 S.W.3d 924, 926 (Ky. App. 2013) (Judge Caperton, M., concurring).

In light of the above, the circuit court's July 11, 2012 "order clarifying" had no effect upon the time allotted to Betty for filing an appeal in this matter. At the latest, her time to file an appeal began to run on June 4, 2012, when the circuit court overruled her only timely and authorized CR 59.05 motion. Consequently, Betty's notice of appeal, which she filed over 30 days after June 4,

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> any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. *A motion under this rule does not affect the finality of a judgment or suspend its operation.*

(Emphasis added.)

2012, was untimely and her direct appeal of the circuit court's March 7, 2012 summary judgment is therefore dismissed.

CIVIL RULE 60.02

The circuit court and the appellees treated Betty's May 29, 2012 motion as a CR 60.02 motion. We will follow suit. The circuit court overruled Betty's motion on June 27, 2012, and Betty filed her notice of appeal on July 16, 2012. Therefore, her appeal of the circuit court's denial of her motion was timely; we will accordingly review the circuit court's decision on the merits. Appellate review of a trial court's denial of a CR 60.02 motion is performed under an abuse of discretion standard. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a "flagrant miscarriage of justice," we will affirm the trial court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

> In general, CR 60.02 is not intended merely as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Rather, the rule was intended to codify the common-law writ of *coram nobis.* "The purpose of such a writ was to bring before the court that pronounced judgment errors in matters of fact which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise

> presented to the court." *Davis v. Home Indem. Co.*, 659 S.W.2d 185, 188 (Ky. 1983) (citing *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)). To this effect, CR 60.02 enumerates certain grounds, including (a), (e), and (f) as cited above, upon which, "on motion, a court may, upon terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding."
>
> . . .
>
> As stated in *Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974):
>
> > In those instances where grounds . . . for relief under a 60.02 motion are such that they were known or could have been ascertained by the exercise of due diligence prior to the entry of the questioned judgment, then relief cannot be granted from the judgment under a 60.02 proceeding. Relief afforded by a 60.02 proceeding is extraordinary in nature and should be related to those instances *where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking relief*.

Kentucky Retirement Systems v. Foster, 338 S.W.3d 788, 796-97 (Ky. App. 2010).

Here, the only argument Betty raised in her CR 60.02 motion was that error occurred because the appellees had failed to place Lucille Brannon's original will into the record before the circuit court had entered summary judgment in their favor on March 7, 2012. Betty does not explain which of the several grounds for filing a CR 60.02 motion would encompass this argument. But, Betty obviously could have raised this argument at any time between February 2, 2010 (when she

filed this action) and March 7, 2012 (the date of the circuit court's summary judgment). It could, therefore, have been raised as an argument in a direct appeal. Furthermore, and as explained in *Ramsey v. Howard*, 289 Ky. 389, 158 S.W.2d 981, 983-84 (1942), the failure to place the original will of record in a will contest is not a basis for voiding a judgment:

> It is to be borne in mind that the issue on the trial in the circuit court is not whether the instrument should be probated and put to record-which is the exclusive province of the county court [now district court]-but whether the instrument which has already been probated is in fact the will of the decedent.[5] Only the question of validity is involved-validity of the form of execution on the one side; validity of the paper or competency of the testator on the other. It is sufficient for a prima facie establishment of the instrument as a will, if it is consistent and rational, for the propounders to prove its execution in the manner prescribed by the statute. They may then rest their case. Hall v. Hall, 153 Ky. 379, 155 S.W. 755; Leary v. Leary, 203 Ky. 344, 262 S.W. 293. There is a presumption of mental capacity and of freedom of will-not because of the probate in the county court but because of all persons are presumed to be normal. Since the propriety of its probate is not involved, it is not necessary that the original instrument be presented. Obviously, the will should be read to the court and to the jury. Leary v. Leary, supra. It was read in the trial of this case from the pleadings and no question was made of that fact or of its accuracy.[6] Of course, where the genuineness of the signature is questioned, the identical paper is a very important item of evidence. It is much better practice in every case that the original or an attested copy of the instrument be produced, but the contestants were not entitled to a

[5] As William Rush Hoskins' status as "Executor of the Estate of Lucille Brannon" would suggest, the will of Lucille Brannon had already been probated prior to when Betty filed these proceedings.

[6] Likewise, a copy of the probated will is of record in this matter; it was attached as an exhibit to the deposition of a witness named Polly North.

directed verdict on the ground that the original paper was not presented in the circuit court.

In sum, Betty's argument in her May 29, 2012 motion was not a permissible basis for a CR 60.02 motion. Consequently, the circuit court did not err in overruling it.

CONCLUSION

For these reasons, Betty's direct appeal of the Leslie Circuit Court's judgment is DISMISSED, and the Leslie Circuit Court's denial of her CR 60.02 motion is AFFIRMED.

ALL CONCUR.

ENTERED: November 22, 2013

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Kenneth S. Stepp
Manchester, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES:

Phillip Lewis
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