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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000686-MR

BRENDA SUE BRIDGES GETTY,
individually, as trustee and beneficiary of
the March 22, 2004 Richard J. Getty Living
Trust, including as amended on October 24,
2008, as trustee and beneficiary of the
March 22, 2004 last will and testament of Richard
J. Getty, as executrix and beneficiary under the
October 27, 2008, last will and testament of Richard J.
Getty as grantee under the October 27, 2008 deed
trust transaction, as grantee of the October 27, 2008 grant deed,
and as attorney-in-fact of Richard J. Getty
under the February 23, 2004 power of attorney and
under the October 24, 2008 general durable power
of attorney APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NOS. 09-CI-00476 AND 10-CI-00424

RICHARD A. GETTY,
individually, as trustee and beneficiary of the
March 22, 2004, Richard J. Getty Living
Trust, and as personal representative,
trustee, and beneficiary of the
March 22, 2004, last will and testament
of Richard J. Getty; SESAMIE
BRADSHAW, individually, and as

beneficiary of the March 22, 2004,
Richard J. Getty Living Trust, and
as beneficiary of the March 22, 2004
last will and testament of Richard J.
Getty; and ERROL COOPER, as
trustee of the March 22, 2004,
Richard J. Getty Living Trust, and as
personal representative and trustee
of the March 22, 2004, last will
and testament of Richard J. Getty APPELLEES

AND NO. 2014-CA-000693-MR

CAROLYN CARROWAY
and KEVAN MORGAN APPELLANTS

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NOS. 09-CI-00476 AND 10-CI-00424

RICHARD A. GETTY,
individually, and as trustee and beneficiary
of the March 22, 2004 Richard J. Getty
Living Trust, and as personal representative,
trustee and beneficiary of the March 22, 2004
last will and testament of Richard J. Getty;
SESAMIE BRADSHAW, individually, and as beneficiary
of the March 22, 2004 Richard J. Getty Living
Trust, and as beneficiary of the March 22, 2004
last will and testament of Richard J. Getty;
ERROL COOPER, as trustee of the
March 22, 2004 Richard J. Getty
Living Trust, and as personal
representative and trustee of
the March 22, 2004 last will and

testament of Richard J. Getty; and
BRENDA SUE BRIDGES GETTY APPELLEES

AND NO. 2014-CA-000711-MR

RICHARD A. GETTY,
individually, as trustee and beneficiary
of the March 22, 2004 Richard J. Getty
Living Trust, as personal representative,
trustee and beneficiary of the
March 22, 2004 last will and testament
of Richard J. Getty, as beneficiary of the
Estate of Richard J. Getty, and as personal
representative of the Estate of
Richard J. Getty; SESAMIE BRADSHAW,
individually, as beneficiary of the March 22, 2004
Richard J. Getty Living Trust, and as beneficiary
of the March 22, 2004 last will and testament
of Richard J. Getty; and ERROL COOPER,
as trustee of the March 22, 2004 Richard J.
Getty Living Trust, and as personal representative
and trustee of the March 22, 2004
last will and testament of Richard J. Getty APPELLANTS

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE ROBERT MCGINNIS, JUDGE
ACTION NOS. 09-CI-00476 AND 10-CI-00424

BRENDA SUE BRIDGES GETTY,
individually, as trustee and beneficiary of
the March 22, 2004 Richard J. Getty Living
Trust, including as amended on October 24,
2008, as personal representative, trustee and beneficiary of the
March 22, 2004 last will and testament of Richard

J. Getty, as executrix and beneficiary under the
October 27, 2008 last will and testament of Richard J. Getty
as grantee under the October 27, 2008 deed trust transaction,
as grantee of the October 27, 2008 grant deed, and
as attorney-in-fact of Richard J. Getty
under the February 23, 2004 power of attorney and
under the October 24, 2008 general durable power
of attorney; CAROLYN CARROWAY,
Individually and as trustee of the
October 27, 2008 Deed Trust; and
JOSEPH MAYER, as trustee of the
March 22, 2004 Richard J. Getty Living Trust
as amended on October 24, 2008, as
executor of the October 27, 2008 last
will and testament of Richard J. Getty,
and as Attorney-in-Fact of Richard J. Getty
under the October 24, 2008 general
durable power of attorney; and
KEVAN MORGAN APPELLEES

AND CROSS-APPEAL NO. 2014-CA-000764-MR

CAROLYN CARROWAY,
individually and as trustee of the
October 27, 2008 Deed Trust;
JOSEPH MAYER, as trustee of the
March 22, 2004 Richard J. Getty Living
Trust as amended on October 24, 2008,
as executor of the October 27, 2008
last will and testament of Richard J.
Getty, and as attorney-in-fact of
Richard J. Getty under the October 24, 2008
general durable power of attorney; and
KEVAN MORGAN CROSS-APPELLANTS

APPEAL FROM BOURBON CIRCUIT COURT
v. HONORABLE ROBERT MCGINNIS, JUDGE

RICHARD A. GETTY,
individually, as trustee and beneficiary
of the March 22, 2004, Richard J. Getty
Living Trust, and as personal representative,
trustee and beneficiary of the
March 22, 2004, last will and testament
of Richard J. Getty; SESAMIE
BRADSHAW, individually, as beneficiary
of the March 22, 2004, Richard J. Getty
Living Trust, and as beneficiary of the
March 22, 2004, last will and testament of
Richard J. Getty; ERROL COOPER,
as trustee of the March 22, 2004, Richard
J. Getty Living Trust, and as personal
representative and trustee of the
March 22, 2004, last will and testament
of Richard J. Getty; and
BRENDA SUE BRIDGES GETTY CROSS-APPELLEES

OPINION
REVERSING AS TO APPEAL NOS. 2014-CA-000686, 2014-CA-000693, AND CROSS-APPEAL NO. 2014-CA-000764; AFFIRMING AS TO APPEAL NO. 2014-CA-000711

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

KRAMER, CHIEF JUDGE: These consolidated appeals relate to an estate plan Richard J. Getty ("Dick") purportedly executed on October 27, 2008, approximately one year before he died at the age of eighty-six following years of poor health and a period of hospice care. As part of his October 27, 2008 estate plan, Dick invalidated a will he had previously executed on March 22, 2004; he

invalidated a revocable trust he had established on March 22, 2004, to hold title to commercial property he owned in Simi Valley, California (the "Regency Center"); he deeded the Regency Center to himself and Sue Getty, his wife of approximately twenty-six years, as joint tenants with rights of survivorship; he deeded the house in which he resided with Sue, along with its surrounding property (the "farm"), to his attorney Carolyn Carroway, as trustee, and then to himself and Sue as joint tenants with rights of survivorship; and, lastly, he executed a new will in which he left the bulk of his estate to Sue, and only one dollar each to his son and daughter, Richard A. Getty ("Rich") and Yolanda Richardson.

Following Dick's death and action from Sue to probate the October 27, 2008 will, Rich, along with Sesamie Bradshaw (Dick's granddaughter and Yolanda's daughter and sole heir[1]), filed suit in Bourbon Circuit Court in their various above-captioned capacities[2] to invalidate the October 27, 2008 estate plan, asserting that Dick had either lacked testamentary capacity when he executed each of the instruments comprising it, or that the estate plan was the product of undue influence from Sue. Additionally, Rich and Sesamie asserted claims against Sue for wrongful death, alleging she hastened Dick's passing by either overmedicating or poisoning him while she cared for him during the last years of his life.

Also, Rich sought to recoup from Sue rental income generated by the Regency Center. Rich claimed that during Sue's marriage to Dick, Sue had stolen

[1] Yolanda predeceased Dick in November 2008.

[2] For the remainder of this opinion, any reference to Rich and Sesamie is likewise a reference to their various capacities.

or "misappropriated" this rental income from Dick or Dick's March 22, 2004 trust. Rich asserted his "misappropriation" claim against Sue in his capacity as co-executor of Dick's estate under the March 2004 will, and as co-trustee of the March 2004 trust—instruments he claimed were not effectively invalidated by the October 27, 2008 estate plan.

Ultimately, these issues were tried before a jury, which found in Sue's favor regarding Rich's and Sesamie's wrongful death claims. But, the jury invalidated Dick's October 27, 2008 estate plan after determining Dick had lacked testamentary capacity and had been subjected to undue influence from Sue when he executed it. The jury also determined that while Sue was married to Dick, she had indeed "misappropriated" $162,500 in rental income generated from the Regency Center and that she owed this amount to Dick's still valid March 22, 2004 trust.

After the circuit court entered judgment in conformity with the jury's findings, these appeals followed. We will outline the issues presented in each of the appeals before this Court.

Appeal No. 2014-CA-000686 was filed by Sue. In this appeal, Sue takes issue with the following rulings of the circuit court: (1) the denial of her motion for a directed verdict regarding the appellees' claim that Dick lacked capacity, or was unduly influenced, to execute most of the instruments connected with his October 27, 2008 estate plan;[3] (2) the denial of her motion for a directed

[3] Sue effectively appealed the jury's invalidation of each of the October 27, 2008 estate plan instruments except for: (1) Dick's October 24, 2008 amendment to his March 22, 2004 trust,

verdict regarding the appellees' claim that she "misappropriated" Regency Center funds from Dick's aforementioned March 22, 2004 trust; and (3) the trial court's decision to award the appellees post-judgment interest at a rate of 12%, rather than at a lower rate.

Appeal No. 2014-CA-000693 was filed by Carolyn Carroway and Kevan Morgan, two of the attorneys who represented Sue during some of the proceedings below. It challenges the validity of an order of contempt issued by the circuit court against Sue, Carroway and Morgan. The background of this order is discussed in depth later in this opinion. It included two sanctions: First, it held all three of these individuals jointly and severally liable for attorney's fees expended by Rich and Sesamie prosecuting their contempt motion; second, it determined Rich and Sesamie were entitled to a "destruction of evidence" jury instruction.

As the caption of this opinion indicates, Sue and her attorneys filed separate appeals. Sue did not perfect an appeal with respect to the circuit court's decision to hold her jointly in contempt with her attorneys. Sue's attorneys, on the other hand, did perfect such an appeal; they effectively named Sue as a party to their appeal—albeit as an appellee, rather than an appellant.

Despite Sue's effective status as an appellee, however, she is nonetheless entitled to benefit from the result caused by her attorneys' appeal (*i.e.*, reversal of the circuit court's order of contempt). This is because "[w]here there

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which removed cross-appellees Errol Cooper and Rich as co-contingent trustees, and replaced them with another co-contingent trustee, Joe Mayer; and (2) Dick's October 27, 2008 deed to the farm to Carolyn Carroway, as trustee, and then to himself and Sue as joint tenants with rights of survivorship.

has been a joint judgment . . . against several, the effect of an appeal . . . by one or more, when it is permitted, without the concurrence of their coparties, is to carry up the whole case, and a reversal will inure to the benefit of all." *Commonwealth, Cabinet for Human Resources, Div. of Unemployment Ins. v. Security of America Life Ins. Co.*, 834 S.W.2d 176, 181 (Ky. App. 1992) (quoting 4 C.J.S. Appeal & Error p. 1332).

Cross-Appeal No. 2014-CA-000764 was filed by Carroway, Morgan, and Joseph Mayer. These cross-appellants take issue with the following rulings of the circuit court: (1) the denial of their motion for directed verdict regarding the appellees' claim that Dick lacked capacity, or was unduly influenced, to execute an October 24, 2008 amendment to his March 22, 2004 trust, which removed cross-appellees Errol Cooper and Rich as co-contingent trustees, and replaced them with another co-contingent trustee, Joseph Mayer; and (2) the denial of their motion for directed verdict regarding the appellees' claim that Dick lacked capacity, or was unduly influenced, to execute the October 27, 2008 deed to the farm to Carolyn Carroway, as trustee, and then to Dick and Sue as joint tenants with rights of survivorship.

As before, Sue did not appeal either of these issues, but these cross-appellants effectively named her as a party to this appeal—albeit as an appellee, rather than an appellant. Despite Sue's effective status as an appellee, however, she is nonetheless entitled to benefit from the result caused by this appeal (*i.e.*, reversal of the circuit court's rulings discussed above.) The aspects of the circuit

court's judgment at issue in this appeal applied jointly to Sue and either Carroway or Mayer; and as discussed, "[w]here there has been a joint judgment . . . against several, the effect of an appeal . . . by one or more, when it is permitted, without the concurrence of their coparties, is to carry up the whole case, and a reversal will inure to the benefit of all." *Security of America Life Ins. Co.*, 834 S.W.2d at 181.

Lastly, in Cross-Appeal No. 2014-CA-000711, Rich and Sesamie argue: (1) the jury's verdict regarding their wrongful death claims against Sue should be reversed and remanded for a new trial because certain evidence was excluded and, as they assert, the jury's instructions were erroneous; (2) attorney's fees were warranted with respect to the finding of contempt against Sue, Morgan, and Carroway; (3) a supplemental judgment was warranted in favor of the March 2004 trust, representing Sue's continued use of Regency Center income during the pendency of this litigation;[4] and (4) costs should have been assessed against Sue because she was not the prevailing party below.

Upon review, we REVERSE with respect to Appeal No. 2014-CA-000686. We REVERSE with respect to Appeal No. 2014-CA-000693. We REVERSE with respect to Cross-Appeal No. 2014-CA-000764. We AFFIRM Cross-Appeal No. 2014-CA-000711.

[4] Errol Cooper also joined in this suit as a plaintiff and is an appellant. However, as indicated in the caption, his interests were and are limited to his roles as trustee and representative of Dick's March 22, 2004 trust and last will and testament, and he merely assisted Rich—who was another such trustee and representative—in asserting claims against Sue on behalf of those entities. Thus, any further discussion in this opinion of matters affecting Dick's March 22, 2004 trust and last will and testament apply equally to Cooper, but for the sake of simplicity, we will not mention Cooper throughout the remainder of this opinion.

ANALYSIS

I. CONTEMPT

The circuit court's order of contempt impacted many of the issues raised in this litigation, and our resolution of its validity affects the disposition of each of these appeals. Accordingly, we will address this matter first.

The relevant background is as follows. Rich and Sesamie made two unsuccessful attempts in two separate forums to compel an autopsy of Dick's remains in conjunction with their wrongful death claims against Sue. Their first attempt began in Bourbon District Court. Initially, the district court granted their request. Sue then appealed to Bourbon Circuit Court and also sought a temporary injunction. Subsequently, the circuit court entered a temporary injunction enjoining any autopsy of Dick's remains and enjoining Sue from cremating Dick's remains. The circuit court then reversed the district court after determining the district court had lacked the authority to allow Rich and Sesamie to have Dick's remains autopsied.

Rich's and Sesamie's second attempt began in circuit court. After they filed suit against Sue for wrongful death, they sought an autopsy of Dick's remains as part of a discovery request. The circuit court held a hearing on January 29, 2010, and several witnesses provided testimony regarding the circumstances surrounding Dick's passing and his relationship with Sue. When the hearing concluded, the circuit court denied Rich's and Sesamie's request for an autopsy,

explaining from the bench that their evidence was not credible and did not provide good cause for disturbing Dick's remains or otherwise interfering with Sue's right of sepulture.[5] But, the circuit court added and made a written notation on the record that until the parties tendered an order incorporating all of the findings of fact and conclusions of law it had issued from the bench on this matter and until the court entered that tendered order, all matters regarding Dick's body were to remain "status quo."

On February 3, 2010—before the requested order was tendered—Rich and Sesamie then filed a motion "pursuant to Rules 59 and 60 of the Kentucky Rules of Civil Procedure and all other applicable law" for the circuit court to reconsider its decision. In their motion, they raised several new arguments regarding why an autopsy, or a more limited form of autopsy, should be permitted by the court. In one paragraph of their motion, they also requested a "stay."

On February 12, 2010, all of the parties then tendered the circuit court's requested order denying the discovery request for an autopsy. The order concluded by stating "[t]his is a final and appealable order, there being no just cause for delay." The circuit court then entered the order; it dissolved the temporary injunction it had previously entered; and it further entered an order

[5] Dick's passing was not a "coroner's case" within the meaning of Kentucky Revised Statutes (KRS) 72.405(2), meaning the coroner determined no reasonable cause existed for believing his death was caused by any of the enumerated suspect conditions set forth in KRS 72.025. Prior to his death, Dick also did not provide written consent to an autopsy on his remains. Thus, as his surviving spouse, Sue had the paramount right to consent to an autopsy of Dick's remains, and the paramount responsibility of disposing of them. KRS 72.425.

directing the clerk to refund Sue the amount of the bond she had posted in relation to the temporary injunction.

The next day, with assistance from and upon the advice of her attorneys (Carolyn Carroway and Kevan Morgan), Sue presented the February 12, 2010 order to the coroner and the director of a funeral home to have Dick's remains secured and cremated. With that order in hand, the funeral director thereafter cremated Dick's remains.

After discovering Dick's remains had been cremated, Rich and Sesamie moved the circuit court to hold Sue and her attorneys in contempt. They argued Sue's cremation of Dick's remains was a willful violation of what had amounted to a court order prohibiting the destruction of evidence. As to the nature of this "court order," they explained it existed by virtue of Kentucky Rules of Civil Procedure (CR) 52.02, CR 59.05, CR 60.02, CR 62.01, KRS 426.030, and by virtue of their request for a "stay." They asserted that when they filed their February 3, 2010 motion (*i.e.*, their motion for the circuit court to reconsider an order it had not yet even entered), these various rules or a combination thereof automatically rendered the circuit court's February 12, 2010 order "interlocutory" and of no operative effect.

Sue disagreed. Over the several months of motion practice that followed, the current judge and the judge who succeeded him both recused; and, when a third judge was assigned to this matter, the situation culminated into a contempt hearing that lasted several days. Thereafter, the circuit court entered a

March 11, 2011 order holding Sue and her attorneys in contempt and sanctioning them by: (1) holding Sue and her attorneys jointly and severally liable for Rich's and Sesamie's yet-to-be-determined amount of attorney's fees expended in prosecuting their contempt motion; and (2) promising Rich and Sesamie a "destruction of evidence" instruction at the conclusion of the upcoming jury trial regarding their wrongful death claims against Sue.

Rich's and Sesamie's wrongful death claims against Sue eventually proceeded to trial. The circuit court gave the jury a "destruction of evidence" instruction. Following a verdict in Sue's favor, their claims were dismissed with prejudice.

As noted, Rich and Sesamie raise several issues on appeal that directly stem from the circuit court's contempt order. They argue it was error for the circuit court (after a fourth judge replaced the circuit court judge who entered the contempt order) to ultimately grant them *no* award of attorney's fees for the amounts they incurred prosecuting their contempt motion, despite the contempt order's promise to the contrary. They argue the circuit court erred by prohibiting them from mentioning or introducing the contempt order during trial as evidence of Sue's "bad faith." They argue the "destruction of evidence" instruction the circuit court eventually gave the jury following the trial of this matter was inadequate, erroneous, and prejudicial enough to warrant a new trial of their wrongful death claims.

Rich and Sesamie also raise two evidentiary issues that indirectly stem from the circuit court's contempt order and impact their appeal of the dismissal of their wrongful death claims against Sue. They argue the circuit court erred in excluding certain portions of testimony provided by their expert witness, Dr. Stephen Godfrey, regarding what an autopsy *might* have revealed, had Dick not been cremated. They also argue the circuit court erred in excluding a statement made under oath and under a polygraph test by Kathy Buckler; Rich and Sesamie contend this statement was relevant because, regardless of whether it was true, it demonstrated why Rich distrusted Sue enough to want an autopsy of Dick's remains.

Carroway and Morgan argue that Rich's above-noted arguments are moot points because Sue was within her legal rights to have Dick's remains cremated when she chose to do so, and the circuit court erred by holding them, along with Sue, in contempt. Upon review, we agree.

Rich's and Sesamie's argument regarding why Sue and her attorneys acted in contempt of court—an argument the circuit court later adopted in its contempt order—was based upon the proposition that Sue and her attorneys willfully violated or disobeyed a valid court order. Rich and Sesamie asserted this "order" had been automatically created through the operation of various civil rules and statutes when they filed their February 3, 2010 motion. They believed this "order" had the effect of enjoining Sue from exercising her right to have Dick's

remains cremated until their February 3, 2010 motion was adjudicated and any ensuing appeal of that adjudication was resolved.

But, no such "order" ever existed.

To be clear, the only "order" that prohibited Sue from cremating Dick's remains was the temporary injunction the circuit court entered prior to February 12, 2010, to preserve the "status quo." When the temporary injunction was dissolved on February 12, 2010, the effect was immediate: There remained no legal impediment to Sue's exercising her right to cremate Dick's remains.

Contrary to what Rich and Sesamie believed, their February 3, 2010 motion (whether it asked for reconsideration of either the dissolved injunction or their denied discovery request) could not have operated to maintain the status quo. An order granting or dissolving a temporary injunction or denying a discovery request is not a final judgment on the merits regardless of whether the court designates it as such. *Brooks Erection Co. v. William R. Montgomery & Assoc., Inc.*, 576 S.W.2d 273, 275 (Ky. App. 1979) (explaining temporary injunctions are not final judgments); *Inverultra, S.A. v. Wilson*, 449 S.W.3d 339, 345 (Ky. 2014) (explaining discovery rulings are interlocutory); *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky.1978) ("Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable.") Therefore, any motion filed pursuant to CR 52.02, CR 59.05, or CR 62.01—civil rules which by their own plain terms apply only to *final judgments on the merits*—could not have operated to stay the effect of the circuit court's decision to dissolve

its temporary injunction.[6] KRS 426.030, which provides "no execution shall issue on any judgment, unless ordered by the court, until after the expiration of ten days from the rendition thereof," also applies only to final judgments. *City of Louisville v. Verst*, 308 Ky. 462, 13 S.W.2d 517, 521 (1948). Likewise, the filing of a motion under the purview of CR 60.02 does not suspend the operation of *any* judgment.[7]

When the circuit court dissolved its injunction, CR 65.07 provided Rich and Sesamie with their only avenue for preserving the status quo. CR 65.07(1) provides:

> When a circuit court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction, a party adversely affected may within 20 days after the entry thereof move the Court of Appeals for relief from such order. *If the order dissolves a temporary injunction theretofore granted, the circuit court may in its discretion suspend the operation of the order for a period not exceeding 20 days to permit such party to proceed under this rule.*

(Emphasis added.)

Rich and Sesamie did not avail themselves of this remedy. Nor did the circuit court include any language in its orders—either its order dissolving the

[6] *See Mitchell v. Mitchell*, 360 S.W.3d 220, 222 (Ky. 2012) (explaining CR 52.02 applies only to final judgments); *see also* CR 59.05 (providing "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the *final judgment*." (Emphasis added)). Moreover, although the injunction in this case was temporary and clearly fell under the purview of CR 65.07(1), CR 62.01 does not stay even a final judgment in an action for an injunction during the period after its entry and until an appeal is taken.

[7] The last sentence of CR 60.02 provides: "A motion under this rule does not affect the finality of a judgment or suspend its operation."

temporary injunction or denying Rich's and Sesamie's discovery request—suspending the operative effect for any period of time beyond February 12, 2010.

Rich's and Sesamie's arguments also focus greatly upon what the parties' attorneys discussed with the circuit court during various hearings, and the fact that in a paragraph of their February 3, 2010 motion they requested a "stay." Whatever the parties' attorneys discussed with the circuit court during various hearings, whatever the circuit court may have stated from the bench, and whatever "stay" they requested in their motion was irrelevant. The circuit court speaks only through its written orders, and the circuit court's written February 12, 2010 order did not state that the operative effect of the dissolved temporary injunction was stayed. *See Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010); *Holland v. Holland*, 290 S.W.3d 671, 675 (Ky. App. 2009); *Commonwealth v. Hicks*, 869 S.W.2d 35, 37 (Ky. 1994) (*overruled on other grounds by Keeling v. Commonwealth*, 381 S.W.3d 248 (Ky. 2012)). In light of this omission, we must presume it was the circuit court's intention, despite any oral pronouncements to the contrary, not to stay the operative effect of its decision to dissolve the temporary injunction. When there is a conflict between oral pronouncements and a written order, the written order controls. *Id*.

In sum, there was no basis for holding Sue or her attorneys in contempt for cremating Dick's remains on February 13, 2010, because no court order, valid or otherwise, prohibited it. We therefore reverse with respect to this appeal (*i.e.*, 2014-CA-000693).

Accordingly, several of the issues presented across these consolidated appeals are moot. First, the circuit court prohibited Rich and Sesamie from mentioning the contempt order or introducing it as evidence before the jury during the trial of this matter. In Appeal No. 2015-CA-000711, Rich and Sesamie appeal the circuit court's decision to prohibit them from introducing the aforementioned contempt order to the jury, arguing the contempt order was evidence of Sue's willful misconduct and malicious intentions, and was thus relevant to their claims against Sue for "misappropriation" and wrongful death. In light of what is discussed above, however, the contempt order proves nothing of relevance; it merely demonstrates a misapplication of the law of contempt. Thus, we cannot find error in the circuit court's decision to exclude any mention or discussion of the contempt order at trial.

Second, Rich and Sesamie argue the "destruction of evidence" instruction the circuit court gave the jury following trial was inadequate. As discussed, the circuit court's only basis for granting them a "destruction of evidence" instruction was its contempt order. Because the circuit court's contempt order was erroneous, there was no basis for granting Rich and Sesamie any "destruction of evidence" instruction. Thus, even if the circuit court's "destruction of evidence" instruction was erroneous, the error was harmless.

Third, Rich and Sesamie argue they were entitled to attorney's fees and costs for successfully prosecuting their contempt motion. But, their motion

was without merit and the circuit court's order of contempt was entered in error. Therefore, no amount of attorney's fees or costs was warranted.

Lastly, the two evidentiary issues Rich and Sesamie have raised on appeal that are indirectly related to the circuit court's contempt order are moot points. Because Sue was not prohibited from cremating Dick's remains when she did so, it makes no difference why Rich wanted Dick's remains autopsied, or what Dr. Godfrey believed an autopsy might have achieved.

II. MISAPPROPRIATION (Appeal No. 2014-CA-000686)

During his marriage with Sue, Dick owned the Regency Center. On March 22, 2004, he deeded the Regency Center to a trust he established in which he named himself grantor, sole trustee, and sole beneficiary, and in which he retained a largely unqualified right of revocation.[8] The trust agreement—which Dick executed (as grantor) with himself (as sole trustee and beneficiary) further declared the *res* of the trust was not only the Regency Center, but also the *income* it generated.

As discussed, Rich, in his capacity as co-trustee and contingent beneficiary of the March 22, 2004 trust, and also in his capacity as co-executor of Dick's 2004 last will and testament, asserted a claim against Sue for "misappropriating" the income derived from the Regency Center. The

[8] Article 1 of the March 22, 2004 trust provided Dick would no longer function as trustee and would be succeeded in that capacity by Rich, Sue, and Cooper (as co-trustees), if "by reason of illness or disability" he became, in the opinion of Sue, Rich, and his attending physician, unable to properly handle his "own affairs." Upon Dick's death, the trust was designed to become irrevocable.

underpinnings of his claim were as follows. Rich introduced evidence demonstrating that after Dick established the March 22, 2004 trust, Sue subsequently and repeatedly accessed the bank account where the Regency Center rental income was deposited and used this rental income for her own purposes. Rich also introduced evidence indicating Dick told her not to spend the Regency Center income; Sue continued to do so and made attempts to conceal her spending from Dick; and that between March 2004 and the time of Dick's death in 2009, Sue had, without Dick's permission, spent $162,500 of the Regency Center income.

Rich reasoned the income generated by the Regency Center was at all relevant times either Dick's separate property (because it derived from Dick's separate property), or the property of the March 22, 2004 trust (because the March 22, 2004 trust agreement stated that it was). Based upon that, Rich argued Sue's use of the $162,500 in Regency Center income during her marriage with Dick, without Dick's permission, amounted to theft[9] and she was required to reimburse that amount to either Dick's estate or the March 22, 2004 trust. Sue responded with various motions to dismiss these claims;[10] her motions were denied; and,

[9] In his appellate brief, Rich calls attention to an incident set forth at trial wherein Dick "confronted Sue Getty about her spending of trust income, asking her 'how can you steal from me again?'"

[10] Sue moved for summary judgment regarding these claims, as well as for a directed verdict and judgment notwithstanding the verdict.

following trial, judgment was entered reflecting the jury's determination that Sue had "misappropriated" $162,500 from the March 22, 2004 trust.

Sue now appeals this judgment. She argues, as she did below,[11] that as a matter of law she could not be held liable for repaying these funds to either Dick's estate or the trust because at the time she expended them the funds were marital property, not Dick's separate property or trust property. We agree.

Whether property qualifies as "marital" is typically a question reserved for property division matters between spouses during dissolution proceedings. However, it is also relevant to a charge of spousal theft or misappropriation. This is because, while under some circumstances one spouse can be guilty or held liable for stealing or misappropriating the other spouse's *separate* property,[12] neither spouse can be criminally or civilly liable for misappropriating *marital* property. Spouses co-own marital property until the dissolution of their marital estate; and a co-owner of property cannot steal or otherwise "misappropriate" it. *See Johnson v. Commonwealth*, 231 S.W.3d 800,

[11] Sue also argues, as she did below, that Rich (in any capacity) lacked standing to prosecute these "misappropriation" claims against her. In light of how we have resolved this matter, we need not address this additional argument.

[12] Rich provides no legal authority in support of his civil claim against Sue, on behalf of Dick Getty's estate, of spousal theft or misappropriation. Taken generously, it appears to have been based upon KRS 514.020, taken in conjunction with KRS 446.070. KRS 514.020 provides in relevant part:

> (2) It is no defense that theft was from the actor's spouse, except that misappropriation of household and personal effects or other property normally accessible to both spouses is theft only if it involves the property of the other spouse and only if it occurs after the parties have ceased living together.

The latter statute, KRS 446.070, provides "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

807 (Ky. App. 2007); *Stark v. Commonwealth*, 295 S.W.2d 337 (Ky. 1956). In other words, until such time as the parties to a marriage contemplate divorce, either spouse is generally vested with the authority to spend marital funds or use marital property however that spouse chooses. Indeed, even after divorce is contemplated but prior to the entry of a divorce decree, one spouse's dissipation of marital assets is not civilly or criminally actionable; it is merely a factor for a court to consider in dividing marital property in the context of dissolution proceedings. *See Gripshover v. Gripshover*, 246 S.W.3d 460, 466 (Ky. 2008), explaining:

> [F]raudulent or dissipative transfers of marital property may be avoided or otherwise counteracted so as to vindicate a spouse's interest in support or in an equitable division of the marital estate.
>
> . . .
>
> Generally, however, a finding of fraud or dissipation requires that the challenged transfer be made in contemplation of divorce with the intent to impair the other spouse's interest.

(Citations omitted.)

With that said, whether the income generated by the Regency Center qualified as "marital property" when Sue expended it presents a question of law. In Kentucky, property is initially classified as marital or otherwise as of its date of acquisition, but once acquired its character may change. This is exemplified in KRS 403.190, which provides in relevant part:

> (2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

> (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
>
> (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
>
> (c) Property acquired by a spouse after a decree of legal separation;
>
> (d) Property excluded by valid agreement of the parties; and
>
> (e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.
>
> (3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

As discussed, Rich's argument (either on behalf of the trust, or in his capacity as co-executor of Dick's 2004 last will and testament), is that the Regency Center's *income* was either Dick's separate property or the trust's separate property

because the Regency Center *itself* was either Dick's separate property or the trust's separate property.

However, to the extent the Regency Center qualified as Dick's separate property, its income did not. All income earned during the marriage is considered marital property, including income from non-marital property. *See Dotson v. Dotson*, 864 S.W.2d 900, 902 (Ky. 1993); *Sousley v. Sousley*, 614 S.W.2d 942, 944 (Ky. 1981); *Brunson v. Brunson*, 569 S.W.2d 173, 178 (Ky. App. 1978). The only exception to this general rule relates to income derived from property acquired by gift, descent, bequest, or devise, and Rich has never argued Dick acquired the Regency Center through any of those means. *See* KRS 403.190(2)(a).

To the extent Rich is arguing the Regency Center's income between 2004 and Dick's passing in 2009 qualified as the *trust's* property, Rich is likewise incorrect. There is a difference between placing assets into a trust in which the beneficiary has *no* enforceable interest, as opposed to placing assets into a trust in which the beneficiary has an *absolutely* enforceable interest (*i.e*, a trust, as here, where the grantor, trustee, and beneficiary are one and the same and retains a right of revocation.)[13] In the case of the former, the assets of the trust cannot be attached

[13] As noted, this "misappropriation" claim sought recoupment from Sue for her expenditures of Regency Center income from 2004 until the date of Dick's death in 2009—a period of time when Dick retained the right to revoke the March 22, 2004 trust as its grantor and trustee. Indeed, the various arguments Rich presented below never challenged Dick's status as the grantor and sole trustee during his lifetime; as Rich acknowledges in his appellate brief, "During his lifetime, Dick Getty was both Trustee and Grantor of the 2004 Trust." Rather, Rich's arguments challenged the validity of certain decisions Dick made during his lifetime in his capacity as the grantor and sole trustee of March 22, 2004 trust.

by the beneficiary's creditors because the assets of the trust are not at all considered the beneficiary's property. *See Goforth v. Gee*, 975 S.W.2d 448, 450 (Ky. 1998). In the case of the latter, the law simply views the "trust" as "*merely a change in an absolute property owner's desires as to methods of enjoying the assets which constitute the trust capitol* [sic]." *Phillips v. Lowe*, 639 S.W.2d 782, 784 (Ky. 1982) (quoting Bogert's *The Law of Trusts and Trustees*, Sec. 1004, p. 523).

For purposes of KRS 403.190, a spouse who has merely changed the form in which he holds absolute title to an asset (*e.g.*, by placing it into a revocable trust in which he is grantor, trustee, and beneficiary) has not divested himself of his absolute title or changed its character as his separate property. *See* KRS 403.190(3) (explaining the manner in which the asset is titled is largely irrelevant.) As explained by one commentator on this subject,

> Where a trust established by one of the parties can be revoked at will, the courts have generally refused to treat the trust as a distinct entity. Instead, the courts have assumed that the power to revoke is tantamount to the power of ownership. As a result, the individual assets owned by a revocable spousal trust are generally treated as if they were owned by the settlor spouse individually.

2 Brett R. Turner, *Equitable Distribution of Property* § 6:93 (3d ed. 2005) (footnote omitted).

In short, for purposes of KRS 403.190 and Rich's claims against Sue for misappropriating Regency Center income between 2004 and the date of Dick's death in 2009, the Regency Center remained Dick's separate property. Thus, for

the reasons discussed above, the income it generated in that period of time was marital; *i.e.*, it was income generated after Dick's and Sue's marriage and from property that Dick did not acquire by gift, decent, bequest, or devise.

From the contours of the theory of recovery Rich presented below, it also appears Rich may have believed Dick's trust agreement—which Dick executed with himself— allowed Dick to effectively exclude the Regency Center income from being considered "marital income." If that was indeed Rich's argument, it was a misreading of the law. KRS 403.190(2)(d) provides that property otherwise considered marital may be regarded as separate if it is excluded by valid agreement of the *parties*, not *one party*. When the circuit court denied Sue's various motions to dismiss Rich's "misappropriation" claims, it erred. Accordingly, we reverse in this respect.

III. WRONGFUL DEATH (Appeal No. 2014-CA-000711)

As noted, Rich and Sesamie filed suit against Sue alleging she caused the wrongful death of Dick. A jury considered their claims; found in Sue's favor; and the circuit court entered a conforming judgment dismissing their claims with prejudice. On appeal, Rich and Sesamie set forth a variety of arguments why, in their view, their claims warrant a new trial. For the reasons set forth above in Section I of our analysis, most of their arguments raised in this appeal are moot. Their only argument left to review is whether the circuit court committed reversible error when, regarding their wrongful death claims, the court instructed the jury as follows:

INTERROGATORY NO. 6

> If your Answer to Interrogatory No. 5 is YES, then are you further satisfied from the evidence that such failure to exercise ordinary care was a substantial factor in causing the death of [Dick] Getty on December 18, 2009?

As it goes, Rich's and Sesamie's argument in this vein is that the circuit court erred when it failed to define the term "substantial factor" in this instruction.

To begin, this argument is a moot point. What Rich and Sesamie omit from their argument is that the jury had no occasion to review "Interrogatory 6" because the jury's answer to "Interrogatory 5" was "NO."[14] Furthermore, the circuit court committed no cognizable error in this regard. "KRS [Kentucky Revised Statutes] 29A.320 places no obligation on the trial court to explain its jury instructions." *St. Luke Hospital, Inc. v. Straub*, 354 S.W.3d 529, 539 (Ky. 2011). "Substantial factor" is a straightforward term that did not require definition in the instructions. *Id*. In the words of Justice Palmore in *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974), "[I]f counsel felt that the jury was too thick to get the point all he had to do was to explain it in his summation."

Accordingly, we affirm the dismissal of Rich's and Sesamie's wrongful death claims against Sue.

IV. TESTAMENTARY CAPACITY (Appeal Nos. 2014-CA-000686 and 2014-CA-000764)

[14] "INTERROGATORY 5" asked "Are you satisfied from the evidence that Sue Getty failed to exercise ordinary care in the administration of medication to [Dick] Getty?"

An individual with testamentary capacity is able to: (1) know the natural objects of his bounty; (2) know his obligations to them; (3) know the character and value of his estate; and (4) dispose of his estate according to his own fixed purpose. *Bye v. Mattingly*, 975 S.W.2d 451, 455 (Ky. 1998). Below, Rich and Sesamie successfully argued the various documents Dick executed in relation to his October 27, 2008 estate plan were invalid on two separate bases, the first of which was lack of testamentary capacity. The appellants argue the circuit court should have directed a verdict in their favor regarding the issue of Dick's testamentary capacity. Upon review, we agree.

At trial, Sue's evidence of Dick's testamentary capacity included but was not limited to the following:

- An October 24, 2008 report from an interdisciplinary team that determined Dick was "competent" for purposes of guardianship proceedings initiated by Rich;
- A November 10, 2008 order, agreed to by Dick's court-appointed lawyer, along with Rich and the Bourbon County Attorney, dismissing guardianship proceedings Rich initiated against Dick, and which found Dick "not to be disabled, or partially disabled, or incompetent pursuant to KRS 387.530 and KRS 387.510(8) and (9);"[15]

[15] "Testamentary capacity" is a mental standard *below* the mental standard required for a court-appointed guardian. *See, e.g., Nance v. Veazey*, 312 S.W.2d 350, 354 (Ky. 1958) (explaining the issues involved in guardianship proceedings include whether an individual is capable of transacting business generally, and "[l]ess mental capacity is required to make a will than to transact business generally.") KRS 387.510, which specifies when an individual is "disabled" and thus requires a guardian, provides in relevant part:

- Opinion testimony from the physician who treated Dick for the last twelve years of Dick's life, along with opinion testimony from a neurologist who treated Dick for the last eight years of Dick's life, that Dick was fully competent at all relevant times to make decisions for himself with appropriate orientation and insight; and
- Testimony, offered by Sue, Carroway, and Carroway's two assistants who were likewise present when Dick executed the various instruments, to the effect that Dick appeared competent at that time.

With that said, Rich and Sesamie never contended Dick was *incapable* of having testamentary capacity when Dick executed any of the instruments connected with his October 27, 2008 estate plan. Rather, they argued Sue was not entitled to a directed verdict on this issue because Sue failed to have Dick examined by a physician on October 27, 2008, to prove Dick was not "over-

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(8) "Disabled" means a legal, not a medical disability, and is measured by functional inabilities. It refers to any person fourteen (14) years of age or older who is:

(a) Unable to make informed decisions with respect to his personal affairs to such an extent that he lacks the capacity to provide for his physical health and safety, including but not limited to health care, food, shelter, clothing, or personal hygiene; or

(b) Unable to make informed decisions with respect to his financial resources to such an extent that he lacks the capacity to manage his property effectively by those actions necessary to obtain, administer, and dispose of both real and personal property.

Such inability shall be evidenced by acts or occurrences within six (6) months prior to the filing of the petition for guardianship or conservatorship and shall not be evidenced solely by isolated instances of negligence, improvidence, or other behavior.

(9) "Partially disabled" refers to an individual who lacks the capacity to manage some of his personal affairs and/or financial resources as provided in subsection (8) of this section, but who cannot be found to be fully disabled as provided therein.

medicated" and thus unfit to execute a will or any other legal document on that date.[16]

For purposes of Sue's directed verdict motion, however, any evidence Sue might have introduced to support that Dick *retained* requisite testamentary capacity was largely irrelevant. It was not her burden to prove Dick *had*

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[16] The contours of Rich's theory in this vein were illustrated by the following exchange at trial between Rich and opposing counsel:

> COUNSEL: Will you agree with me that your father had the mental capacity to, on this day, to execute the will and legal documents?
>
> RICH: *I didn't say he didn't.* I said, our position is that he was manipulated and, um, subject to undue influence. There's no question about the isolation that occurred. Read the documents. I never sought to have my father, nor would I, have ever sought to have him declared mentally incompetent. *I never thought that he was.*
>
> COUNSEL: You did not?
>
> RICH: Excuse me. I do think that he was subjected to some pretty bad exaggerations or lies or misrepresentations. He was kept away from me and my sister and he was fed some things which are confirmed in documentation that he, you know, he was told that we were trying to take his property away from him, and put him in a nursing home. Nothing could be further from the truth. It never happened. But it obviously had some effect upon him which would cause him to change the way he wanted to save his estate in place after his death. Okay? Drastically.
>
> COUNSEL: I understand that you strongly feel that my client exercised undue influence and substituted her will for his. But you have just now agreed with me, having now finally read the report of the practitioners appointed by the court that your father had testamentary capacity in 2008, October 2008, to execute his will.
>
> RICH: I, no, I don't agree that he had testamentary capacity. I, whatever they found was that he, he was not mentally incompetent, okay? That he, he was lucid, uh, at times. Uh, you know, you can be lucid on one day and be over-medicated on another day and not know what the heck you're signing. You know, not know what you've done.

(Emphasis added.)

testamentary capacity when he executed his will and various instruments. It was Rich's and Sesamie's burden, as the parties contesting the will and opposing a directed verdict motion, to adduce "substantial evidence" to prove Dick *lacked* testamentary capacity at that time. *See Bye*, 975 S.W.2d at 455; *see also Woodford v. Buckner*, 111 Ky. 241, 63 S.W. 617, 619 (1901) (explaining a will proponent's decision to introduce evidence in support of testator's capacity does not alter the burden of the party contesting the will to disprove the testator's capacity.) "Substantial evidence," in turn, means "something of substantial and relevant consequence, carrying the quality of proof and having fitness to induce conviction, and not vague, uncertain, and irrelevant matter, giving rise to a chimerical probability." *Duff v. May*, 245 Ky. 709, 54 S.W.2d 4, 5 (1932).

With this in mind, Rich admits in his brief that "he was not with his father at the time his father executed the 2008 estate planning documents, so he has no personal knowledge regarding his father's testamentary capacity at that time." Likewise, Sesamie makes no representation that she has any personal knowledge of what Dick's capacity was at that time. Nevertheless, Rich and Sesamie believe they adduced substantial evidence capable of supporting a finding that, at the time Dick executed those documents, Dick lacked testamentary capacity.

In this regard, they begin by recounting five instances between August and September of 2008 where, in their view, Dick acted in a disoriented or confused manner.[17] They note that two of their experts testified Dick probably

[17] On August 26, 2008, Dick was admitted to Bourbon Community Hospital for altered mental status and confusion associated with dehydration. On September 20, 2008, Dick executed a

suffered from "fluctuating mental capacity" over the months surrounding October 27, 2008, because, during that time frame, Dick had been prescribed high dosages of narcotic pain medication to take on an "as needed" basis.[18] They point to the testimony of one of their experts, Dr. Robert J. Kuhn, who reviewed several of Dick's medical records from 2008. Dr. Kuhn opined that the types of medications Dick was prescribed in 2008 would have affected Dick's mental condition on a "day-to-day" or "hour-to-hour" basis depending upon when they were administered. They also point to the following testimony of another of their experts, Dr. Stephen Raffle:

> RAFFLE: [Dick] was having periodic hospitalizations and many doctor visits for dehydration, chronic, severe pain that wouldn't go away and it was poorly controlled. Um, he was having problems with constipation, dehydration, um, states, periods of confusion and disorientation. Um, weakness. Difficulties with his bladder. Um, that's what jumps to my mind right now, right in front. He was a sick man and he was at times sicker and at other times less sick. He was also bed-bound, or he wasn't ambulatory during this period in part because of just weakness or because of his pain.
>
> COUNSEL: Did you see evidence in the medical records that he was on significant amounts of opioids or narcotic medications?
>
> RAFFLE: Yes, he was. He definitely was.

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document purporting to revoke a trust he had executed in February of 2004, but had previously revoked in March of 2004. On September 27, 2008, it was noted that Dick's attorney was unable to get a statement from him because he was "too sleepy and appeared to be disoriented as a result of pain med given at 3 p.m." On September 28, 2008, it was noted Dick was "disoriented does not know where he lives or where he is, month, season, thinks he is going to Lexington this morning[.]" Rich also notes that on September 30, 2008, Dick signed his name with a "dot."

[18] On October 27, 2008, Dick had been prescribed Endocet 10 mg (every three hours as needed) and Oxycontin 40 mg (morning and night).

> COUNSEL: Did you see evidence in the medical records that his mental capacity fluctuated? That at times he was confusional, delusional, disoriented?
>
> RAFFLE: Yes.

Rich and Sesamie also note that Sue had access to Dick's medications, and they assert Sue might have caused Dick to be over-medicated on October 27, 2008. They reason the totality of what is set forth above qualifies as substantial evidence that Dick could not have had testamentary capacity on October 27, 2008.

Rich and Sesamie are incorrect. To be sure, circumstantial evidence that has a reasonable tendency to indicate the testator's mental state during the execution of the will is relevant and admissible regarding the issue of testamentary capacity. However, where it is alleged that a testator lacked testamentary capacity at the time of execution because he or she suffered from a mental illness or habitually used mind-altering substances, the circumstantial evidence must, to be relevant, indicate the mental illness or habitual use of substances resulted in a fixed and constantly impaired mental state "down to the day of the will's execution[.]" *Warnick v. Childers*, 282 S.W.2d 608, 609 (Ky. 1955).

For instance, in *Pardue v. Pardue*, 312 Ky. 370, 227 S.W.2d 403, 405 (1950), for purposes of assessing capacity, a trial court properly admitted not only evidence from August 9, 1943, the date the testator purportedly executed his will, but also from two years before and a few weeks afterward. Two years prior, the testator had begun suffering from uremic poisoning due to kidney issues. *Id*. at

404. The testator's doctor testified that uremic poisoning had only continued to worsen the testator's mind thereafter; and, based upon an examination of the testator in September 1943, after which the testator's doctor concluded the testator had "practically had no mind," the testator's doctor testified it was more probable than not that the testator's mind had been in the same state the prior month when the will was purportedly executed. *Id*. Lay witnesses also offered testimony to the same effect. *Id*. This species of circumstantial evidence was deemed sufficient to demonstrate that on the day the testator purportedly executed his will, he lacked the requisite capacity to do so.

Likewise, in *Osborn v. Paul*, 272 Ky. 694, 114 S.W.2d 1134, 1138 (1938), the record offered no indication why a testator chose to disinherit his daughter, the will contestant. In addition, the daughter argued that the testator's ten years of constant alcoholism had destroyed his mental ability to execute a will. After considering the litany of evidence introduced on this subject, a jury agreed and the trial court invalidated the will on grounds of lack of capacity. Our former High Court affirmed, explaining that the testator's unexplained disinheritance of his daughter, taken in conjunction with the evidence of the testator's mental state around the time he purportedly executed his will, sufficiently indicated the testator's mind "throughout that period was so alcoholically diseased as to reduce its level, in his occasionally lucid intervals, below that which is requisite to execute a will according to the standards erected by law[.]" *Id*. at 1137.

On the other hand, where a testator's mental illness or sustained, habitual use of substances results in a *fluctuating* mental condition—which is precisely what Rich's and Sesamie's theory asserted and their evidence discussed above demonstrated—the "lucid interval" doctrine provides that a testator is not *per se* unable to dispose of property by will, and the burden remains with the party asserting incapacity to prove the testator lacked capacity at the time the testator executed the will.[19] *Bye*, 975 S.W.2d at 456 (explaining "When a testator is suffering from a mental illness which ebbs and flows in terms of its effect on the testator's mental competence, it is presumed that the testator was mentally fit when the will was executed."); *see also Nunn v. Williams*, 254 S.W.2d 698, 700 (Ky. 1953) (trial judge instructed jury to sustain validity of will, despite evidence that on the day or day before the will was executed the testatrix had been given a larger than normal dose of a pain killing drugs, because "[e]ven if the testatrix was under the influence of narcotics at the time of the execution of the will, she still could be capable of making one and of knowing the natural objects of her bounty."); *Martine v. Roadcap*, 281 Ky. 389, 136 S.W.2d 16 (1940) ("[T]he proof sufficiently demonstrates that the testatrix had frequent lucid intervals. The fact is apparent

[19] On a somewhat related note, Rich argues that because Sue did not "raise" the lucid interval doctrine below, or insist on referencing this doctrine in her jury instructions, she "waived" it. As indicated, however, the lucid interval doctrine is not an affirmative defense that can be "waived;" it is one aspect of the overall presumption of testamentary capacity that a will contestant has the burden of rebutting with proof. *Bye*, 975 S.W.2d at 456. Moreover, presumptions regarding testamentary capacity and undue influence have no place in jury instructions. *Briggs v. Kreutztrager*, 433 S.W.3d 355, 362-63 (Ky. App. 2014). Rather, "[p]resumptions are in the nature of guides to be followed by the trial judge in determining whether there is sufficient evidence to warrant the submission of an issue to the jury[.]" *Mason v. Commonwealth*, 565 S.W.2d 140, 141 (Ky. 1978).

from a reading of the proof, that it was only when she was on, or getting over, one of her [drinking] 'sprees,' that she was incompetent to attend to business.")

In sum, insinuating Sue *might* have caused Dick to be over-medicated when he executed his estate planning instruments on October 27, 2008; or pointing to the fact that Dick had spells of confusion and disorientation in August and September of 2008; or pointing to the fact that Dick had been *prescribed* narcotics to take on an "as needed" basis on October 27, 2008, which *could* have had the effect of mentally incapacitating him, does not rebut the legal presumption that Dick had testamentary capacity at the time he executed his estate planning documents on October 27, 2008. It merely provides grounds for improper speculation and conjecture. *Bye*, 975 S.W.2d at 455.

Next, Rich and Sesamie offer a number of observations and inferences they draw from a video recorded by attorney Carolyn Carroway that features Dick executing the October 27, 2008 last will and testament in the kitchen of his home and in the company of Carroway and two of her employees. Rich and Sesamie focus upon the following:

1. Dick is seated in an electric scooter, wearing a seatbelt, and in Rich's and Sesamie's opinion appears "weak and frail;"
2. During the video, while Dick is initialing a page of the will, Dick does not react to the ringing of a telephone;

3. Prior to executing the will, Carroway and Dick have the following exchange which Rich and Sesamie believe "is a clear indication" that the estate plan did not reflect Dick's true testamentary intent:

> CARROWAY: I previously met with you last week and went over a draft of a will that I prepared for you that you asked me to prepare. Is that correct?
>
> DICK: Correct.
>
> CARROWAY: Okay. And in that will, you have asked that I revoke your old will, and that you have a new will drafted which provides for your estate passing to your wife, Sue Getty. Is that correct?
>
> DICK: Correct.
>
> CARROWAY: And in that will you have also asked that I provide language that allows for if Sue dies before you that your estate would then go to Sue's two children. Is that correct?
>
> DICK: Correct.
>
> CARROWAY: We have discussed when we met last week that you still want to go ahead and sign this will, but you would like to think about revising your documents to provide for a trust for your daughter, Yolanda, and your granddaughter, Sesamie. Is that right?
>
> DICK: Correct.
>
> CARROWAY: And have I been instructed to prepare those documents?
>
> DICK: Yes. I have instructed you.
>
> CARROWAY: Now, you have still instructed me, though, to go ahead and have you sign this will. Is this, you're in agreement to do this will today, is that correct?

DICK: Yes.

CARROWAY: Okay. I think we're prepared to have you go on and sign this, sir. You need to sign the will at the bottom of each page and sign your name as best you can, Mr. Getty. Now, is this a close enough point for you to sign? I'll scootch you up a little. Sorry. There we go. How about a tray? Okay, you want something to elevate your hand to sign better, or can you sign?

DICK: No, that won't help me any.

CARROWAY: That won't help you any? Okay. Just the line right there, Mr. Getty. Just sign your name the best you can. Would that tray help you?

DICK: I don't know.

CARROWAY: Do you want me to flip it over on the back side, or…? Now, it's my understanding that your medical condition really affects your handwriting. Is that right?

DICK: Yes. My arms and my hands make it difficult for me to sign anything.[20]

CARROWAY: Okay. And you have fully read this document several times. Is that correct?

DICK: Oh yes.

4. Over the course of the above exchange, Carroway, in Rich's and Sesamie's view, "hovers over [Dick] and appears to guide his hand;"

[20] Near the conclusion of the video, Dick asked Carroway, "I bet you've never had another case where somebody couldn't sign their name like this." He then explained he had difficulty signing because he was afflicted with "essential tremors," and to treat it "they have me on a little pill I take, so many in the daytime and so many in the nighttime."

5. Near the conclusion of the video, Dick responds to a question from Carroway by saying, "Yes sir," and then corrects himself by saying "Yes, ma'am."
6. Carroway does not read the will to Dick before he signs it, and there is no discussion of what property would, or would not, be included in Dick's estate;
7. Dick was not asked why the will he is executing effectively disinherits Rich and Sesamie;
8. Dick also executed deeds to the farm and the Regency Center on October 27, 2008, but the video did not record it; and
9. Sue was in the house, and near enough to hand Carroway a tray for use as a writing surface to assist Dick with executing the will.

With that said, what is enumerated above as points "1," "2," "4,"[21] and "5" reflects, at most, that Dick was an older person, possessed a failing memory, momentary forgetfulness, or lack of strict coherence in conversation. These traits do not render one incapable of validly executing a will. *Bye*, 975 S.W.2d at 455.

As to point "3," Rich and Sesamie look to the fact that Dick mentioned preparing a trust for Yolanda and Sesamie, but nevertheless executed a will that effectively left nothing in his estate that could have been placed in trust for Yolanda and Sesamie. Rich and Sesamie argue this reflects that Dick's

[21] To the extent Rich is arguing Carroway exercised some form of coercion upon Dick by "hover[ing]" over him and "appear[ing] to guide his hand," his argument is relevant, if at all, to a claim of undue influence, rather than lack of capacity. This is also the case if, in point "9," Rich is arguing Sue exercised some form of coercion upon Dick by being present at the time.

"testamentary intent" was contradictory and therefore lacking. But, this is neither a fair nor reasonable inference drawn from the evidence. Dick repeatedly indicated during his exchange with Carroway that he had read the will he was signing; understood it; and that if he changed his mind about what his will reflected and decided to establish a trust for Yolanda and Sesamie, he would revise his estate documents later.

As to points "6," "7," and "8," Rich and Sesamie appear to be arguing it was not enough for Dick to state on the record that he had read the October 27, 2008 will and that it conformed to his intent. Accordingly, they appear to be arguing *no one* has capacity to execute a will, or any other legal instrument, unless: (1) The instrument is first read aloud in its entirety; (2) the individual executing the instrument then answers a series of questions demonstrating knowledge and understanding of its contents; and (3) those events, along with the ultimate execution of the document, are recorded.

Rich and Sesamie present no authority in support of this argument. Moreover, their argument misapprehends the burden of proof. Just as the law presumes a testator has testamentary capacity at the time he or she executes a will, it likewise presumes, absent evidence to the contrary, that an individual who executes a will or any other legal document knows and understands the contents of what he or she is signing. *Clark v. Brewer*, 329 S.W.2d 384, 387 (Ky. 1959); *Bye*, 975 S.W.2d at 455. In other words, for purposes of a directed verdict motion on the issue of testamentary capacity, any failure to read the will aloud to a testator;

any failure to ask a testator a battery of questions about the will; or any failure to even record the testator executing the will are irrelevant. Any such failures do not *disprove* testamentary capacity.

Lastly, what is enumerated as point "9" appears to be a contention that Dick lacked testamentary capacity because Sue was in the vicinity when he executed his will. But, Rich and Sesamie do not explain how Sue's presence could have rendered Dick mentally incapable of knowing the natural objects of his bounty; knowing his obligations to them; knowing the character and value of his estate; or disposing of his estate according to his own fixed purpose. In the context of Dick's testamentary capacity, this detail is irrelevant.

In short, the balance of what Rich and Sesamie presented in opposition to Sue's directed verdict motion on the issue of Dick's testamentary capacity had no tendency of proving Dick lacked testamentary capacity at the time he executed his October 27, 2008 will. The circuit court erred by denying Sue's motion for directed verdict on this issue. We reverse on this point.

V. UNDUE INFLUENCE (Appeal Nos. 2014-CA-000686 and 2014-CA-000764)

Rich and Sesamie also contended Dick's October 27, 2008 estate plan and its associated instruments were the product of undue influence from Sue. Undue influence was the jury's second basis for invalidating Dick's October 27, 2008 estate plan. The appellants unsuccessfully moved for a directed verdict in

this regard. They now argue the circuit court erred by denying their motion. Upon review, we agree.

The inability to establish a case for lack of testamentary capacity does not preclude a finding of undue influence. *Gibson v. Gipson*, 426 S.W.2d 927, 928 (Ky. 1968). A mentally diminished person may still possess the capacity to execute a will but may have his or her intent overborne by the undue influence of another person. *Id*. Undue influence is influence such that the testator's free agency is destroyed. It is not influence derived merely from acts of kindness, appeals to feeling, or arguments addressed to the understanding. Moreover, the undue influence must be exercised at the time of the will's execution. *See Fischer v. Heckerman*, 772 S.W.2d 642, 645 (Ky. App. 1989) (internal citations omitted).

Rich's and Sesamie's arguments below and on appeal regarding why the appellants were not entitled to a directed verdict focus to some extent upon the notion that the jury was entitled to disbelieve any evidence Sue produced to support that she did *not* unduly influence Dick when he executed his last will and trust documents.[22] To be clear, any evidence *Sue* adduced to support she did *not* unduly influence Dick is irrelevant. For the purpose of the appellants' directed verdict motion, it was *Rich's and Sesamie's* burden to produce substantial evidence at trial to support she *did*. *Nunn v. Williams*, 254 S.W.2d 698, 700 (Ky. 1953).

In that regard, Rich and Sesamie did not produce any direct evidence of undue influence. Their case focused instead upon demonstrating undue

[22] For example, Rich dedicates three pages of his brief to explaining why, in his view, Carroway was not a credible witness.

influence circumstantially, through evidence of the so-called "badges" of undue influence which include:

> [A] physically weak and mentally impaired testator, a will unnatural in its provisions, a lately developed and comparatively short period of close relationship between the testator and the principal beneficiary, participation by the beneficiary in the physical preparation of the will, the possession of the will by the beneficiary after it was written, efforts by the beneficiary to restrict contacts between the testator and the natural objects of his bounty and absolute control of testator's business affairs by a beneficiary.

Fischer, 772 S.W.2d at 645 (citations omitted).

To begin, Rich and Sesamie do not argue Sue's 26-year marital relationship with Dick was "lately developed" or "comparatively short." They do not argue Sue maintained possession of the October 27, 2008 will and trust instruments after they were written.

They do argue, and it is uncontested, that Dick was extremely weak at the time he executed his will and trust instruments; therefore, physical weakness clearly exists in this case. It is also uncontested that Dick was in extreme pain. That, in conjunction with the levels of medication he was taking for his pain, could have amounted to a level of mental impairment. *See Amos v. Clubb*, 268 S.W.3d 378, 381 (Ky. App. 2008). Nevertheless, evidence of mental and physical impairment, in and of itself, is insufficient for purposes of summary judgment or a directed verdict if it is unaccompanied by at least slight evidence demonstrating

undue influence was actually exerted. *See Dennison v. Roberts*, 439 S.W.2d 577, 578 (Ky. 1968); *Gibson v. Gipson*, 426 S.W.2d 927, 928 (Ky. 1968).

Rich and Sesamie also argue the estate plan Dick executed on October 27, 2008, was unnatural, unreasonable, and unexpected in its disposition because, unlike several estate plans Dick had executed in prior years, Dick's October 27, 2008 estate plan (1) excluded Rich and Yolanda, and (2) effectively left everything to Sue, who (as Rich asserts in his brief) abused drugs, might have tried to poison Dick, "squandered and depleted" Dick's assets, and had adulterous affairs.

The issue of whether an unnatural, unreasonable, or unexpected disposition occurred is factual in nature, and it can be so clear that a trial court can properly hold that rational minds could not disagree and sustain a directed verdict. *Nunn*, 254 S.W.2d at 700. In and of itself, however, an unnatural, unreasonable, or unexpected disposition—like mental and physical weakness—is insufficient for purposes of opposing summary judgment or a directed verdict if it is unaccompanied by at least slight evidence demonstrating undue influence was actually exerted. *Gibson*, 426 S.W.2d at 928. And, as discussed further in this opinion, Rich and Sesamie failed to present even slight evidence of the remaining badges of undue influence.

In any event, Rich and Sesamie fail to cite and we are unaware of authority providing it would it be *per se* unnatural for a testator to leave the entirety of his estate to a wife with whom he had shared 26 years of marriage. *Cf. Burke v. Burke*, 801 S.W.2d 691, 693 (Ky. App. 1990) ("We realize that in many if

not most cases, it would not be considered "unnatural" to leave everything to one's spouse to the exclusion of one's children.") An estate plan is not unnatural in its disposition simply because it excludes biological relatives or departs from the way property would otherwise have descended by intestacy. *Middleton v. Middleton's Ex'r*, 302 S.W.2d 588, 592 (Ky. 1956); *see also Burke v. Burke*, 801 S.W.2d 691, 693 (Ky. App. 1990) (explaining a testator is free to ignore his relatives).

Nor is it *per se* indicative of undue influence for a testator to leave all or a substantial amount of his estate to an individual upon whom he substantially depends for support in his remaining years of life. *See Middleton*, 302 S.W.2d at 591-92 (explaining with respect to testator's decision to disinherit his children and leave the entirety of his estate to his ex-wife and caretaker, "the disposition of his property by the testator in his second will does not strike us as being unnatural. He needed care because of his old age and apparently had to seek it . . . until he brought his ex-wife, Verda, back to Harlan County to care for him."); *see also Gay v. Gay*, 308 Ky. 545, 215 S.W.2d 96, 98 (1948) ("The mere fact that an aged and infirm person conveys his property to another in consideration of support raises no presumption that it was the result of undue influence." (Citations omitted.))

Whether a testamentary disposition is unreasonable, unnatural, or unexpected must be considered "in light of the circumstances in which the testator wrote it." *Trust Dept. of First Nat. Bank v. Heflin*, 426 S.W.2d 128, 132 (Ky. App. 1968). Those circumstances include whether the disposition was "at variance with

any fixed or declared intention of the testator." *Mossbarger v. Mossbarger's Adm'x*, 230 Ky. 230, 18 S.W.2d 997, 998 (1929).

Here, Rich and Sesamie make much of the fact that Dick's estate plans prior to October 27, 2008 established more or less of a fixed intention or pattern, whereby Rich, Yolanda and Sue received somewhat equal shares of Dick's estate and trust assets. They make light of the fact that Dick's October 27, 2008 estate plan drastically deviated from that pattern, in that it effectively devised the entirety of Dick's estate to Sue. They also argue Dick's October 27, 2008 will and trust instruments could be considered "unnatural" because they operated to disinherit Sesamie. They note Sesamie testified Dick told her on a few occasions *after* October 27, 2008, that she would eventually receive what Yolanda would have inherited.

However, the circumstances surrounding the period of time Dick drafted and executed his October 27, 2008 will and trust instruments reflect that Dick's latest estate plan was not at variance with any fixed or declared intention Dick held *at that time*. Dick executed each of his prior estate plans before September 15, 2008. It is undisputed Dick told Rich and Yolanda on multiple occasions over the years that if they ever filed guardianship proceedings against him, he would disinherit them. Nevertheless, on September 15, 2008, Rich, with Yolanda's assistance, initiated guardianship proceedings against Dick in Bourbon District Court. It is undisputed Dick was outraged with Rich and Yolanda for doing so. Numerous witnesses, including Rich's partner at his law firm who

assisted Rich with initiating the guardianship proceedings against Dick, testified that due to Dick's resulting outrage, it was *expected* or *presumed* at or about the time of those proceedings that Dick had effected, or would effect, some kind of revision to his estate plan adverse to Rich and Yolanda.[23] And, Dick executed his October 27, 2008 will and trust instruments, which effectively disinherited Rich and Yolanda, approximately two weeks before those proceedings concluded and were dismissed in Dick's favor.

Moreover, Sesamie's interest in Dick's estate, as demonstrated in each of Dick's several estate plans introduced in this matter, was always limited to and contingent upon Yolanda's receipt of a share. The recording of Dick's execution of his October 27, 2008 will and trust instruments reflects Dick contemplated that

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[23] For example, Whitney Wallingford, who assisted Rich in prosecuting the guardianship proceedings, testified in relevant part as follows:

> COUNSEL: Mr. Richard Getty has testified that he did not know that his father had changed his will in 2008 until Ms. Carroway attempted to probate and did probate successfully the 2008 will in February of 2010. Do you have any information that Mr. Richard Getty knew that he had been disinherited before, as he's testified, February of 2010?
> W: My recollection at the time was there was a presumption that had occurred. Whether there was actual knowledge or not, I don't recall.
> COUNSEL: Based upon what?
> W: I don't recall. I presume there'd been considerable estrangement in the family since the '04 time frame that had been involved, and certainly because of the '08 incident.
> COUNSEL: What do you mean? I agree with you, but tell the jury what you mean by "after the '08 incidents?"
> W: Uh, that would've been the time in which the conservatorship or guardianship was sought and reached by agreement not to appoint a conservator or guardian. My recollection was there was a presumption that the will had been re-written or that there had been changes.
> COUNSEL: Because Dick Getty was absolutely furious that his children had sought to have him declared disabled?
> W: That was my understanding, yes.
> COUNSEL: And because he had told them for many years, "If you ever haul me into court to have me declared disabled, you're out." Hadn't he?
> W: I believe that is correct.

he *might* revise his plan at a later date. But, Dick nevertheless executed an estate plan on October 27, 2008, that effectively gave Yolanda, and by extension Sesamie, nothing.

In light of the above, Rich's and Sesamie's evidence regarding what they characterized as the unnatural disposition of Dick's estate was insufficient. Under similar circumstances, a testator's decision to disinherit his children or other relatives has been found not to be so unnatural, or unexpected, as to preclude a directed verdict or summary judgment. *See, e.g., Warnick v. Childers*, 282 S.W.2d 608, 610 (Ky. 1955) (testator's decision to leave the bulk of his estate to his niece deemed natural, and no jury instruction on undue influence was warranted, where niece lived with and cared for testator in his latter years and the principal will contestants "unsuccessfully disputed the decedent's right to a gift causa mortis of $15,000 in cash from a sister, which action on their part had necessitated a suit to clarify the matter."); *see also Wallace v. Scott*, 844 S.W.2d 439 (Ky. App. 1992) (for purposes of summary judgment regarding a claim of undue influence, testatrix's decision to disinherit children not deemed unnatural, and was merely viewed by the court as action in conformity with a promise, where children had litigated against testatrix; the testatrix had deemed the result of the litigation unfair; and the testatrix thereafter proclaimed to several witnesses "[t]hat's the last they'll ever get off me.").

As to Rich's and Sesamie's characterization of Sue as a thief, adulterer, and worse—and their citations to evidence they were permitted to

introduce at trial to this effect and over Sue's objection—this merely demonstrates that even if Sue were *not* entitled to a directed verdict on the issue of undue influence, a new trial regarding the issue of undue influence would be warranted. As explained in *Phillips v. Phillips*, 149 Ky. 206, 148 S.W. 51, 60 (1912),

> Where the testator fails to provide for a child [or spouse], such failure may be explained by proof that the habits and conduct of such child [or spouse] were such as to justify the omission (*Conover v. Conover* [N. J.] 8 Atl. 500; *Haight v. Haight* [Sup.] 112 N. Y. Supp. 144; but, where the child [or spouse] is provided for in the will, his acts and conduct, except in so far as they show that he used undue influence or practiced fraud on the testator, are not proper subjects for investigation. The only effect of evidence as to particular immoral acts or conduct on the part of the devisee is to place him in an unenviable position, and to introduce into the case collateral matters which can throw no light upon the real issues in question. If such evidence were admissible, then every devisee under a will would be called upon to defend his character, and the decision of a will case would be made to depend not upon whether fraud or undue influence was practiced, or upon the testamentary capacity of the testator, but upon how far the contestants could succeed in showing that the devisees, because of their immoral acts, were not worthy of being beneficiaries under the will. While it is true that in will contests the evidence is permitted to take a wide range, yet we know of no instance where evidence of the kind referred to has been permitted to go to the jury. Manifestly, too, the effect of such evidence is to impeach the witness by evidence of particular wrongful acts, which is prohibited[.]

Sue was provided for in each and every one of Dick's wills and estate plans introduced in this matter. Rich and Sesamie do not explain how Sue, through the perpetration of her alleged prior bad acts, defrauded Dick into continuously *including* her as a devisee. Accordingly, for the reasons expressed in *Phillips*,

Rich's and Sesamie's evidence of Sue's alleged prior bad acts was not only irrelevant to any issue regarding undue influence; it was also unduly prejudicial and should have been excluded.[24]

Moving on to another badge of undue influence, Rich and Sesamie note with respect to Sue's participation in the process of planning Dick's estate that when Dick executed his October 27, 2008 will and trust instruments in the kitchen of his home, Sue was in the house, eventually executed two deeds that accompanied the overall transaction, and handed Dick a tray. They also note that Carroway, who prepared the October 27, 2008 will and trust instruments, represented both Dick and Sue on varying occasions; directed correspondence to Sue during this period of time; and, as they state in their brief, "took only 5 lines of notes comprised of approximately 20 words" regarding Dick's wishes.

This falls short of demonstrating Sue was an active participant in the physical preparation of the October 27, 2008 will and trust instruments. Nothing reflects Dick's October 27, 2008 will and trust documents were drafted at Sue's insistence; or that Sue hired Carroway to draft Dick's October 2008 will and trust documents; or that Sue gave direction or input to Carroway or Dick regarding the contents and provisions of the instruments.

[24] Throughout the briefs he has filed in this appeal, Rich continuously refers to his evidence of Sue's prior bad acts as relevant to her "motive" for wanting to unduly influence Dick to leave her more of his estate. "Motive," however, is not evidence of undue influence. *Clark v. Johnson*, 268 Ky. 591, 105 S.W.2d 576, 580 (1937).

As to whether Sue secluded and restricted contacts with Dick, Rich notes that he received three letters threatening him with criminal charges if he attempted to visit Dick, dated October 10, 2008, October 11, 2008, and February 12, 2009; and that the letter from October 10, 2008, which Sue (along with Dick and two witnesses) signed, was posted on the front door of Dick's residence. Rich claims Sue manipulated the nurses who assisted with Dick's in-home medical care from late 2008 through 2009 into either not answering his or Yolanda's phone calls, and that Sue once asked a nurse on October 5, 2008, to call Rich on the telephone and "lie" by telling him Dick was too sick to see him and did not want to talk to him. Sesamie also notes that she testified Sue told her on one or more occasions after October 27, 2008, that "the three of them" would find a way to work together to manage the Regency Center once Dick passed away in order to, in the words of Rich's brief, "ensure that Sesamie believed she was included in her grandfather's estate plan and would not raise the topic with him."

But, this does not demonstrate that Sue secluded and restricted contacts with Dick. Regarding the letters that threatened Rich with criminal charges if he attempted to visit Dick, Rich presented no evidence supporting that these were written by or at the behest of Sue. To the contrary, C.V. Collins, one of Dick's attorneys, testified he assisted Dick with at least one of these letters at Dick's request and advised Dick to post the letter on the front door of Dick's residence. The October 10, 2008 letter was also drafted by another of Dick's

attorneys, Kevan Morgan; Morgan also testified this letter was drafted at Dick's request.

With respect to the occasion on October 5, 2008, wherein Sue told the in-home care nurse to call Rich on the telephone and tell him Dick was too sick to see him and did not want to talk to him, Rich admitted during trial that a few hours afterward he nevertheless visited with Dick and spoke with him for an hour outside of Sue's presence.

To the extent there was testimony about any instructions to the nurses from Sue regarding Rich's and Yolanda's telephone calls to Dick, one of Dick's nurses (Janet Olson) stated there was a high volume of calls, day and night, from Rich and Yolanda; it became annoying and harassing; and that Sue told her she was not required to answer all of their telephone calls, but at least needed to inform Dick they had called so Dick could decide whether to call them back. Aside from that, none of Dick's in-home care nurses testified Sue directed them to restrict Rich's or Yolanda's contact with Dick, and Rich presented no evidence to the contrary. Dick's nurses each testified that while they would sometimes prevent Rich's or Yolanda's telephone calls from reaching Dick, they did so only out of concern for Dick's health, at Dick's request, or when they personally regarded Rich or Yolanda as being verbally abusive or upsetting toward Dick over the telephone.[25]

[25] Marie Cameron, Janet Olson, and Lori Turetzky, who were Dick's nurses, each testified to this effect. The court-appointed attorney who represented Dick during the guardianship proceedings, Anna Johnson, also testified she witnessed this occur when she visited Dick to confer with him.

And, while Sesamie testified to the effect that Sue misled her regarding the disposition of Dick's estate, she did not testify that Sue prevented her from seeing Dick or communicating with him.

Lastly, with respect to whether Sue exercised "absolute control" over Dick's business affairs, Rich's and Sesamie's argument, as set forth in their brief, is as follows:

> There was evidence that Sue Getty exercised absolute control over the business affairs of Dick Getty. As set out herein, Dick Getty was essentially bedridden in the final years of his life and was entirely dependent upon Sue Getty for his daily needs.
>
> It was well known that one of Dick Getty's greatest fears was being put in a [nursing] home, and Sue Getty used that fear to drive a wedge between him and his children. (VR 6/20/13: S. Raffle 1:13:58-2:02:00) Sue Getty testified that when served with the initial papers regarding the Guardianship Proceeding, she told Dick Getty that it was something about "Richie trying to get control of you." (VR 6/27/13: S. Getty 9:02:03-9:05:30) During the course of the Guardianship Proceeding, on September 18, 2008, Rich Getty advised the Court that he did not wish to be appointed guardian. Although she was present at the hearing and representing Dick Getty, Anna Johnson testified that she did not recall ever advising Dick Getty of this change. (VR 6/26/13: A. Johnson 11:19:20-11:20:58) Thereafter, Sue Getty perpetuated the myth that Rich Getty wanted to "take control" of his father's property and place his father in a nursing home (VR 6/20/13: S. Raffle 11:13:30-11:14:49)
>
> In an Affidavit filed in the Guardianship Proceeding (that was prepared by Sue Getty's attorney, C.V. Collins), Dick Getty states that he wishes "to **remain at home** with my wife at 1685 Millersburg Road, Paris, Kentucky 40361." (PTE 70) (emphasis added) There would be no reason for him to include such a statement had he not

> been told, and then believed, that the purpose of the Guardianship Proceeding was to put him "in a home."
>
> Bill Bishop testified that he visited with Dick Getty on October 5, 2009 and that Dick Getty was under the mistaken impression that Rich Getty was trying to take his property away from him. (VR 6/21/13; B. Bishop 10:33:00-10:43:33) After this visit, the Nurses Registry notes indicate that Dick Getty said, "Now, I don't know who to believe." (PTE 69)
>
> Dr. West's medical records document a visit on October 9, 2008 with Dick and Sue Getty in which Dr. West was told that "Court order was obtained after the son apparently tried to have him removed from the home… The son again has been attempting to get him removed from the home which is the basis for the court action mandating an in home nurse 24 hours a day."[FN] (PTE 39)
>
> > [FN] Earlier records from Dr. West's file indicate that both Dick Getty and Rich Getty were opposed to placing Dick in a nursing home. (PTE 38)

With that said, Rich and Sesamie presented no evidence Dick feared Sue would limit his access to his money or that Sue otherwise used Dick's finances to control Dick's behavior.

Moreover, while Dick's fear of being placed in a nursing home is evidence of his *susceptibility* to undue influence,[26] Rich's and Sesamie's evidence stops short of demonstrating that what played upon Dick's fear was Sue, rather

[26] *See, e.g., Golladay v. Golladay*, 287 S.W.2d 904, 905 (Ky. 1955) (explaining evidence of testator's worries demonstrates the testator's susceptibility to undue influence, but is not substantive evidence, for purposes of a jury question, that undue influence was actually exercised); *Wilson v. Taylor*, 167 Ky. 162, 180 S.W. 45 (1915) (explaining declarations of testator that "he was influenced to make the will by the threats of his wife and the fear that she might do him some harm" did not qualify as substantive evidence of undue influence from wife, but only evidence of the testator's mental condition at the time of the making of the will.)

than the "initial papers" Rich filed on September 15, 2008, relative to his guardianship proceedings against Dick. Those documents consisted of a petition to determine disability and an application for the emergency appointment of a fiduciary for a disabled person. In relevant part, the former document stated:

> Richard A. Getty has reasonable grounds or knowledge to lead him/her to believe [Dick] appears to be unable to provide for his/her physical health and safety and/or manage his/her financial resources effectively and submits to the Court the following facts upon which he/she supports this belief:
>
> . . .
>
> [Dick] suffers from heart disease and high blood pressure, and is unable to walk. Over the last two days his health condition has deteriorated rapidly, and he is now hospitalized at St. Joseph hospital in Lexington and is under Hospice care. As of the time of this petition, [Dick] is moving in and out of consciousness, making communication difficult. He is therefore unable to make important decisions regarding his health and safety and financial matters.
>
> . . .
>
> Name of Person having custody of Respondent: Sue Getty
> Address: 1685 Millersburg Road

In the latter document, Rich requested appointment as Dick's emergency limited guardian for the purpose of "Protecting the health and safety of [Dick] and preventing the imminent dissipation of [Dick's] assets by third parties." Rich added that his qualifications for appointment were:

> Mr. Richard A. Getty is an attorney who has been practicing for more than 30 years. He is a partner in

> Getty & Childers, PLLC. Mr. Getty is financially and otherwise capable of *handling all physical, medical and residential needs* of [Dick]. In addition, Mr. Getty has extensive knowledge of the Respondent's business activities and finances, which will enable him to make appropriate decisions regarding same during the tenure of his guardianship.

(Emphasis added.)

A plain reading of these documents demonstrates Rich intended to take control of Dick's health care and assets, and to separate Dick from Sue and the residence he shared with her. Through the documents he served upon Sue, Rich represented: (1) Dick was unable to make important decisions regarding his own health, safety, and finances; (2) Sue was incapable of making those decisions or otherwise caring for him; and (3) in order to protect Dick's assets, health, and safety, Rich should be the sole authority with respect to handling all of Dick's "physical, medical and residential needs[.]"

Rich and Sesamie also fail to explain why it is significant that Anna Johnson, the court-appointed attorney who was at the guardianship hearing representing Dick, could not recall whether she informed Dick that Rich told the district court approximately one week after he filed his petition that he no longer wished to be appointed Dick's guardian.

However, Johnson did not testify she informed Sue about this, either. If Sue was also not informed of Rich's verbal amendment to his guardianship petition, we are left to guess at how Sue could have *knowingly* misrepresented to Dick thereafter that Rich wanted to take control of his health care and assets.

While Rich may no longer have wished to be appointed as Dick's guardian, he nevertheless continued to seek the appointment of someone other than Dick or Sue to take control of Dick's physical, medical, and residential needs.

In short, Rich and Sesamie put forth no evidence supporting that Dick's October 27, 2008 will and trust instruments were the product of undue influence. The circuit court erred in denying a directed verdict in this respect, and we accordingly reverse.

VI. REMAINING ISSUES

We have not addressed Sue's contention that a lower judgment interest rate could have been required; the propriety of the circuit court's decision to refrain from entering a supplemental judgment reflecting Sue's use of income from the Regency Center during the pendency of the litigation below; or the propriety of its decision not to award costs to Rich and Sesamie. It is unnecessary to do so. In light of our disposition of these appeals, those issues are moot.

CONCLUSION

For the reasons discussed, the Bourbon Circuit Court entered its contempt order in error; Dick Getty's October 27, 2008 estate plan should not have been deemed invalid; and each of the claims asserted by Rich and Sesamie in this matter, in their various capacities, should have been dismissed as a matter of law. We therefore REVERSE the Bourbon Circuit Court with respect to Appeal No. 2014-CA-000686. We REVERSE with respect to Appeal No. 2014-CA-000693.

We REVERSE with respect to Cross-Appeal No. 2014-CA-000764. We AFFIRM Cross-Appeal No. 2014-CA-000711.

ALL CONCUR.

BRIEF FOR BRENDA SUE BRIDGES GETTY, CAROLYN CARROWAY, KEVAN MORGAN, AND JOSEPH MAYER, INDIVIDUALLY AND IN THEIR ABOVE-CAPTIONED CAPACITIES:

Leslie Patterson Vose
Mark L. Moseley
Erin C. Sammons
Gregory A. Jackson
Lexington, Kentucky

BRIEF FOR RICHARD A. GETTY, SESAMIE BRADSHAW, AND ERROL COOPER, INDIVIDUALLY AND IN THEIR ABOVE-CAPTIONED CAPACITIES:

William M. Lear, Jr.
John W. Bilby
Lucy A. Ferguson
Lexington, Kentucky