

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000033-MR

DAVID A. KOENIG, AS
PUBLIC ADMINISTRATOR OF
ADA MAE HAMBLIN AND
HAROLD HAMBLIN, INDIVIDUALLY

APPELLANTS

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 14-CI-00105

RONALD HAMBLIN, ANNETTE
HARMON, PAMELA HAMBLIN,
AND JAMES E. HAMBLIN

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR,
JUDGES.

CLAYTON, CHIEF JUDGE: This case arises from a family dispute over a tract
of property in Gallatin County owned by the late Ada Mae Hamblin. Four of
Ada's children, the Appellees Ronald Hamblin, Annette Harmon, Pamela Hamblin

and James E. Hamblin, brought this action in Gallatin Circuit Court to contest a deed in which Ada transferred the entire tract of property to their brother, Harold R. Hamblin. They claimed Ada had always intended to divide the tract equally among all her children. A jury found that Ada was not of sound mind when she deeded the entire property to Harold but that the deed was obtained without the exercise of any undue influence on his part. This appeal is taken¹ from orders and judgments entered by the trial court on October 20, 2015, and December 22, 2015, ordering the deed to be set aside, denying Harold's motions for judgment notwithstanding verdict; for a new trial; and to alter, amend or vacate the judgment; and creating a constructive trust for James E. Hamblin. Having reviewed the record, we affirm.

Factual Background

Ada and her husband Charles, who passed away in 1995, had six children: Ronald, Pamela, James, Annette, Harold, and Theresa, who passed away in 2011. Ada and Charles purchased the disputed tract of property, which is located on Johnson Road in Gallatin County, in 1987. In the years that followed,

¹ This appeal was originally brought by Harold R. Hamblin, individually and as Guardian of his mother, Ada Mae Hamblin. Ada Mae Hamblin passed away on March 31, 2016. The Gallatin District Court subsequently removed Harold R. Hamblin as the Executor of the Estate and appointed David A. Koenig as the Administrator. David A. Koenig as Public Administrator of the Estate of Ada Mae Hamblin was substituted as a party for Harold R. Hamblin as Guardian of Ada Mae Hamblin by this Court on appellants' motion on January 23, 2018.

Harold, James and his wife Rose, and Theresa and her husband Carl Lacey, resided on the property.

At the time of the trial in October 2015, Ada was seventy-eight years of age and suffered from frail health and symptoms of dementia. She had been cared for by her daughter, Theresa, who also acted as her power of attorney (POA), until Theresa's death in 2011. Her son James then acted as her POA until September 2013. Harold acted as Ada's POA from September 2013, until May 20, 2015, when he was appointed her guardian by the Gallatin District Court.

On May 8, 2014, Harold, who also lived with Ada and acted as her caretaker, took her to her attorney's office where she signed a deed conveying the entire Gallatin County property to Harold.

Harold's siblings filed a complaint in Gallatin Circuit Court in July 2014, alleging that Harold had exercised undue influence over Ada in obtaining the conveyance, and that she lacked the mental capacity necessary to make a deed. The complaint further alleged that the deed violated an agreement between Ada and her children which directed the property to be divided among all the siblings in equal proportions. Harold maintained that Ada may have intended to divide the property in that manner at one time but changed her mind and wanted him to have the entire tract.

At trial, Ada was permitted to testify over Harold's objection after the trial court conducted a competency hearing. Two documents regarding how Ada intended to dispose of the property were also introduced into evidence over Harold's objection. One of the documents, entitled "Property Agreement," which was executed on February 1, 2012, provided that James would have sole interest in his current residence and the two acres upon which it is located; that Harold would have sole interest in his current residence, which he shared with Ada, and the two acres of land upon which it is located; and Ronald, Pamela and Annette were each entitled to a similar sole interest in two acres of the land, with road frontage, should any of them decide to establish a residence on the property. The remainder of the property, which included the family cemetery, was to be maintained and controlled equally by all the parties. Although there were some irregularities surrounding the signing procedure of the agreement, with some siblings signing on behalf of others, they all testified that the document contained Ada's intentions.

The other document, entitled "Property Instructions for my children," was signed by Ada in 2013. According to Harold, it was prepared by his girlfriend on behalf of his mother. All parties acknowledged that the document expressed Ada's intentions in 2013, although Harold testified that she later changed her mind. It stated in part:

I feel it is time for each of the children to come and mark the acres of land that have be giving to them threw my

will [sic]. Each is entitled to 2 acres street front James and Harold have their areas and have homes upon the area [sic]. Annette, Pamela, and Ronald are to pick the areas and place the areas in writing. I would like for this to be done as soon as possible.

The document also stated that Ada wanted each of the children to take responsibility for their share of the expenses of the property, including taxes, insurance and maintenance, including the common area. The document concluded:

I Ada Mae Hamblin had this prepared because it is my wish to have this settled so nothing is left to assume and everything is not left on one person. This is a common sense and correct way of handling the property that has been willed to all my children. No one needs to sign this paper but please be known this is not negotiable and will not be changed. This is the way I want it to be.

As further evidence that Ada intended the Gallatin County property to be divided among all her children, Carl Lacey, her son-in-law, the widower of her late daughter, Theresa, testified that Ada transferred the portion of the property that contained Carl and Theresa's home to him on February 1, 2012.

At trial, the jury found the May 8, 2015, deed was not the product of undue influence but that Ada was not competent when it was made. This appeal by Harold followed.

Ada's competence to testify

Harold initially wanted Ada to testify at trial. He listed her name on his pre-trial witness list and moved to quash a trial deposition of Ada that the

defendants had scheduled, arguing that Ada would be a witness at trial and the deposition would deny him the opportunity to present his case to the jury with live testimony. The trial court granted the motion to quash the deposition, but also told the parties it would conduct a competency hearing due to concerns about Ada's condition. The trial court conducted the competency hearing on the morning of trial, as close to the time of Ada's intended testimony as practicable. The trial court questioned Ada as follows:

The Court: Do you – are you aware of what all's going on in this case?

Ada: Yeah.

The Court: Okay. Can you describe to me what's happening in this case?

Ada: I think they – some of them's starting to be a little greedy.

The Court: Okay. What do you mean by that?

Ada: Well, I think some wants more than others.

The Court: Okay, when you say some wants more than others, do you mean that everybody's getting some?

Ada: Yeah.

The Court: What is the some that you think everybody is getting?

Ada: Well, I don't know now. I really don't know.

The Court: If I would have asked you that question a year ago –

Ada: I would have said two acres.

The Court: Okay. But you don't know now?

Ada: No, I don't.

The Court: Okay. Why don't you know now?

Ada: Because they think I want to be dishonest, and I want every one of them to have the same.

Following the competency hearing, Harold objected to allowing Ada to testify.

The trial court overruled the objection but offered to give a limiting instruction following her testimony if Harold found it necessary. He did not request such an instruction. Following the trial, Harold filed a motion to alter, amend or vacate the judgment partly on the grounds that Ada's testimony was unduly prejudicial.

Harold argues that the competency hearing was inadequate and that the jury was improperly influenced by Ada's weakness on the stand. Under Kentucky Rules of Evidence (KRE) 601, every person is competent to be a witness unless that person: "1) lacks the capacity to accurately perceive the matters about which the witness proposes to testify; 2) lacks the capacity to recall facts; 3) lacks the capacity to express himself or herself so as to be understood, either directly or via interpreter; and 4) lacks the capacity to understand the obligation to tell the truth." *J.E. v. Commonwealth*, 521 S.W.3d 210, 214 (Ky. App. 2017) (citing KRE

601(b)(1)-(4)). “The determination of a witness’s competence to testify falls within the discretion of the trial court. . . . [T]he burden of rebutting the presumption of competency is on the party seeking exclusion of the witness’ testimony.” *Huddleston v. Commonwealth*, 542 S.W.3d 237, 244 (Ky. 2018), *reh’g denied* (Apr. 26, 2018) (internal citations and quotations marks omitted).

In denying Harold’s motion, the trial court explained that it allowed Ada to testify because she was able to explain her perspective about what was going on in the case, describe her feelings about her children getting the property at issue, and was even able to express how her feelings might have been different if she had been questioned about the matter a year earlier.

As evidence of Ada’s incompetence to testify, Harold points to the fact that shortly before trial the Appellees moved the circuit court to substitute Harold, as guardian for Ada, for Ada as the defendant in the action because she had been adjudged incompetent by an order of the Gallatin District Court. He argues that the jury’s finding that Ada was incompetent to sign the deed shows they were improperly influenced by her frailty on the witness stand and were not aware of the how “strong-willed” she was on May 8, 2014.

But the jury heard testimony that Ada was not “strong-willed” at that time. Ada’s attorney testified he was concerned about Ada’s feebleness and

postponed preparing the deed conveying to property to Harold. Dr. Benjamin Kutnicki testified that on the day before she signed the deed to Harold, Ada was depressed, her insight was poor, and she demonstrated poor judgment.

The trial court's interview of Ada, although brief, showed she had the capacity to understand what she would be asked to testify about, could recollect the salient facts, and could express herself clearly. Her frankness with the trial court indicated she understood she must tell the truth. An impression of frailty and even some confusion does not equate to incompetence to testify. "[J]udgment as to the credibility of witnesses and the weight of the evidence are left exclusively to the jury." *Farrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005) (internal citations omitted). The trial court's decision to allow the testimony was not an abuse of discretion.

The admission of evidence

Harold argues that the trial court abused its discretion in admitting the following documents into evidence: the "Property Agreement" dated February 1, 2012; the undated "Property Instructions for my children;" and two deeds. In his motions before the trial court, he argued that the documents were unauthenticated and not "best evidence."

The best evidence rule, the foundation of which is contained in KRE 1002, provides that "[t]o prove the content of a writing, recording, or photograph [e.g. an x-ray], the original writing, recording, or photograph is

required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute.” Essentially, this rule requires a party to introduce the most authentic evidence which is within their power to present.

Savage v. Three Rivers Med. Ctr., 390 S.W.3d 104, 114 (Ky. 2012) (citing *Marcum v. Commonwealth*, 390 S.W.2d 884, 886 (Ky. 1965); *Johnson v. Commonwealth*, 231 S.W.3d 800, 805 (Ky. App. 2007)).

“[A]buse of discretion is the proper standard of review of a trial court’s evidentiary rulings.” *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

“[P]reserved evidentiary and other non-constitutional errors will be deemed harmless . . . if we can say with fair assurance that the judgment was not substantially swayed by the error.” *Ordway v. Commonwealth*, 391 S.W.3d 762, 774 (Ky. 2013).

As to the “Property Agreement,” Harold points out that the Appellees’ counsel in his opening statement told the jury that all the children had signed the document. He argues that this statement was inconsistent with subsequent testimony from the Appellees. James testified that he signed the document but did not see anyone else sign it; Annette testified that she did not sign it and her mother

forged her name; Ronald testified that the signature on the document was not his and he thought Harold had signed his name; Pamela testified that they all signed it except Annette and that she had signed it but did not see anyone else sign it. The trial court acknowledged these irregularities surrounding the signing of the document but pointed out the siblings all consistently testified that the document expressed Ada's intentions at the time. Furthermore, the jury was made fully aware of the irregularities regarding the signing of the document through the testimony of the siblings. The trial court did not abuse its discretion in admitting the document into evidence.

Harold objects to the admission of the "Property Instructions" because the document was undated, the notary who signed it did not testify, and Ada was unable to identify it. In overruling Harold's objection to the admission of the document, the trial court explained the defendants had produced the best evidence within their power to present, as they did not possess the original document. The trial court acknowledged that the document was undated but noted that all parties acknowledged the document expressed Ada's intention at the time, even though Harold testified that she later changed her mind. Harold himself testified that the document was prepared by his girlfriend Jacky. Under these circumstances, the admission of the "Property Instructions" was not an abuse of discretion.

The final two documents at issue are copies of deeds that were not authenticated. Harold argued that certified copies could easily have been obtained as public records and contends they did not constitute best evidence. Harold does not describe the nature of the deeds or how their admission into evidence affected the outcome of the trial. Consequently, there is nothing for us to review. “It is not our function as an appellate court to research and construct a party’s legal arguments, and we decline to do so here.” *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).

The constructive trust

Finally, Harold argues that the trial court’s award of a constructive trust for the benefit of James was erroneous. According to the testimony of James and his wife Rose, they conveyed property they owned in Newport, Kentucky, to Charles for no consideration on the understanding and agreement that they would move to the Gallatin County property and build a house. Charles and Ada subsequently sold the Newport property to a third party. James and Rose moved to the Gallatin County property, built a house, and lived there for approximately seventeen years.

James argued that the improvements he and Rose made to the property, such as building the house, mowing the grass, and installing a septic system shared by their home and Ada’s, had resulted in a benefit to Ada. He

further claimed that he made the improvements on the belief that he would receive the portion of property where his home is located. When the deed from Ada to Harold was declared void and set aside following the trial, title to the entire property reverted to Ada. James argued that allowing her to retain the value of the improvements would be contrary to the understanding between the parties and would result in an unjust detriment to him.

The trial court agreed and ruled that Ada was holding title to a portion of the property, approximately two acres with a home attached, in constructive trust for the benefit of James.

“Constructive trusts are created by the courts in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.” *Keeney v. Keeney*, 223 S.W.3d 843, 849 (Ky. App. 2007) (internal citations and quotation marks omitted). The evidence required to establish a trust must be clear and convincing and the trial court’s findings of fact shall not be set aside unless they are clearly erroneous. *See id.* at 850.

In its lengthy and well-reasoned order and judgment, the trial court relied not only on the testimony of James and Rose, but on the terms of the “Property Agreement” and “Property Instructions.” The “Property Agreement,” which all the children agreed expressed Ada’s intent regarding the property,

provided that James would have sole interest in his current residence and the two acres of land upon which it was located. The “Property Instructions,” a notarized document, stated that each of the children was entitled to two acres of street front and that James and Harold already had their areas and homes. The evidence supporting the trial court’s decision is clear and convincing and consequently its decision to award the constructive trust will not be disturbed on appeal.

For the foregoing reasons, we affirm the orders and judgments entered by the Gallatin Circuit Court on October 20, 2015, and December 22, 2015.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Grant M. Axon
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BRIEF FOR APPELLEES

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