RENDERED: JUNE 5, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000420-MR

PHYLLIS J. HOUCHIN, PERSONAL REPRESENATITIVE AND EXECUTOR OF THE DECEASED, JUANITA BERRY[1] — APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NOS. 17-CI-00059 AND 17-CI-00081

MARYTENA HODGES; BETHANY HIMES (A/K/A BETHANY HIMER); MICAH THOMPSON; LAURA BEARD; MAE LOBB MILBY; MARCIE GOFF; HAROLD HUDGINS; LARKIE HUDGINS; BARRY SHUFFETT; DONNA SHUFFETT; KIM LOBB (A/K/A KIM MILBY); JOHN HANCOCK; SARAH HANCOCK; WILLIAM MARSHALL LOWE; WILLIAM COLVIN; JOANN O'BANION; TOMMY O'BANION; MARY LYNN; BETTY JO RUSSELL; BILL RUSSELL; FRANCES PERKINS; BILLY JOHNSON; ELVIRA GILKESON (A/K/A ELVIRA GILKERSON); GREENSBURG CUMBERLAND PRESBYTERIAN CHURCH; AND GREEN COUNTY SCHOOL DISTRICT — APPELLEES

[1] Juanita Berry passed away during the pendency of this appeal, and her Personal Representative and Executor, Phyllis J. Houchin, was substituted as appellant by order of this Court entered on March 18, 2019.

OPINION
AFFIRMING

** ** ** ** **

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

TAYLOR, JUDGE: Phyllis J. Houchin, Personal Representative and Executor of the deceased appellant, Juanita Berry, brings this appeal from a March 5, 2018, Order of the Green Circuit Court determining that the Last Will and Testament of Tenabel Hancock, executed on October 17, 2016, was valid and enforceable. We affirm.

The relevant facts are undisputed. John Ed Hancock and Tenabel Hancock, a married couple, and residents of Green County, Kentucky, executed on May 7, 1975, a Joint Will. Under the terms of the 1975 Joint Will, the survivor of John and Tenabel was devised "all the property of the deceased[,]" and upon the death of the survivor, the remaining property was to be sold with the proceeds distributed to various beneficiaries, including Juanita Berry. The 1975 Joint Will also specifically provided neither party could revoke it in whole or in part. John passed away in December of 1984, and the Joint Will was probated on January 14, 1985.

Subsequently, on October 17, 2016, Tenabel executed another will. The terms of the 2016 Will differed significantly from the 1975 Joint Will,

particularly as to beneficiaries. Relevant to this appeal, Juanita Berry was not a beneficiary under the 2016 Will.

In 2017, Tenabel passed away, and the 2016 Will was probated on March 13, 2017, by the Green District Court in Action No. 17-P-00025. Thereafter, the executor of the 2016 Will filed a motion to set aside the probate of the 2016 Will and to declare the 2016 Will invalid. The executor believed that the 1975 Joint Will prohibited Tenabel from revoking said will and that the 2016 Will was invalid. By order entered May 23, 2017, the district court concluded that the 2016 Will was invalid as the 1975 Joint Will contractually prohibited Tenabel from executing a subsequent will. The district court also granted a motion to probate the 1975 Joint Will.

Four days before entry of the May 23, 2017, order in district court, Marytena Hodges, Laura Beard, John Hancock, Sarah Hancock, Bethany Himes, Mae Lobb Milby, Micah Thompson, Marcie Goff, Harold Hudgins, Larkie Hudgins, and William Marshall Lowe (collectively referred to as petitioners) filed a Petition for Declaratory Judgment (Action No. 17-CI-00059) in the Green Circuit Court on May 19, 2017.[2] The petitioners were beneficiaries under the 2016 Will. They named, *inter alios*, Juanita Berry as a respondent, as Berry was a beneficiary

[2] The circuit court has jurisdiction to hear a will contest as it constitutes an adversary proceeding pursuant to Kentucky Revised Statutes (KRS) 394.240.

under the 1975 Joint Will. In the petition, petitioners sought to have the 2016 Will declared valid and to have the 2016 Will admitted for probate.

Thereafter, on June 21, 2017, Marytena Hodges, Laura Beard, John Hancock, Sarah Hancock, Bethany Himes, Mae Lobb Milby, Micah Thompson, Marcie Goff, Harold Hudgins, Larkie Hudgins, William Marshall Lowe, Barry Shuffett, and Donna Shuffett filed an action (No. 17-CI-00081) in circuit court to contest the 1975 Joint Will and named as respondent, *inter alios*, Juanita Berry. Therein, they claimed that the 1975 Joint Will did not constitute an irrevocable contract as it failed to satisfy the requirements of KRS 394.540. They also asserted that the 2016 Will should be probated.

The circuit court consolidated Action No. 17-CI-00059 with Action No. 17-CI-00081 by order entered October 17, 2017.

Ultimately, by order entered March 5, 2018, the circuit court determined that the 2016 Will was valid and "shall control the disposition of [Tenabel's] estate." In so doing, the circuit court concluded that the 1975 Joint Will did not contain a contractual obligation prohibiting Tenabel from revoking it as required under KRS 394.540. This appeal follows.

Houchin argues that the circuit court erred by adjudicating that the 2016 Will was valid. In particular, Houchin argues that the 1975 Joint Will constituted a contract prohibiting Tenabel from revoking it as provided by KRS

394.540(1)(a). Houchin believes that Item IV of the 1975 Joint Will sets forth the material provisions of a contract not to revoke, and the circuit court erred by concluding otherwise.

We begin by setting forth relevant provisions of the 1975 Joint Will:

> ITEM II: It is the will and desire of each of us and both of us that on the death of either of us all the property of the deceased party, whether real or personal, and wheresoever situated, shall descend to and become the sole property of the surviving party for his or her benefit. So long as the survivor shall live the survivor shall use, exchange, sell, or dispose of the real and personal property or the proceeds thereof in any manner the survivor, in his or her discretion, deems necessary for his or her benefit.
>
> . . . .
>
> ITEM IV: This Joint Will is made by each of us and both of us in consideration of the terms and bequests herein made for the benefit of the other party. And by the further terms that each of us would and will not revoke this Will in whole or in part or attempt to do so.

In 1972, the General Assembly enacted KRS 394.540, which provides:

> (1) A contract to make a will or devise, or not to revoke a will or devise or to die intestate, if executed after June 16, 1972, can be established only by:
>
> (a) Provisions of a will stating material provisions of the contract;

(b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

(c) A writing signed by the decedent evidencing the contract.

(2) The execution of a joint will or mutual wills gives rise to no presumption of a contract not to revoke the will or wills.

Relevant to this appeal is KRS 394.540(1)(a). Under KRS 394.540(1)(a), a contract not to revoke a will may be established by the will itself if the will sets forth the "material provisions of the contract[.]" The bar to establish a contract not to revoke a will is set high. Our Court has held that "no longer will mutual or joint wills be considered to constitute an irrevocable contract unless the will by its terms states plainly that its provisions are to be considered as a contract[.]" *Martin v. Cassady*, 628 S.W.2d 888, 890 (Ky. App. 1982); *see also Duncan v. Wold*, 846 S.W.2d 720, 722 (Ky. App. 1992).

In the 1975 Joint Will, Item IV provides that "each of us would and will not revoke this [W]ill in whole or in part." However, the 1975 Joint Will does not contain terms expressly stating that Item IV is to be considered contractual in nature. Additionally, the material provisions of a contract not to revoke a will are not set forth in the 1975 Joint Will. Therefore, we conclude that the 1975 Joint Will does not constitute an irrevocable contract as it fails to satisfy the requirements of KRS 394.540(1)(a). *See Martin*, 628 S.W.2d at 890; *Duncan*, 846

S.W.2d at 723; L. Rush Hunt and Lara Rae Hunt, *Baldwin's Ky. Wills and Trusts* § 2:14 (2019).

Houchin also asserts that Tenabel was only devised a life estate in John's property under the terms of the 1975 Joint Will, and thus could not dispose of the property under the 2016 Will as her interest in John's estate ceased to exist upon her death. Based on our review of the record on appeal, it appears that Houchin failed to raise this issue before the circuit court.[3] We are without authority to review an issue not presented to the court below. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009). As a result, this issue is not properly before this Court in this appeal, and we decline to address the merits thereof. *See Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).[4]

We view any remaining contentions of error as moot or without merit.

For the foregoing reasons, the Order of the Green Circuit Court is affirmed.

CLAYTON, CHIEF JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent.

[3] The circuit court's order recites that the parties stipulated the only issue before the court was a question of law regarding the interpretation and application of KRS 394.540 to the 1975 Joint Will.

[4] We also note that Phyllis J. Houchin, Personal Representative and Executor of the deceased, Juanita Berry, failed to comply with Kentucky Rules of Civil Procedure 76.12(4)(c)(v) by not stating in her brief how and in what manner this issue was preserved below for our review.

The applicable statutory provision is KRS 394.540(1)(a). Stripped of inapplicable verbiage, that subsection says: "A contract to make a will or devise, or not to revoke a will or devise . . . can be established only by . . . [p]rovisions of a will stating material provisions of the contract[.]" KRS 394.540(1)(a). There is no additional requirement of a warning or caveat in the will that "states plainly that its provisions are to be considered as a contract . . . ." *Martin v. Cassady*, 628 S.W.2d 888, 890 (Ky. App. 1982). That language in *Martin* is dicta. Here is why we know that.

The joint will of Mr. and Mrs. Martin is set out in full in the opinion. *Id.* at 889-90. Search the will thoroughly and you will find no indication of the parties' mutual obligation to one another to make a will or devise or not to revoke one. *See Gray v. Greer*, 253 Ky. 809, 70 S.W.2d 683, 685 (1934) ("If it be a contract to make a will . . . there must be some sufficient consideration to support it."); *Pace v. Burke*, 150 S.W.3d 62, 65 (Ky. App. 2004) (for "valid contract to make a will . . . there must be a mutuality of obligation between the contracting parties"). The Martins' joint will failed as a contract under the statute because it lacked one of the "material provisions of the contract[,]" KRS 394.540(1)(a) – consideration for entering into it. Even if the warning or caveat of the *Martin* dicta had been put in the will – *i.e.*, that "its provisions are to be considered as a contract" – the lack of consideration still would have prevented enforcement under

KRS 394.540(1)(a). *Beaver v. Oakley*, 279 S.W.3d 527, 533 (Ky. 2009) (when construing contracts, "the appropriate focus [is] on actual function and substance rather than simply on form").

In *Martin*, this Court said, "We must assume that a legislative act was intended for some purpose." 628 S.W.2d at 890. But if we guessed that purpose to be requiring probate lawyers to include a warning in their client's will that it has contract terms, that guess was wrong. The legislation was a response to our own jurisprudence.

The legislature enacted KRS 394.540 in 1972 shortly after our jurisprudence revealed an apparent willingness to find reciprocal provisions of a married couple's joint will (and some mutual wills) sufficient in themselves to justify enforcement of the will as a contract, even if necessary contract elements were lacking. Two cases in particular reveal that willingness. They are *Arndell v. Peay*, 411 S.W.2d 473 (Ky. 1967) and *Hatfield v. Jarrell*, 433 S.W.2d 346 (Ky. 1968).

In the former case, Arndell and his wife executed separate but identical wills, each leaving his or her entire estate in fee simple to the other if surviving, and otherwise to their five children in equal shares. *Arndell*, 411 S.W.2d at 474. After his wife died, Arndell executed a new will disposing of his estate in a different manner than expressed in his prior will. *Id.* When putative

heirs under the old will sought to invalidate the new one, the Court framed the question as "whether the mutual wills that had been executed by Arndell and his wife were *contractual* in nature . . . ." *Id.* at 475 (emphasis added). The putative heirs argued the mutual wills "were reciprocal in their terms, and were executed by husband and wife at the same time[,]" but the Court concluded that was not enough. *Id.* at 475-76. What was lacking?

The only logical answer is that these wills, though mutual, lacked mutuality of obligation, *i.e.*, consideration. The opinion indicates that each will stood on its own and gave no hint that the other even existed, despite their common attributes. The fact that the Court considered mutuality of obligation absent is apparent from how it distinguished *Boner's Administratrix v. Chesnut's Executor*, 317 S.W.2d 867 (Ky. 1958), from the facts in *Arndell*.

Arndell called *Boner's Administratrix* "[a] departure from the general rule" that "separate wills drawn by the same scrivener and executed by husband and wife at the same time, contain[ing] reciprocal or similar provisions and indicat[ing] a common purpose *is not alone sufficient evidence* of a contract between the testators." 411 S.W.2d at 475 (emphasis added). As in *Arndell*, the separate wills in *Boner's Administratrix* were contemporaneously executed and provided equally for the parties' separate heirs. But, read closely, *Boner's Administratrix* shows the Court expressly rejected the argument that there was not

"any *consideration* for such contract," 317 S.W.2d at 868-69 (emphasis added), and then, disappointingly, said nothing about what form consideration took. Instead, the Court said, "*Without going into details*, the terms of the wills force us to the conclusion that these two wills were executed as a result of a plan carefuly [sic] determined by the testators. Clearly, this established the contract to make reciprocal wills under the above authorities." *Id.* at 869 (emphasis added). So, sometimes mutual, reciprocal, contemporaneously executed wills were enforceable as contracts to make a will or devise, and sometimes they were not.

Then along came *Hatfield*. Unlike *Arndell* and *Boner's Administratrix*, *Hatfield* involved the single, joint will of a husband and wife. *Hatfield* tells us that in *Arndell* there was no contract to make wills "specifically bacause [sic] of the fact that the wills did not refer each to the other." *Hatfield*, 433 S.W.2d at 347. *Hatfield* seems to say all that was lacking in *Arndell* was mutual *reference* in the separate wills one to another. *Id.* (testators "executed separate wills containing reciprocal or similar provisions" but did so without "in any way referring each to the other"). Conversely, in *Boner's Administratrix*, the separate wills did refer to one another and that was enough to find a contract. *Id.*

So, *Hatfield* held that the problem in *Arndell* of no cross-referencing was solved simply by the testators executing a single, joint will. The general rule *Arndell* cited was inapplicable because Mr. and Mrs. Hatfield utilized the joint-will

approach to express a unity in their testamentary intent and that was sufficient for the Court to find mutuality of obligation, even if it was not expressly stated as it would be in an actual contract. In fact, the general rule applicable with mutual wills was turned completely around in the context of a joint will. In the words of the *Hatfield* Court:

> It was *apparent* from the face of the instrument that the parties had reached an understanding between themselves prior to the execution of the will as to the joint disposition of their property and the *reciprocal provisions of the will itself are sufficient proof that each of the parties executed the will in consideration of the other's execution*.

Id. (emphasis added) (citing *Watkins v. Covington Tr. & Banking Co.*, 303 Ky. 644, 198 S.W.2d 964 (1947)[5]).

Therefore, not only did our jurisprudence still leave a reviewing court with a fair amount of discretion, it flipped the general rule so that mere reciprocal provisions in a joint will were sufficient to bind the surviving testator. Enactment

[5] *Watkins* sought to clarify some previous erroneous approaches to wills that were variously called "reciprocal," "joint," "mutual," and even "concerted." *Watkins*, 198 S.W.2d at 965 ("[T]he word 'concerted' better fits a will such as the one under consideration than the word 'joint.'"). Whether to enforce such wills, or not, often involved whether the testator had the "intention of giving the survivor an absolute estate[,]" *id.*; "whether the first taker took an absolute fee or a life estate[,]" *id.*; whether "a joint will was a nullity because it . . . ran afoul of the policy of law that an instrument to be a will must be revocable[,]" *id.* at 966; whether "where a joint will is found to be based upon a contract, the estate is impressed with a trust for the use and benefit of the legatees[,]" *id.*; and whether "equity would not enforce the joint will when one of the parties had a considerable estate and that of the other was small or negligible." *Id.*

of KRS 394.540 effected a dramatic change. And as subsection (2) of the statute shows, it seems the Court's decision in *Hatfield* was the target.

Subsection (2) reversed *Hatfield's* holding, a presumption really, that "the reciprocal provisions of the will itself are sufficient proof that each of the parties executed the will in consideration of the other's execution." *Hatfield,* 433 S.W.2d at 347. Subsection (2) says the exact opposite – "The execution of a joint will or mutual wills gives rise to no presumption of a contract not to revoke the will or wills." KRS 394.540(2). Although reciprocal provisions might serve as proof of the subject matter and perhaps even the testators' mutual assent, such provisions alone no longer provide proof of a mutuality of obligation – *i.e.*, consideration for a contract.

Having eliminated *Hatfield's* reciprocal-provision presumption, the statute's subsection (1) more expressly requires that all elements of a contract be found either within the will itself under subsection (a), or by extrinsic proof as permitted under subsection (b) or (c). As noted, only subsection (a) applies here. And when I look in the 1975 will for all the "material provisions of the contract" to make or not revoke a will or devise, I find them. *Energy Home, Div. of Southern Energy Homes, Inc. v. Peay,* 406 S.W.3d 828, 834 (Ky. 2013) (internal quotation marks and citation omitted) ("The fundamental elements of a valid contract are offer and acceptance, full and complete terms, and consideration.").

The Hancocks' signatures evince the "voluntary, complete assent by the parties having capacity to contract" and reflect the binding equivalent of an offer and acceptance. *Conners v. Eble*, 269 S.W.2d 716, 717-18 (Ky. 1954); *see also RCR Leasing, Inc. v. Harpring Sales & Erectors, Inc.*, 474 S.W.2d 870, 872 (Ky. 1971) ("offer . . . could not be binding on any of the parties unless the contract was agreed upon and signed"). Their respective promises and return promises constitute the offer and acceptance of this bilateral contract. *Jackson v. Pepper Gasoline Co.*, 280 Ky. 226, 133 S.W.2d 91, 93 (1939) (citing RESTATEMENT OF CONTRACTS, Section 12).

As for full and complete terms, our high Court said: "For the terms to be considered complete they must be definite and certain and must set forth the promises of performance to be rendered by each party." *Energy Home*, 406 S.W.3d at 834 (internal quotation marks and citation omitted). The contract terms contained in the 1975 will are clear that upon the death of one of them, their separate estates would merge to be the sole property of the survivor, with no restriction on the survivor's right to divest himself or herself of the property during his or her lifetime; provided, however, that "on the death of whichever one survives the other," the remaining estate would be distributed to the devisees and legatees in the percentages they agreed upon. (1975 will, Item III). If one could argue that the joint will does not include the material provision of a contract to

make a will or devise, it cannot be doubted that it is "[a] contract . . . not to revoke a will[,]" KRS 394.540(1), for it inarguably expresses Mr. and Mrs. Hancock's agreement "that each of us would and will not revoke this Will in whole or in part or attempt to do so." (1975 will, Item IV).

Finally, and as the jurisprudential-legislative history indicates, the real focus is on the consideration question – a question glossed over in our pre-1972 will-contract jurisprudence. When it comes to analyzing a contract for making or not revoking a will within a joint will itself, we must look for the "mutuality of obligation between the contracting parties." *Pace*, 150 S.W.3d at 65 (citation omitted). Mutuality of obligation – *i.e.*, consideration – is found in the Hancocks' mutual promise to devise the individual estates to each other in Item II, and in the mutual promise that whoever survives will leave the remaining estate in accordance with Item III. But most importantly, consideration for the contract is found in Item IV where they said they were making the joint will "in *consideration* of the terms and bequests" to each other, and "by the further terms that each of us would and will not revoke this Will in whole or in part or attempt to do so." (1975 will, Item IV (emphasis added)).

Subsection (1)(a) of the statute requires no more and no less than what is contained in the 1975 will. *See Bauer v. Piercy*, 912 S.W.2d 457, 457-58 (Ky. App. 1995) (similar promises not to revoke; no allegation that joint will with

parties' agreement not to revoke failed to satisfy KRS 394.540). I readily acknowledge that others might have read *Martin* as suggesting subsection (a) requires a warning that the will is to be interpreted as contractual in nature. The specific passage in which *Martin* suggests that inference says:

> We interpret the statute to mean that no longer will mutual or joint wills be considered to constitute an irrevocable contract unless the will by its terms states plainly that its provisions are to be considered as a contract [referencing subsection (a)], or unless the conditions of subsections (b) and (c) of the statute are met.

Martin, 628 S.W.2d at 890.

But it makes no sense, nor is our Court permitted, to superimpose language upon subsection (a) requiring a self-evident warning that the contractual terms of the will are contractual. *Edwards v. Harrod*, 391 S.W.3d 755, 757 (Ky. 2013) (citation omitted) ("[w]e are not at liberty to add or subtract from the legislative enactment"). The protection called for in subsection (a) is the same as in the other two subsections – compliance with contract law rather than old probate law that, until enactment of the statute, allowed courts a means of skirting contract law requirements. *Duncan v. Wold*, 846 S.W.2d 720, 723 (Ky. App. 1992) ("previous law provided that a contract for reciprocal wills need not be expressed and could arise by implication").

In any event, when this Court rendered *Duncan v. Wold*, we backed off the warning language in *Martin* and stated, "What the *Martin* Court said was that if [KRS 394.540(1)](a) *standing alone* is met the will is a contract." 846 S.W.2d at 722 (emphasis added).

Because I believe all the requirements of KRS 394.540(1)(a) are met in this case, I would find Tenabel Hancock's October 17, 2016 will unenforceable as violative of her previous contract not to revoke her will, but to dispose of her estate upon her death as the contract in the 1975 will expressed. Therefore, I respectfully dissent.

BRIEFS FOR APPELLANT:

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

BRIEF FOR APPELLEES, MARYTENA HODGES, BETHANY HIMES (A/K/A BETHANY HIMER), MICAH THOMPSON, LAURA BEARD, MAE LOBB MILBY, MARCIE GOFF, HAROLD HUDGINS, LARKIE HUDGINS, BARRY SHUFFETT, DONNA SHUFFETT, KIM LOBB (A/K/A KIM MILBY), JOHN HANCOCK, SARAH HANCOCK, AND WILLIAM MARSHALL LOWE:

Theodore H. Lavit
Cameron C. Griffith
Lebanon, Kentucky