IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 27, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000886-DG

ORRIS SALISBURY, ET AL. — APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2006-CA-002217-MR
FLOYD CIRCUIT COURT NO. 03-CI-01308

EARL HALL, JR. — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants, Emmit Salisbury, Orris Salisbury, Gertrude Boggs, and Charlotte Salisbury, filed a Complaint in the Floyd Circuit Court contesting the document admitted to probate as the Last and Will and Testament of Jay Salisbury on the grounds that it was the product of undue influence exerted by Appellee, Earl Hall, Jr., and that Jay Salisbury was incompetent to make the will. The trial court entered summary judgment dismissing and on appeal, the Court of Appeals affirmed. We granted discretionary review and now affirm the decision of the Court of Appeals.

Factual and Procedural Background

Jay died on October 21, 2001, at the age of 79. He had lived in the rural area of Hunter, Kentucky, for most of his life. In 1944, he was discharged from the United States Army for being mentally unfit to serve, and was never known to have had another job. His only known income came from Supplemental

Security Insurance (SSI). In 2000, Jay was hospitalized twice, once as the result of a car wreck and again from a fall in his home. Despite his various health issues, Jay lived alone until his death.

Appellants contend that after having little or no contact with Jay for several years, Appellee pressured Jay into agreeing to name Appellee the sole beneficiary and executor of his estate. In return, Appellee would become Jay's caretaker. Appellants further allege that on October 11, 2000, Appellee took Jay to an attorney to execute a will in accordance with the agreement. Both Orris and Emmit Salisbury testified that Appellee never lived up to his part of the bargain. They described visiting Jay only to find him toothless, foodless, and often crying that Appellee was not caring for him.

The claims of Charlotte Salisbury and Gertrude Boggs were dismissed because they failed to comply with an order compelling them to respond to Appellee's discovery requests. In April 2006, the circuit court granted summary judgment for Appellee against the remaining claims of Emmitt and Orris, concluding they had failed to produce evidence that could establish a genuine issue of fact in support of their claims. Appellants filed a CR 59.05 motion to alter, amend, or vacate summary judgment, and supplemented the record with documentation of Jay's mental health army discharge. Notwithstanding, the circuit court denied the motion. The Court of Appeals affirmed the dismissal of Gertrude's and Charlotte's claim and the summary judgment dismissing the claims of Emmit and Orris.

The Dismissal of the Claims of Gertrude Boggs and Charlotte Salisbury

On August 20, 2004, the circuit court entered an order to compel discovery after Gertrude Boggs and Charlotte Salisbury, repeatedly failed to respond to discovery requests. Neither Gertrude nor Charlotte responded to the order and as a result their claims were dismissed on November 18, 2005.

Both Charlotte and Gertrude were in their eighties and in ill health at the time Appellee's discovery requests were made.[1] Appellants argue that the circuit court was aware of this fact and therefore abused its discretion by enforcing its discovery order so harshly. However, a review of the record shows that the circuit court gave both Appellants ample opportunities to respond. Therefore, we find no error on the part of the circuit court in dismissing Gertrude's and Charlotte's claims.[2] As such, Appellants' request for reversal on this issue is denied.

The Summary Judgment Dismissing the Claims of Orris and Emmit Salisbury

A. Standard of Review

In ruling on a motion for summary judgment, the trial court must examine the record to determine if any real or genuine issue of material fact exists. City of Florence v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001). Summary judgment is proper when, as a matter of law, it appears that it would be

[1] Gertrude died during the pendency of the case.

[2] The record discloses that Charlotte was not related to Jay by blood, but was his sister-in-law. She was not an heir-at-law of Jay, but her standing to bring suit was apparently not challenged.

impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991); CR 56.03. The issue of impossibility is viewed in a practical sense, rather than an absolute one. Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992). Because summary judgments involve no fact finding, this Court will review the circuit court's decision de novo. Blevins v. Moran, 12 S.W.3d 698, 700 (Ky. App. 2000).

B. The Claim of Lack of Testamentary Capacity

Under Kentucky law, a strong presumption exists favoring a testator's mental capacity to make a will. This presumption can only be rebutted by a strong showing of incapacity. Bye v. Mattingly, 975 S.W.2d 451, 455 (Ky. 1998). "The privilege of the citizens of the Commonwealth to draft wills to dispose of their property is zealously guarded by the courts and will not be disturbed based on remote or speculative evidence." Id., (citing American National Bank & Trust Co. v. Penner, 444 S.W.2d 751 (Ky. 1969)). "The degree of mental capacity required to make a will is minimal." Bye, 975 S.W.2d at 455-456 (citing Nance v. Veazey, 312 S.W.2d 350, 354 (Ky. 1958)).

To validly execute a will, a testator must know the natural objects of his bounty and his obligations to them, the character and value of his estate, and must dispose of his estate according to a fixed purpose. Bye, 975 S.W.2d at 455-456; Adams v. Calia, 433 S.W.2d 661, 662-663 (Ky. 1968); Waggener v. General Ass'n of Baptists, 306 S.W.2d 271, 272-273 (Ky. 1957). Our review of

the record confirms Appellants' failure to assert facts sufficient to raise a genuine issue of material fact regarding Jay's testamentary capacity. Appellants' only evidence to support the claim of Jay's mental infirmity was the 1944 Army discharge papers, and the deposition testimony of Orris and Emmit, in which they offer no more than their own opinion based on limited observations. Orris testified that he had no personal knowledge of Jay's mental state at or around the time Jay's will was executed. Emmit testified that he had only seen Jay once or twice during that time and only for a brief period. Their evidence indicated nothing to show that Jay lacked knowledge of his relatives, or his estate. They failed to demonstrate that Jay lacked any of the mental requisites cited above for making a will. Finally, they offered no indication that sufficient evidence would be forthcoming from the other witnesses. In addition, we agree with the Court of Appeals that evidence of Jay's mental condition at the time he was discharged from the Army in 1944 carries little weight as affirmative evidence of Jay's testamentary capacity in 2000.

Appellants failed to demonstrate that they could produce sufficient evidence at trial to sustain their burden as to the allegation of testamentary incapacity. We thus affirm the Court of Appeals decision on this issue.

C. The Claim of Undue Influence

Appellants contend that their interrogatory answers and deposition testimony presented to the trial court sufficiently established the existence of a

genuine issue of fact regarding the allegation of undue influence. The inability to make a case of lack of testamentary capacity does not preclude a finding of undue influence. See Gibson v. Gipson, 426 S.W.2d 927, 928 (Ky. 1968). One with diminished mental ability may yet be competent to make a will, but in that condition he is more susceptible to fraud or undue influence. Id.

Undue influence is ordinarily exerted in a subtle manner, and can rarely be shown by direct proof. In most instances, its existence can be established only by examining the facts and circumstances leading up to the execution of the particular instrument involved. McKinney v. Montgomery, 248 S.W.2d 719, 721 (Ky. 1952). Experience has taught that certain circumstances are especially indicative of undue influence, and have come to be recognized as the "badges" of undue influence. Belcher v. Somerville, 413 S.W.2d 620, 622 (Ky. 1967). These include the following:

1. A will unnatural in its provisions;
2. A physically weak, mentally impaired testator;
3. Participation by the beneficiary in the physical preparation of the will and possession of the will by the beneficiary after its being written;
4. Efforts by the beneficiary to restrict contacts by the testator with other persons;
5. A lately developed and comparatively short period of close relationship between the testator and the principal beneficiary.

Id.

In the year his will was executed, Jay lived alone, had been hospitalized twice, and suffered from various physical ailments. He had very little income. Appellants suspected that Appellee took advantage of Jay's situation, and

coerced him to believe that he must name Appellee the sole beneficiary and executor of his will in order to receive adequate care. Although the evidence is clear that Jay was in a physically weakened condition due to the infirmities of age and his recent injuries, Appellants indicated no ability to produce evidence to substantiate their suspicion.

Emmit and Orris both testified that Appellee supervised their visits with Jay during the last year of his life. They also state that Jay's will was drafted by an attorney of Appellee's choosing. The record shows that the will was drafted by an attorney in Prestonsburg, Kentucky, who appears to have no other connection with this matter, and from whom no evidence is offered about who participated in the creation of the will. Emmit and Orris claim that when Appellee took charge of Jay's personal care, he took control of Jay's SSI check, although no evidence is suggested to show that the handling of Jay's money was abused.

Of all the "badges" of undue influence, perhaps the most telling is the unnatural disposition of the testator's bounty. We have long recognized that a "gross inequality of distribution between the natural objects of the testator's bounty" may raise a question of undue influence, but is alone insufficient to establish it. Bottom v. Bottom, 106 S.W. 216, 218 (Ky. 1907). The fact that the will on its face shows an unequal distribution of the estate, or that one devisee or legatee was given more than another one of equal degree of kinship does not necessarily constitute an unnatural disposition. See Clark v. Young's

Ex'x, 142 S.W. 1032, 1034 (Ky. 1912) ("It would be a strange law that gave to a man the power to make a will and dispose of his property as he saw fit, and at the same time couple with it the limitation that if any inequality appears on the face of the will this of itself is sufficient to create the presumption of incapacity or undue influence.").

Here, the unequal disposition contained in Jay's will is self-evident. One nephew received the entire estate,[3] to the apparent exclusion of at least one sister (Gertrude), one nephew (Emmit), and Orris, whose relationship to Jay is uncertain. Orris, uncertain about his own paternity, testified that he was either a half-brother to Jay or a nephew. He was raised to believe that Jay was his uncle, but learned during this litigation that perhaps Jay was really his half-brother. The record is mute as to whether there are others that qualify as Jay's heirs-at-law. No family tree was provided to indentify the natural objects of Jay's bounty.

Appellants' evidence showed that Appellee lived about one-hundred feet from Jay. Up until the last year of Jay's life, he was looked after by his brother, Bert. Bert's death left Jay without a personal attendant, until Appellee undertook that duty. Jay's apparent need for a caretaker and Appellee's close proximity simultaneously demonstrates his vulnerability to undue coercion while it also provides a rational explanation for the unequal treatment.

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[3] The probate documents filed by Appellee list the estate as consisting of a house and lot valued at $15,000 and personal property valued at $25,000.

However, viewing the circumstance most favorably to Appellants raises merely a suspicion that the will may be the product of undue influence.

No single badge of undue influence is conclusive. Instead, their cumulative effect must be considered. The totality of the circumstances here, viewed most favorably toward the Appellants, establishes no likely possibility that sufficient evidence would be forthcoming to warrant submission of the case to a jury.

We therefore conclude that summary judgment was properly granted and affirm the decision of the Court of Appeals.

All sitting. All concur.

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