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Supreme Court of Kentucky

2018-SC-000111-DG

RICHARD A. GETTY, RICHARD A. GETTY, AS TRUSTEE AND BENEFICIARY OF THE MARCH 22, 2004 RICHARD J. GETTY LIVING TRUST, RICHARD A. GETTY, AS PERSONAL REPRESENTATIVE, TRUSTEE AND BENEFICIARY OF THE MARCH 22, 2004 LAST WILL AND TESTAMENT OF RICHARD J. GETTY, RICHARD A. GETTY, AS BENEFICIARY OF THE ESTATE OF RICHARD J. GETTY, RICHARD A. GETTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD J. GETTY, SESAMIE BRADSHAW, SESAMIE BRADSHAW, AS BENEFICIARY OF THE MARCH 22, 2004 RICHARD J. GETTY LIVING TRUST, SESAMIE BRADSHAW, 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 ERROL COOPER, AS PERSONAL REPRESENTATIVE AND TRUSTEE OF THE MARCH 22, 2004 LAST WILL AND TESTAMENT OF RICHARD J. GETTY

APPELLANTS

ON REVIEW FROM COURT OF APPEALS
V. CASE NOS. 2014-CA-000686, 2014-CA-000693, 2014-CA-000711, AND 2014-CA-0764
BOURBON CIRCUIT COURT NOS. 09-CI-00476 AND 10-CI-00424

BRENDA SUE BRIDGES GETTY, BRENDA SUE BRIDGES GETTY, AS TRUSTEE AND BENEFICIARY OF THE MARCH 22, 2004 RICHARD J. GETTY LIVING TRUST, INCLUDING AS AMENDED ON OCTOBER 24, 2008, BRENDA SUE BRIDGES GETTY,

APPELLEES

AS PERSONAL REPRESENTATIVE, TRUSTEE AND BENEFICIARY OF THE MARCH 22, 2004 LAST WILL AND TESTAMENT OF RICHARD. J. GETTY, BRENDA SUE BRIDGES GETTY, AS EXECUTRIX AND BENEFICIARY UNDER THE OCTOBER 27, 2008 LAST WILL AND TESTAMENT OF RICHARD J. GETTY, BRENDA SUE BRIDGES GETTY, AS GRANTEE UNDER THE OCTOBER 27, 2008 DEED TURST TRANSACTION, BRENDA SUE BRIDGES GETTY, AS GRANTEE OF THE OCTOBER 27, 2008 GRANT DEED, BRENDA SUE BRIDGES GETTY, 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, CAROLYN CARROWAY, AS TRUSTEE OF THE OCTOBER 27, 2008 DEED TRUST, JOSEPH MAYER, AS TRUSTEE OF THE MARCH 22, 2004 RICHARD J. GETTY LIVING RUST AS AMENDED ON OCTOBER 27, 2008, JOSPEH AS EXECUTOR OF THE OCTOBER 27, 2008 LAST WILL AND TESTAMENT OF RICHARD J. GETTY, JOSEPH MAYER, AS ATTORNEY-IN-FACT OF RICHARD J. GETTY UNDER THE OCOTBER 24, 2008 GENERAL DURABLE POWER OF ATTORNEY AND KEVAN MORGAN

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

AFFIRMING, IN PART, REVERSING, IN PART, AND REMANDING

A circuit court jury rendered a verdict in favor of the contestants in this will-contest case, but the Court of Appeals reversed, in part, the resulting judgment because the appellate panel found the contestants' evidence at trial insufficient to support the jury's verdict. On discretionary review, we reverse the opinion of the Court of Appeals and reinstate the jury's verdict on the will-

contest issues because we hold that the Court of Appeals erred when it failed to apply the appropriate standard of appellate review of the trial court's denial of the will-proponent's directed-verdict motion. We otherwise affirm the opinion of the Court of Appeals on other issues raised, and we remand this case to the Court of Appeals to resolve the remaining issues raised on appeal but not addressed in its opinion.

I. BACKGROUND.

Richard J. Getty ("Dick") and Sue Getty married in 1983, and Sue became stepmother to Dick's adult biological children, Richard A. Getty ("Rich") and Yolanda Richardson. Yolanda, who predeceased Dick, was the mother of Sesamie Bradshaw.[1]

In 2004, Dick executed a will and a living trust agreement ("2004 Estate Plan"). The gist of the 2004 Estate Plan divided Dick's estate evenly among Sue, Rich, and Yolanda in one-third shares.

In late October 2008, Dick executed another will and some deeds, which rearranged ownership in certain real property (collectively the "2008 Estate Plan"), the validity of all of which is disputed in this case. Under the 2008 Estate Plan, Sue inherited by will or otherwise succeeded in ownership to everything Dick owned except for a $1.00 bequest each to Rich and Yolanda.

Upon Dick's death on December 28, 2009, Rich and Sesamie sued Sue, seeking to invalidate the 2008 Estate Plan. Rich and Sesamie also claimed that for a considerable period before Dick's death Sue systematically

[1] The parties agree that Sesamie stepped in the shoes of Yolanda upon Yolanda's death for purposes of Dick's estate distribution.

misappropriated funds from the income stream of one of Dick's properties that he had placed in trust in the 2004 Estate Plan. Finally, Rich and Sesamie brought a claim of wrongful death against Sue, alleging that Sue caused or contributed to Dick's death.

The jury found the 2008 Estate Plan to be invalid, thereby resurrecting the provisions of the 2004 Estate Plan.[2] The jury also found that Sue misappropriated funds and arrived at a monetary amount to be paid to Rich and Yolanda. But the jury did not find Sue liable for wrongful death. The trial court entered judgment in accordance with the jury's verdicts.

On appeal, the Court of Appeals reversed the jury's invalidation of the 2008 Estate Plan, finding insufficient evidence to support the verdict. The Court of Appeals also reversed the jury's verdict that held Sue liable for the misappropriation of funds. The jury's finding on the wrongful-death claim was not appealed.

II. ANALYSIS.

A. The trial court did not err in denying Sue's motions for directed verdict on Rich and Sesamie's claims that Dick did not have the requisite testamentary capacity to execute the 2008 Estate Plan and that Sue exercised undue influence over Dick in his execution of that plan.

The first issue we address is whether the trial court erred when it denied Sue's motion for a directed verdict on Rich and Sesamie's claim that Dick lacked testamentary capacity to execute the 2008 Estate Plan. The second

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[2] The revival of the 2004 Estate Plan upon nullification of the 2008 Estate Plan is a fact not only unchallenged by either side but explicitly agreed to by all parties. During the jury's deliberation, the jury referred a question to the trial court: "If the [2008 Estate Plan is] deemed invalid will Sue Getty, Richard Getty and Sesamie Bradshaw receive 1/3 of Richard J. Getty's estate?" The trial court's response was approved and signed by counsel for the parties and stated, "Everything will revert to the [2004 Estate Plan]."

issue is whether the trial court erred when it denied Sue's motion for directed verdict on Rich and Sesamie's claim that Sue exercised undue influence over Dick in his execution of the 2008 plan.

After the trial court denied these motions for directed verdict, the case was submitted to the jury, and the jury found in favor of Rich and Sesamie on both claims. Before this Court, Sue argues that the Court of Appeals' opinion correctly reversed the portion of the judgment that reflected the jury's verdict, arguing that insufficient evidence supported it.

Trial evidence concerning these issues overlaps, so we analyze them both here, even though the resolution of one of them has the same effect as resolution of the other—either a finding of lack of testamentary capacity or undue influence over the testator ends in nullification of the 2008 Estate Plan and revival of the 2004 Estate Plan.

We first note the highly deferential standard of review we apply in evaluating jury verdicts for sufficiency of the evidence:

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"[3]

[3] *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461–62 (Ky. 1990) (citations omitted).

To execute a valid will, the testator must have testamentary capacity. Former Chief Justice Robert F. Stephens summarized Kentucky law on the testamentary-capacity issue in *Bye v. Mattingly*:

> In Kentucky there is a strong presumption in favor of a testator possessing adequate testamentary capacity. This presumption can only be rebutted by the strongest showing of incapacity. Testamentary capacity is only relevant at the time of execution of a will. Thus any order purporting to render a person per se unable to dispose of property by will is void *ab initio*, as such a ruling on testamentary capacity would be premature. This is not to say that such an order is irrelevant, but rather it is not dispositive of the issue of testamentary capacity.
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> "Kentucky is committed to the doctrine of testatorial absolutism." The practical effect of this doctrine is that 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. The degree of mental capacity required to make a will is minimal. The minimum level of mental capacity required to make a will is less than that necessary to make a deed or a contract.[4]
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> *To validly execute a will, a testator must: (1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose.* Merely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable of validly executing a will. "Every man possessing the requisite mental powers may dispose of his property by will in any way he may desire, and a jury will not be permitted to overthrow it, and to make a will for him to accord with their ideas of justice and propriety."
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> . . . While a ruling of total or partial disability certainly is evidence of a lack of testamentary capacity, it is certainly not dispositive of the issue. This Court has upheld the rights of those afflicted with a variety of illnesses to execute valid wills. We have not disturbed the testatorial privileges of those who believed in witchcraft, spiritualism, or atheism. . . . [T]his Court has always taken the

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[4] Were we to conclude that Dick lacked testamentary capacity to execute his will, this would also necessarily mean that he also did not have the requisite mental capacity to deed his properties to Sue. *See also Creason v. Creason*, 392 S.W.2d 69, 74 (Ky. 1965). ("Less mental capacity is required for the execution of a will than a deed. Therefore, the will having been set aside the deed also must be set aside.").

broadest possible view of who may execute a will no matter what their infirmity. . . .

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. This is commonly referred to as the lucid interval doctrine. . . .

The lucid interval doctrine is only implicated when there is evidence that a testator is suffering from a mental illness; otherwise the normal presumption in favor of testamentary capacity is operating. The burden is placed upon those who seek to overturn the will to demonstrate the lack of capacity. The presumption created is a rebuttable one, so that evidence which demonstrates conclusively that the testator lacked testamentary capacity at the time of the execution of the will results in nullifying the will.[5]

Similar to a lack of testamentary capacity nullifying a will, undue influence over the testator in the testator's execution of a will invalidates that will. As before, we endorse former Chief Justice Stephens's articulation of Kentucky law regarding undue influence:

> Undue influence is a level of persuasion which destroys the testator's free will and replaces it with the desires of the influencer. In discerning whether influence on a given testator is "undue", courts must examine both the nature and the extent of the influence. First, the influence must be of a type which is inappropriate. Influence from acts of kindness, appeals to feeling, or arguments addressed to the understanding of the testator are permissible. Influence from threats, coercion and the like are improper and not permitted by the law. Second, the influence must be of a level that vitiates the testator's own free will so that the testator is disposing of her property in a manner that she would otherwise refuse to do. The essence of this inquiry is whether the testator is exercising her own judgment.
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> In addition to demonstrating that undue influence was exercised upon the testator, a contestant must also show influence prior to or during the execution of the will. Undue influence exercised after the execution of the will has no bearing whatsoever upon whether the testator disposed of her property according to her own wishes.

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[5] 975 S.W.2d 451, 455–56 (Ky. 1998) (citations omitted) (emphasis added).

> The influence must operate upon the testator at the execution of the will. If the influence did not affect the testator, then such conduct is irrelevant. However, even if the influence occurred many years prior to the execution of the will, but operates upon the testator at the time of execution, it is improper and will render the will null and void.
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> To determine whether a will reflects the wishes of the testator, the court must examine the indicia or badges of undue influence. Such badges include a physically weak and mentally impaired testator, a will which is unnatural in its provisions, a recently developed and comparatively short period of close relationship between the testator and principal beneficiary, participation by the principal beneficiary in the preparation of the will, possession of the will by the principal beneficiary after it was reduced to writing, efforts by the principal beneficiary to restrict contacts between the testator and the natural objects of his bounty, and absolute control of testator's business affairs.
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> . . .
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> When a contestant seeks to claim that undue influence was employed upon a testator, the burden is upon the contestant to demonstrate the existence and effect of the influence. Merely demonstrating that the opportunity to exert such influence [existed] is not sufficient to sustain the burden of proof. When undue influence and a mentally impaired testator are both alleged and the mental impairment of the testator is proven, the level of undue influence which must be shown is less than would normally be required since the testator is in a weakened state.
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> There is a presumption which [may have] some potential application to the instant case. In those instances in which a will is grossly unreasonable and the principal beneficiary actively participated in its execution, a presumption of undue influence arises. If the contestant can offer evidence of such activities, then the burden of persuasion shifts to the proponents of the will, but it does not relieve the contestants of the continuing burden of proof.[6]

The evidence presented by Rich and Sesamie to prove Dick's lack of testamentary capacity to execute the 2008 Estate Plan can be placed into two

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[6] *Bye*, 975 S.W.2d at 457 (citations omitted).

main categories: (1) medical evidence calling into question Dick's mental capacity and (2) evidence suggesting undue influence on the part of Sue. While the medical evidence presented by Rich and Sesamie arguably calls into question the existence of all the requisite elements of testamentary capacity, the element called most into question by the totality of the evidence submitted is the fourth one—that Dick "dispose[d] of h[is] estate according to h[is] own fixed purpose."[7]

As our caselaw explains, ["[T]he court parallels its requirement of the testator's 'fixed judgment or settled purpose of his own' with a requirement of a mind in a proper state for disposing of his estate with reason. We interpret the test to mean simply that the testator must be capable of producing a document which at the time represents his own will or, examined synthetically rather than analytically, that the testator's mind must be such as to be capable of producing an instrument which is his own, and not that of someone else."[8]] In applying that test, this Court in *Bishop* examined whether the will was "reasonable" and whether "it is . . . claimed to be the product of any undue influence exercise over the testat[or]."[9] So evidence of undue influence is relevant both in examining whether the testator lacked testamentary capacity to execute a will and whether another individual unduly influenced that testator in the execution of a will.

"It is well settled law that, like other species of fraud, influence that results in the execution of a will which is not in truth the free expression and

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[7] *Id.* at 455.

[8] *Greer's Ex'r v. Bishop*, 96 S.W.2d 851, 853 (Ky. 1936).

[9] *Id.*

desire of the maker may be proved by a chain of circumstances. Ordinarily that is the case; often of necessity."[10] "All that can be done is to prove certain acts and facts, and it is from these, when connected into a composite whole, that the evidence of undue influence is made to appear."[11] "[W]hen slight evidence of the exercise of undue influence and the lack of mental capacity is coupled with evidence of an unequal or unnatural disposition, it is enough to take the case to the jury."[12]

Rich and Sesamie presented medical evidence suggesting that Dick was not in his normal state of mind when he executed the 2008 Estate Plan. Dr. Stephen Raffle, an expert witness called by Rich and Sesamie, testified that, after spending "over 200 hours" reviewing voluminous information about Dick's medical condition, in his medical opinion as a forensic psychiatrist, Dick was "physically weak and mentally impaired" at the time that he executed the 2008 Estate Plan. The record also documents a large amount of medication Dick was taking for his ailments. These medications included narcotics.

On October 27, 2008, the day of the execution of the 2008 Estate Plan, Dick was taking narcotic medications, as had been prescribed for quite some time. According to another medical expert presented by Rich and Sesamie, Dr. Robert J. Kuhn, the medications Dick was taking impair cognitive functioning. Additionally, Dick's narcotics dosage "was at an all-time high" when he executed the 2008 Estate Plan. Dr. Kuhn also explained how prescribing high

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[10] *Marcum v. Gallup*, 237 S.W.2d 862, 865 (Ky. 1951) (citing *Walls v. Walls*, 99 S.W. 969 (Ky. 1907); *Barber's Executors v. Baldwin's Executor*, 128 S.W. 1092 (Ky. 1910)).

[11] *Livering's Ex'r v. Russell*, 100 S.W. 840, 844 (Ky. 1907).

[12] *Gibson v. Gibson*, 426 S.W.2d 927, 928 (Ky. 1968) (citing *McKinney v. Montgomery*, 248 S.W.2d 719 (Ky. 1952); *Sutton v. Combs*, 419 S.W.2d 775 (Ky. 1967)).

doses of narcotics following a period of low doses would result in further cognitive deficiency. According to Rich and Sesamie's proof, this is exactly what happened with Dick—Dick's dosage of narcotic pain medication from 2002 to 2007 was below average, then spiked to an extremely high dosage in 2008, October 2008 being the time of Dick's execution of the 2008 Estate Plan.

A September 2008 hospital visit, in which Dick was diagnosed with an "overdose," led Rich to institute guardianship proceedings in district court. Rich sought to prevent Sue from administering Dick's medications and to place all financial matters in the hands of a qualified third party. The parties eventually reached an agreement whereby only the nurses would administer Dick's medications and a third-party CPA or bookkeeper would handle the income from the trust. But Rich testified that Sue refused to comply with this agreement—she continued to administer Dick's medications, and no CPA or bookkeeper was ever retained. Testimony from two of Dick's nurses revealed that one nurse allowed Sue to have extra medication for Dick at some point and the other nurse told Sue where to find the key to Dick's narcotic medications.

Against all this evidence, Sue presented several medical experts, including many of Dick's own treating physicians. Sue's experts agreed that Dick had the cognitive ability to execute a valid will. The jury also heard testimony from Carolyn Carroway, the attorney overseeing Dick's 2008 Estate Plan execution, the will's attesting witnesses, and various other friends, family members, and even strangers who all believed Dick had the cognitive ability to execute a will.

Sue points to the conclusions made in the district court guardianship proceedings that purportedly support her position that Dick had testamentary capacity to execute his 2008 Estate Plan. Specifically, on October 24, 2008, a report by a three-person interdisciplinary team appointed by the district court found Dick "not cognitively impaired and [to be] capable of expressing his wishes regarding his personal finances." Finally, Sue notes statements made by Rich himself in stipulating to the fact that Dick was "found not to be disabled, partially disabled, or incompetent" during the district court proceeding in which Rich sought to be named Dick's guardian, in addition to Rich's testimony admitting that his father was mentally competent during October of 2008, but that he was overmedicated.

Sue also attacked the legitimacy of Rich and Sesamie's experts, Dr. Kuhn, who was not a licensed physician but rather a pharmacist, and Dr. Raffle, who never treated Dick.

Finally, Sue directs us to view the video recording of Dick's signing of his 2008 will. The video appears to show Dick to be coherent and sound-of-mind.

In sum, both sides presented evidence about Dick's mental capacity at the time of the execution of the 2008 Estate Plan—Rich and Sesamie presented evidence of Dick's weakened mental incapacity at that time while Sue presented evidence suggesting that Dick was completely mentally coherent. In dealing with this conflicting evidence, "we cannot . . . assume [the jury's] prerogative of weighing the evidence or passing on the credibility of the

witnesses."[13] "[W]e cannot reverse a judgment merely because the evidence was admittedly conflicting."[14]

As mentioned before, evidence of undue influence is relevant both in examining a jury's verdict on that issue and examining whether a testator had the testamentary capacity to execute "his own will . . . and not that of some one else."[15] So we must examine the "badges of undue influence" to determine if Sue unduly influenced Dick in the execution of the 2008 Estate Plan.

Two of the badges of undue influence seem to weigh immediately in Sue's favor. There is no evidence to suggest that Dick and Sue's 26-year marriage constituted "a recently developed and comparatively short period of close relationship."[16] And there is no evidence suggesting that Sue had "possession of the will . . . after it was reduced to writing."[17] That being said, the other badges weigh more in favor of Rich and Sesamie.

No one can dispute that Dick was a "physically weak" testator at the time of the execution of his 2008 Estate Plan.[18] And as previously discussed, medical evidence presented by Rich and Sesamie suggests that Dick could have been a "mentally impaired testator" at that time, as well.[19]

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[13] *Martin v. Commonwealth*, 108 S.W.2d 665, 670 (Ky. 1937) (citing *Wireman v. Commonwealth*, 104 S.W.2d 1083, 1085 (Ky. 1937)).

[14] *Wireman*, 104 S.W.3d at 1085.

[15] *Bishop*, 96 S.W.2d at 853.

[16] *Bye*, 975 S.W.2d at 457.

[17] *Id.*

[18] *Id.*

[19] *Id.*

Whether the 2008 Estate Plan can be termed "unnatural" is a factor that does not come down squarely for either side.[20] On one hand, we find it unrealistic to consider "unnatural" a will that leaves everything to one's spouse of 26 years.[21] On the other hand, a will entirely disinheriting one's children under the particular facts of this case *could* be considered unnatural: "When a will disposes of the testator's property so that his children or other natural objects of his bounty are excluded or are favored unequally, the will is said to be 'unnatural' and that fact has an important bearing on the issue of undue influence."[22] It is undisputed that Rich and Yolanda, who were Dick's biological children and who had been included in Dick's estate plans for many years, were entirely excluded from the 2008 Estate Plan.

Sue attempts to explain that exclusion by viewing the totality of the circumstances of the case. Sue points to the famously dramatic and volatile relationship between Dick and Rich and Yolanda that seemed to reach its apex when Dick made good on his threat of disinheriting them after they attempted to impose a guardianship over him. But this kind of conflicting evidence, once again, highlights the jury's role to decide whose story to believe.

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[20] *Id.*

[21] Sue cites to this Court's decision in *Golladay v. Golladay*, 287 S.W.2d 904 (Ky. 1955), for the proposition that a will in which a spouse leaves everything to the other spouse cannot be deemed unnatural. But *Golladay* does not stand for that proposition; rather, *Golladay* stands for the proposition that the will in that case was not so unnatural to shift the burden of proof to the spouse to have to prove its reasonability. *Id.* at 905. In other words, *Golladay* was about burden shifting, not the rule Sue espouses.

[22] *Kentucky Practice Series*, 1 Ky. Prac. Prob. Prac. & Proc § 553, Undue Influence—Effect of Unnatural Will (Nov. 2018 update).

Sue also refers us to Dick's earlier wills, specifically, Dick's 1998, 2000, and 2002 wills, which, she argues, look more like Dick's 2008 Estate Plan than his 2004 Estate Plan.[23] The 1998, 2000, and 2002 wills grant a life estate in Dick and Sue's main residence to Sue and allow Sue most of the income generated from one of Dick's properties. But it is undeniable that the 2008 Estate Plan was the first estate plan executed by Dick that completely disinherited Rich and Sesamie—this fact alone calls into question the weight given to Sue's assertion that the three previous wills look more like the 2008 Estate Plan than the 2004 plan.

Rich and Sesamie presented evidence suggesting "participation by the principal beneficiary in the preparation of the will," Sue.[24] Sue was not simply the principal beneficiary of the 2008 Estate Plan, she was its sole beneficiary. Rich and Sesamie presented evidence suggesting that Carolyn Carroway, the attorney purportedly hired to act on behalf of Dick to assist him in executing his 2008 Estate Plan, was really acting in a dual role because she was helping Sue. In other words, the inference asserted by Rich and Sue's evidence was that Carroway was Sue's instrument.[25]

The record contains evidence from Rich and Sesamie tending to support their argument that Carroway acted as Sue's attorney just as much as she

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[23] Sue also argues that the execution and terms of the 2004 Estate Plan were manipulated by Rich in the same way that Rich argues that Sue manipulated the execution and terms of the 2008 Estate Plan. But the validity of the 2004 Estate Plan is not before us and both sides have agreed that the 2004 Estate Plan takes effect should the court nullify the 2008 Estate Plan.

[24] *Bye*, 975 S.W.2d at 457.

[25] *See Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 287 (Ky. 2014) ("A jury is entitled to draw all reasonable inferences from the evidence[.]").

acted as Dick's attorney. Specifically, bills submitted by Carroway to Dick include charges for consultations with Sue and her attorney, C.V. Collins, on October 10 and 13 of 2008, November 12 and 14 of 2008, and February 2 of 2009. Additionally, on October 27, 2008, the day of the execution of the 2008 Estate Plan, Carroway noted, "Revisions to documents; review and execution of Revocation of Trusts, Will and deeds with client and Sue Getty." Finally, the record contains a letter written on behalf of Dick and Sue to a bank in which she refers to those two as "my clients."

The video of the execution of Dick's 2008 will reveals that when it was time for the attesting witnesses to sign the will, Carroway explained that when the first of the witnesses was done signing Dick's will, she would have to switch with the other witness holding the camera "since it's just the four of us in this room," meaning Dick, Carroway, and the two witnesses. Yet the attesting witnesses testified at trial that Sue was present at least for a period during the will execution. Recall also that Sue had to have been present that day to sign the deeds that were also executed on that day making her a joint tenant with Dick of certain properties with a right of survivorship. The implication presented to the jury by Rich and Sesamie on this evidence was that Carroway, for whatever reason, stated that Sue was not present during the will signing when, in fact, she was.

The jury heard additional evidence from Rich and Sesamie that suggested impropriety on the part of Carroway. On August 3, 2009, Dick executed an affidavit swearing that the execution of his 2008 Will was valid and that he had no desire to change the terms of that will. At trial, Carroway admitted that she prepared the affidavit of her own accord and without request

or direction from Dick to do so. Additionally, Carroway admitted that, upon finding a mistake in one of the deeds that Dick signed over to Sue, Carroway altered the document without Dick's knowledge and filed it of record instead of correcting it and having Dick sign it again.

Sue dismisses most of this evidence regarding Carroway as simply an attempt to disparage a reputable attorney and argues that the descriptions of Carroway's services provided in her bills are taken out of context. Sue also attempts to refute Rich and Sesamie's insinuation that Carroway was acting on Sue's behalf during Dick's estate plan execution by pointing to the fact that Carroway had never met the Gettys before October of 2008, having been referred to them by another attorney. Sue affirmatively points to the extensive notes taken by Carroway during her representation of Dick, coupled with her testimony about her services provided to him and their relationship, as explicit evidence refuting the idea that Carroway conspired with Sue to hand over Dick's entire estate to Sue.

Rich and Sesamie attempted to create a narrative that Sue conspired with Carroway to dupe Dick, whom Sue was allegedly overmedicating, into handing over his entire estate to Sue; that Carroway allowed herself to be influenced by Sue; or, at the very least, that Carroway and Sue became close enough to call into question Carroway's allegiance to Dick in the execution of his 2008 Estate Plan. By pointing to specific evidence indicating a questionable relationship between Carroway and Sue and questionable activity on the part of Carroway in the preparation, execution, and post-execution of the 2008 Estate Plan, Rich and Sesamie promoted that narrative. It is not a reviewing court's prerogative to overturn a jury's verdict that is supported by evidence of

record, even when one party's story may seem more plausible or acceptable to the reviewers than the other's.

Finally, Rich and Sesamie point to certain provisions of the 2008 will itself to suggest Sue's involvement in the creation and execution of Dick's 2008 Estate Plan. The record shows that Dick made it known consistently in the past that he wanted to have his remains interred in Pennsylvania with those of his late wife, Carol. In fact, in the previous five wills executed by Dick, spanning between 1998 and 2004, this provision existed. Yet, the 2008 Estate Plan not only does not provide for this but also left this decision to the sole discretion of Sue.

Additionally, a review of the video of the 2008 will-signing reveals that Dick himself made clear that he instructed Carroway to prepare a trust for Yolanda and Sesamie in which Dick would leave provisions for them upon his death:

> Carroway: We had discussed when we met last week that you want to still 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.
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> Dick: Correct.
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> Carroway: Have I been instructed to prepare those documents?
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> Dick: Yes I have, I've instructed you.
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> Carroway: Ok.

Sesamie also testified at trial that Dick told her, multiple times, that he had provided for Sesamie and her daughter, including during conversations occurring after the execution of the 2008 Estate Plan. Yet, no such provision

existed for either Yolanda or Sesamie in the entirety of the 2008 Estate Plan nor in any other document submitted into evidence.

Sue attempts to counter Sesamie's exclusion by pointing to evidence suggesting that Dick's exclusion of Rich and Yolanda from his estate plan was simply Dick making good on his threat to disinherit his children over their guardianship attempt. But this does not explain Dick's exclusion of Sesamie from his estate. There is no evidence in the record suggesting that Dick's anger at his children over the attempted guardianship carried over to his grandchild, Sesamie.

Sue also argues, through the testimony of Carroway, that Dick simply changed his mind and decided not to go through with providing for Sesamie. Yet, as stated earlier, Sesamie testified that the conversations she had with Dick, in which he assured her that she would be provided for, occurred after the execution of the 2008 Estate Plan. This kind of conflicting evidence was, again, the type of factual conflict that is a jury's prerogative to resolve.

According to the narrative offered by Rich and Sesamie, the reasonable implication from the exclusion of Sesamie from Dick's 2008 Estate Plan and the change of terms regarding the placement of Dick's cremated remains, a directive that had remained consistent in five prior wills, is that the terms of the 2008 Estate Plan were dictated by Sue. Again, although this evidence, in and of itself, does not make a strong case for undue influence, this evidence, coupled with reasonable inferences based on that evidence, does at least

suggest "participation by the principal beneficiary in the preparation of the will[.]"[26]

Rich and Sesamie also proffered evidence suggesting that Sue attempted "to restrict contact[] between the testator and the natural objects of his bounty," particularly Rich. The record contains a letter signed by Dick and Sue threatening Rich with criminal prosecution if Rich tried to enter upon their property. Another letter sent to Rich by Dick alone a few months later threatened the same. Nurses caring for Dick kept a log of their time spent doing so, which shows a time when Rich called asking to speak with Dick, to which Sue instructed the nurse to tell Rich that Dick was "too sick to see anybody."

Sue countered this assertion by pointing to evidence showing that Dick was visited by many people, including Rich. But this evidence does not erase the claim of Sue's "efforts to restrict contact[] between" Dick and Rich—simply because she was unsuccessful in doing so does not negate her efforts.[27] Sue also points to recorded conversations that show her pleading with Rich to come see his father. However, those conversations occurred after the execution of the 2008 Estate Plan.

Along the same lines, some evidence presented by Rich and Sesamie suggested that Sue manipulated Dick in his weakened physical and mental state into believing that Rich was trying to take Dick's property from him. One

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[26] *Bye*, 975 S.W.2d at 457.

[27] *But see Tate v. Tate's Ex'r*, 275 S.W.2d 597, 598 (Ky. 1955) (suggesting that unsuccessful efforts to restrict contact between testator and testator's children may weigh against a valid claim of undue influence).

of Dick's friends testified about a visit that the friend and Rich had with Dick where conversation arose about Dick's dire financial situation. The witness testified that Dick said to Rich, "Richy, they're telling me that you're trying to take my property away from me." The witness questioned Dick's belief—he knew how close Dick and Rich were. Moreover, there was not a need for Rich to take his dad's money, considering that Rich is "a very successful attorney" in his own right, the witness testified. Notes taken by one of Dick's nurses confirm that after this visit, Dick commented, "I don't know who to believe now."

Finally, Rich and Sesamie presented evidence suggesting that Sue maintained "absolute control of [Dick]'s business affairs."[28] At trial, a witness who was very close to Sue and the Getty family testified at trial that Sue essentially intercepted all mail addressed to Dick, including, specifically, mail dealing with Dick's financial affairs. And Rich and Sesamie presented evidence of Sue's control over Dick's financial affairs in the form of Sue's having misappropriated enough money from Dick to make his bank account run dry.

As mentioned, the 2008 Estate Plan gave Dick's entire estate to Sue, except for $1.00 each to Rich and Sesamie. Dick also deeded some of his properties to Sue and himself as joint tenants with right of survivorship. One of those properties was a commercial property known as the Regency Center, a shopping center located in Simi Valley, California, with several commercial tenants. Before Dick added Sue on the deed to the Regency Center at the execution of the 2008 Estate Plan, Dick remained the sole person on its title,

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[28] *Id.* (citations omitted).

having owned the Regency Center before his marriage to Sue. Within a year after her marriage to Dick, Sue quitclaimed to him any interest in the Regency Center property.

Before the execution of the 2008 Estate Plan, Dick had put the ownership of the Regency Center into a trust as part of the execution of his 2004 Estate Plan. The trust was a living trust in which Dick maintained complete control over the property in the trust and the income derived from it. Tenants of the Regency Center paid their rent through checks made out to Dick.

The Regency Center generated approximately $15,000 in net income per month. Testimony from a forensic accountant stated that Sue withdrew from their personal bank accounts almost $200,000 in cash via ATMs between 2004 and 2009, and other documents showed that Sue withdrew almost $125,000 for three of those years. And almost every month from 2004 to 2008, Dick and Sue were overdrawn on their bank accounts, resulting in thousands of dollars in overdraft fees. Documents also show that a total of around $103,000 was given to Sue's two biological children. Rich and Sesamie presented recordings of telephone conversations between Sue and an individual identified as Kathy in which Sue appears to implicate herself in an attempted coverup to prevent Dick and Rich from learning about her role in the diversion of funds and other possibly unscrupulous behavior.

Rich testified about having caught Sue forging checks and converting income from the Regency Center for her own use in 2005. It started when Dick told Rich that the Regency Center was in default and asked for Rich's help in collecting rent from the tenants who were allegedly not paying. Rich obtained

copies of the tenants' rent checks that revealed that the tenants had been paying their rent all along but that Dick's endorsement of them had been forged. Rich also testified, with documents confirming, that several of the forged checks had been deposited into the personal bank account of Sue's daughter, Carolyn. In total, Rich testified that he believed $366,000 of Regency Center income had been diverted by Sue for her own personal purposes.

Rich testified that he found checks with Dick's forged signature written to third parties. Apparently, Sue attempted to cover up this activity by providing Dick's accountant with photocopies of checks on which she had attempted to hide the names of the true payees and write in the names of others.

The role of the appellate court in evaluating the propriety of a jury's verdict on a claim that the verdict was not supported by the evidence is to evaluate whether that verdict was "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"[29] We cannot find this to be the case here, despite the voluminous amount of contradictory evidence.

Rich and Sesame presented medical evidence suggesting Dick to be mentally impaired at the time of the execution of his will. They also put forth evidence suggesting Sue unduly influenced Dick in the execution of his will. In sum, Rich and Sesamie presented proof of "inappropriate" influence on the part of Sue "that vitiate[d Dick's] own free will so that [Dick] dispos[ed] of h[is]

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[29] *Lewis*, 798 S.W.2d at 461–62 (citations omitted).

property in a manner that []he would otherwise refuse to do[,]" influence that existed both "prior to [and] during the execution of the will."[30]

Rich and Sesamie presented medical evidence suggesting Dick to be mentally incapacitated at points prior to and on the day of the execution of the 2008 Estate Plan. Rich and Sesamie also showed that Sue had access to Dick's narcotics medication, affording the jury the reasonable inference that Sue was overmedicating Dick to dupe him into handing over his entire estate to her. Rich and Sesamie also presented proof allowing an inference of a suspicious relationship between Dick's last estate-planning attorney, Carroway, and Sue, which potentially led to Sue's involvement in the preparation of and control over Dick's 2008 Estate Plan. Rich and Sesamie presented proof of Sue's control over and manipulation of Dick's financial matters. Evidence supported Sue's potential manipulation of Dick into believing that it was Rich who was attempting to assert control over Dick's finances, in addition to some evidence suggesting that Sue was trying to keep Rich away from Dick. Rich and Sesamie further offered evidence that Dick's disinheritance of Rich, Yolanda, and Sesamie from his estate plan—particularly the disinheritance of Sesamie—was suspect given the complete lack of animosity between Dick and Sesamie and Dick's assurances to her that she would be provided for. Finally, the evidence showed that Dick's longstanding desire for his cremated remains to be placed with his previous wife, a stipulation included in all of Dick's prior wills, was inexplicably changed.

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[30] *Bye*, 975 S.W.2d at 457.

We cannot say that the jury's apparent acceptance of the narrative presented by Rich and Yolanda was "'palpably or flagrantly' against the evidence."[31] So we reverse the Court of Appeals and reinstate the jury's verdicts finding that Dick lacked the requisite testamentary capacity to execute his 2008 Estate Plan and that he was unduly influenced by Sue in doing so.

B. The Court of Appeals properly reversed the jury's determination that Sue misappropriated funds from property located within the 2004 Estate Plan because Rich and Sesamie have offered no legitimate reason to dispute Sue's right to use the Regency Center income.

We next address the issue of whether the Court of Appeals erred in vacating the jury's award of $162,500 to Rich and Sesamie for Sue's misappropriation of money from the income stream from the Regency Center. We find that Rich and Sesamie have failed to articulate any legal reason why Sue could not have full use of the Regency Center income.

Shortly after Dick and Sue married, Sue quitclaimed her interest in the Regency Center, a piece of commercial real estate titled solely in Dick's name since before their marriage. By doing so, Sue did not relinquish her interest in the Regency Center income, only ownership in the real property itself. The record also reveals that Sue performed services for the Regency Center that contributed to the income derived from it.

As part of his 2004 Estate Plan, Dick placed the Regency Center and the income derived from it into a living trust, of which Dick was the sole trustee and beneficiary until his death. According to the terms of the living trust, upon Dick's death, "the market value of the cash, securities or other property" of the living trust would be divided into two parts: One-third of the previously

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[31] *Lewis*, 798 S.W.2d at 461–62 (citations omitted).

mentioned property was to be placed in a marital trust for the benefit of Sue, while the other two-thirds was to be placed in a children's trust for the benefit of Rich and Yolanda.

The Regency Center tenants paid rent in the form of checks made out solely to Dick. Evidence presented at trial showed that Sue intercepted Dick's mail, which included the rent checks. Sue then forged Dick's name on the checks and used the proceeds for her own personal purposes.

As part of their lawsuit against Sue, Rich and Sesamie brought various claims against Sue seeking to recoup the Regency Center income that Sue converted for her own use. While the jury awarded Rich and Sesamie $162,500 for Sue's misappropriation, the Court of Appeals held that, as a matter of law, the income derived from the Regency Center was "marital property"; thus, Sue cannot be said to have "stolen" that "marital property."

"[T]hree different property systems" exist in Kentucky: "the property system prevailing during the marriage, those rights arising when the marriage is dissolved by the death of one spouse, and the marital property system prevailing when the marriage is dissolved by divorce."[32] What is at issue in this case is the property system prevailing during marriage, as Rich and Sesamie allege that Sue stole Dick's property while Dick was living and married to Sue.

The Court of Appeals appears to have conflated competing property systems defining a spouse's right over property acquired during the marriage to be used during the marriage versus to be used after the marriage. Nonetheless,

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[32] Louise Everett Graham and James E. Keller, *Kentucky Practice Series Domestic Relations Law*, 15 Ky. Prac. Domestic Relations L. § 4:1, Property rights during marriage—Common law separate property system (Dec. 2017 update).

the Court of Appeals correctly concluded that Rich and Sesamie have not defeated the right of Sue to use the Regency Center income during the marriage.

In 1894, Kentucky adopted the Weissinger Act, a variation of laws adopted across the United States known as the Married Women's Act.[33] It is currently codified at KRS 404.010, et seq. The Act abrogated the common law concept that "the husband of a married woman controlled her property."[34] As it stands today, KRS 404.020(1) states, "A married woman may acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and may, in her own name, as if she were unmarried, sell and dispose of her personal property." In *Clark v. Meyers*, the wife earned money through her job as a bookkeeper during her marriage.[35] As such, this Court expressed "no doubt of her right . . . to hold her earnings free from the control of her husband."[36]

At bottom, "Married Women's Acts generally enable married people to carry on a separate trade or business or to perform labor and services for their sole and separate account and make the assets and profits of any such business and the earnings of any such trade, labor, or services the person's own property, which may be recovered in an action in the person's own name

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[33] *Id.*

[34] *Id.* (citations omitted).

[35] 68 S.W. 853, 854 (Ky. 1902).

[36] *Id.*

and to that person's own use."[37] With the passing of the Married Women's Act, "the law now presumed that a married woman is alone entitled to any wages, earnings, or any other remuneration for services which she renders. Such compensation constitutes a part of her separate estate, and she can maintain any action in reference thereto which she could maintain if she were unmarried."[38] "Whereas previous to that Act, [a married man] could convey his property without his wife joining, except to release her dower, and she could not do likewise with reference to her property, *after* the Act, she could convey her property without her husband joining, except to release his curtesy."[39]

The combination of the Married Women's Act and the rule "that has long been recognized that a married man has the right to hold and manage property held individually, obtained before or after marriage[,]"[40] act to form the general rule that "[a] married person's earnings are generally considered separate property" during the marriage.[41]

Rich and Sesamie's spousal-theft argument presumes that Sue had no right to use the Regency Center income for herself. That argument rests on the assumption that the Regency Center income belonged only to Dick. But Rich and Sesamie have not pointed to anything in the record tending to show that

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[37] Paul M. Coltoff, et. al., *American Jurisprudence*, 41 Am. Jur. 2d Husband and Wife § 15 Earnings of spouses as separate property (2d ed. May 2019 update) (citing *De Brauwere v. De Brauwere*, 96 N.E. 722 (N.Y. 1911)).

[38] *De Brauwere*, 96 N.E. at 723.

[39] *Schaengold v. Behen*, 208 S.W.2d 726, 729 (Ky. 1948) (emphasis in original).

[40] *Canjar v. Cole*, 770 N.W.2d 449, 452–53 (Mich. App. 2009) (citations omitted).

[41] 41 C.J.S. *Husband and Wife* § 13 (June 2019 update) (citing *Hammonds v. Commissioner of Internal Revenue*, 106 F.2d 420 (10th Cir. 1939); *Fortner v. McCorkle*, 50 S.E.2d 250 (Ga. 1948)).

Regency Center income was truly Dick's "earnings" separate and apart from Sue; Rich and Sesamie have not pointed to anything in the record rebutting the assertion that Sue contributed to the earnings of the Regency Center. The record reveals that Sue was very much involved in the management of the Regency Center. Rich and Sesamie are unable to refute the fact that Sue's work done for the Regency Center contributed to the income derived from the Regency Center, including the income received during the time when Sue is alleged to have "stolen" it. Although spouses have the right to hold their earnings separate and apart from the nonearning spouse's control during marriage, it must be shown that the earnings truly derived separate and apart from efforts of the other spouse because a spouse cannot be characterized as a "nonearning" spouse to the earnings in question if the earnings in question derived from the efforts of both spouses.

While Dick placed the Regency Center income in trust, simply placing the Regency Center income in trust cannot defeat that income's characterization as income earned by both Dick and Sue. If the property of a revocable trust is subject to claims of the settlor's creditors during the lifetime of the settlor,[42] then when both spouses work in a business and derive earnings from that business, one spouse cannot shield the other spouse's ability to use those earnings simply by placing those earnings in a trust.

In sum, Rich and Sesamie have not provided any justification to defeat the assertion that the income derived from the Regency Center was derived through the joint efforts of Dick and Sue. Because Sue contributed to the

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[42] *See* KRS 386B.5-040(1)(a).

earnings derived from the Regency Center, the Regency Center income cannot be characterized as Dick's separate property during their marriage. And without defeating Sue's right to use the Regency Center income, Rich and Sesamie cannot maintain an action against Sue based on wrongful use of the income. Therefore, we affirm the Court of Appeals on this issue.

C. The Court of Appeals properly reversed the trial court's sanction imposed against Sue and her attorneys.

Finally, we address whether the Court of Appeals correctly reversed and vacated the trial court's sanction of Sue and her attorneys. For the reasons stated below, we affirm the Court of Appeals on this issue.[43]

Rich and Sesamie intended to assert a claim of wrongful death against Sue for having caused or contributed to Dick's death. A few days after Dick's death, Rich filed a petition in the district court to compel an autopsy of Dick's body, which the district court granted. Upon learning of the district court's order, Sue appealed that decision to the trial court[44] and sought a temporary injunction to prevent the autopsy. The trial court issued a temporary injunction to prevent the autopsy and, at the same time, enjoined Sue from having the body cremated pending the trial court's appellate review of the

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[43] At the outset, we note that Sue argued that KRS 72.425, a statute within the Kentucky Coroner's Act of 1978, deprives Rich and Sesamie of standing to compel an autopsy. KRS 72.425 states, "In the event the death of a person is not a coroner's case, consent to an autopsy shall be obtained from the decedent, by written consent, signed and acknowledged prior to his death; or his or her spouse; or in the absence of a spouse, the next of kin of the decedent[.]" Sue argues that, per this statute, she is the only person authorized by law to give permission for Rich and Sesamie to obtain an autopsy. And she did not give permission. Because of the way we resolve the overall sanction issue, however, we need not reach this issue.

[44] Appeals from district court are heard in the circuit court. KRS 23A.080(1). Here, the appeal of the district court's cremation order was assigned to be heard in the same division of circuit court in which the present case was filed.

district court's decision. Rich sought emergency relief with the Court of Appeals, which was denied. Rich also sought discretionary review in that court, which was denied.

While the autopsy-order appeal was pending in circuit court, Rich and Sesamie filed their complaint in the present suit, which included a wrongful-death claim against Sue. They also filed a motion to compel an autopsy of Dick's body under Kentucky Rule of Civil Procedure ("CR") 35. The trial court conducted a lengthy hearing on this discovery motion, denied the motion from the bench at the end of the hearing, and directed counsel to draft an order consistent with the ruling. The trial court also orally directed that cremation would be stayed pending entry of the written order denying the motion for autopsy.

The trial court also heard argument on the merits of Sue's appeal of the district court's autopsy order, concluded that the district court had erred by ordering cremation, reversed the district court's order in a ruling from the bench, and stated its intention to issue a written order accordingly. The trial court further admonished counsel that until it issued a written order reflecting its ruling on the appeal and on the CR 35 motion, no action should be taken to cremate Dick's body.

Before the circuit court's written orders reversing the appeal and denying the discovery order were entered, Rich and Sesamie filed a motion for reconsideration or, in the alternative, the "more limited" request for hair, nail, and bodily fluid samples and noticed the motion for a hearing. On the same day the motion for reconsideration came before the trial court for a hearing, the trial court entered the written orders reversing the appeal, denying the

discovery motion, and dissolving the temporary injunction against cremation. At Rich and Sesamie's request, their pre-filed motion for reconsideration was passed for consideration to a later, unspecified date.

Following the entry of the orders denying the autopsy and lifting the injunction, Carroway delivered copies to the director of the funeral home that had taken charge of Dick's body. The following morning, the director called Sue to confirm that cremation should proceed. Having been so advised by Carroway, Sue authorized cremation. And the funeral home cremated Dick's body that day.

About ten days later, Rich and Sesamie moved the circuit court for a finding of contempt and sanctions against Sue and her attorneys for the destruction of Dick's body by cremation. In an order entered more than a year after the filing of the motion for sanctions, the trial court granted Rich and Sesamie's motion, sanctioning Sue, and her attorneys, Carroway and Morgan, by making them jointly and severally liable for Rich and Sesamie's attorneys' fees and costs expended in prosecuting the contempt motion. The trial court also promised to give Rich and Sesamie a "destruction of evidence" instruction at the end of the jury trial on the wrongful-death claim.[45]

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[45] Judge Robert G. Johnson, the regular judge of the 14th Judicial Circuit, Division No. 1, presided over all proceedings until he recused by order entered March 31, 2010. He issued the orders reversing the district court's cremation order and denying Rich and Sesamie's Autopsy Motion. Senior Judge Julia Hylton Adams was appointed by order entered August 2, 2010, following the recusal of both regular judges of the 14th Judicial Circuit. Senior Judge Julia Hylton Adams issued the order imposing sanctions, which was entered March 18, 2011. Senior Judge Adams presided over the case until Senior Judge Robert McGinnis was appointed to preside by order entered February 13, 2013.

At trial, the trial court instructed the jury concerning Sue's "destruction of evidence." Even so, the jury found in favor of Sue on the wrongful-death claim. So whether the trial court erred in granting a destruction-of-evidence instruction is no longer at issue. But whether the trial court erred in awarding to Rich and Sesamie attorneys' fees and costs for prosecuting their motion for sanctions remains at issue before this Court. Now we examine whether the trial court erred in issuing its sanction.

The motion filed by Rich and Sesamie sought punishment for Sue and her attorneys for contempt and other sanctions. And it appears the trial court addressed both a sanction for contempt and a sanction for the bad-faith destruction of evidence. Both situations require the existence of a clear basis to support the imposition of sanctions. If the trial court's basis for sanctioning a party is flawed, then the sanction itself is flawed and must be reversed.

Examining the trial court's order first as one of contempt, "[c]ontempt is the willful disobedience toward, or open disrespect for, the rules or orders of a court."[46] "Contempt sanctions are classified as either criminal or civil depending on whether they are meant to punish the contemnor's noncompliance with the court's order and to vindicate the court's authority and dignity, or are meant to benefit an adverse party either by coercing compliance with the order or by compensating for losses the noncompliance occasioned."[47] The underlying assumption, therefore, to the issuance of a contempt sanction

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[46] *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996) (emphasis added).

[47] *Commonwealth, Cabinet for Health and Family Services v. Ivy*, 353 S.W.3d at 324, 332 (Ky. 2011) (citing *Gormley v. Judicial Conduct Commission*, 332 S.W.3d 717, 725–26 (Ky. 2010)).

is that a party must have violated a court rule or an order of the court. In other words, only if the party has violated a court order or rule may a contempt sanction be issued by the court.

"We review the trial court's exercise of its contempt powers for abuse of discretion, but we apply the clear error standard to the underlying findings of fact."[48] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[49]

As the Court of Appeals correctly pointed out, no trial court order preventing Sue from proceeding with cremation of Dick's body existed at the time the cremation occurred. The trial court had extinguished the temporary injunction that was in place. The only articulated basis for the existence of any kind of trial court order or rule that Sue and her attorneys purportedly violated is Rich and Sesamie's argument that an implicit stay existed on the trial court's order dissolving the temporary injunction by operation of the Kentucky Rules of Civil Procedure and a specific statute, KRS 426.030.

Rich and Sesamie argue that CR 59 and 62.01 operated to stay the trial court's dissolution of the previously granted temporary injunction preventing Sue from proceeding with cremation of Dick's body. But as the Court of Appeals explained, those rules only apply to *judgments*.[50] "A judgment is a

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[48] *Ivy*, 353 S.W.3d at 332 (citing *Lewis*, 875 S.W.2d at 864; *Blakeman v. Schneider*, 864 S.W.2d 903 (Ky. 1993)).

[49] *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

[50] *See* CR 59 (New Trials; Amendment of Judgments); CR 62.01 (Motions After Verdict or Judgment).

written order of a court adjudicating a claim or claims in an action or proceeding."[51] A trial court's decision on an interlocutory or even a final order dealing with a discovery request is not a "judgment." A ruling on a discovery request is not an "adjudicati[on] of a claim" because a discovery request is not an assertion of a "claim." This is the same issue with Rich and Sesamie's argument regarding the application of KRS 426.030.

So no implicit stay based on operation of the Kentucky Rules of Civil Procedure or KRS 426.030 existed at the time of the cremation; in other words, no trial court order that was purportedly violated existed at the time of the cremation, nor any "rule."[52] Finally, we note that Rich and Sesamie did not avail themselves of any of the procedural rules that could have stayed the trial court's dissolution of its temporary injunction.[53] The trial court's holding Sue and her attorneys in contempt of court had no basis because it cannot be said that Sue and her attorneys violated a rule or order of the court.

The only other articulated "rule" that Sue and her attorneys allegedly violated is the prohibition against destroying evidence in bad faith. In this case, Rich and Sesamie sought to compel an autopsy of Dick's body; more generally, to make Dick's body the subject of a discovery request. Sue and her attorneys first argue that a party cannot even make a dead body a part of a discovery request in a civil proceeding. Determining whether the trial court's sanction

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[51] CR 54.01.

[52] Rich and Sesamie do not appear to make the argument that the mere filing of a motion for a stay operates to prohibit a party from acting in contravention of that request.

[53] *See, e.g.,* CR 65.07 (Interlocutory Relief in Court of Appeals Prior to Final Judgment); CR 76.36 (Original Proceedings in Appellate Court).

was an abuse of discretion[54] requires first deciding whether a party can compel discovery of a dead body in a civil case.[55]

A helpful law review article outlines the standard courts should employ in civil cases when evaluating parties' requests for a compelled autopsy and, more generally, discovery requests involving dead bodies:

> The proper approach to evidentiary autopsy motions in the usual case has been taken by the courts who have treated both sides in autopsy disputes fairly and equally. These courts do not begin with a presumption that they will only grant an evidentiary autopsy motion under the rarest of circumstances and only after the party requesting the autopsy makes a tremendous showing of need and probable success. Nor do they treat an autopsy as if it were no different from any other type of physical examination that a court routinely orders pursuant to modern discovery practices. Instead, these courts understand that they are being asked to take an extreme step and that they must be certain that the proper predicate to an autopsy motion has been laid before they grant it.
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> . . .
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> The actual standard a court should apply in the usual case can be expressed in several ways. As one early decision indicated, a court should order an evidentiary autopsy only when "*good cause and urgent necessity exist.*"[56]

The standard espoused above is the exact standard applied by the trial court when it denied Rich and Sesamie's request: "The Court finds that [Rich and

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[54] *Rumpel v. Rumpel*, 438 S.W.3d 354, 361 (Ky. 2014) ("trial court's grant or denial of discovery sanctions, including fee awards" is reviewed for abuse of discretion).

[55] In the "alternative" to a compelled autopsy, Rich and Sesamie filed a motion for a "less invasive" sampling of "hair, nail, and bodily fluids sampled." But we find no meaningful distinction between a request for a compelled autopsy of a dead body and a request for "hair, nail, and bodily fluids samples" from that dead body to treat differently the evidentiary standard to be applied when considering of a motion for either in a civil case.

[56] *See generally* James T.R. Jones, *Evidentiary Autopsies*, 61 U. Colo. L. Rev. 567, 597–98 (1990) (citations omitted) (emphasis added).

Sesamie] have failed to show *good cause*."[57] And we find nothing erroneous about that decision.

Rich and Sesamie's request stemmed from their belief that Sue killed Dick by poisoning or overdosing him. Over the course of the trial court's 14-hour hearing on the matter, Rich and Sesamie produced only one witness who purportedly knew that Sue poisoned Dick. But the circuit court found that witness's testimony to be "not credible" and "not believable" based on "the Court's observation of th[e] witness'[s] mannerisms and the manner in which she testified." Rich and Sesamie also introduced medical records from a time in which Dick was diagnosed with an "overdose." Yet the trial court found that the medical records did not identify the root cause of the overdose—the overdose apparently could have been caused by hospital staff upon Dick's entering the hospital for another reason.

Against Rich and Sesamie's proof, Sue produced the testimony of several doctors and nurses who treated Dick and who "commented that the level of care [Dick] received was as good as the doctors and nurses had ever seen." In sum, the trial court found that Rich and Sesamie failed to meet the "good cause" standard necessary for a compelled autopsy.

In ordering sanctions against Sue and her attorneys, the trial court failed to determine whether it had the proper basis for doing so. Before the cremation of Dick's body, the trial court determined that Rich and Sesamie failed to show the "good cause" required for a discovery request involving a dead body in a civil case. In other words, the circuit court determined that Rich and Sesamie's

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[57] (emphasis added).

discovery request was not justified. And Rich and Sesamie have not raised as an issue before this Court the merits of that decision. In ordering sanctions without addressing whether a compelled autopsy is even a proper discovery request in general or is proper in this case, the trial court legitimized a discovery request that had been specifically rejected.

The trial court's abuse of discretion here was its failure to ascertain the justifiability of Rich and Sesamie's request before ordering sanctions that entirely stemmed from that request, especially when a prior court order established the justifiablity of Rich and Sesamie's request. The trial court previously held that Rich and Sesamie could not meet the threshold for compelling Dick's body to be made part of a discovery request. Because the trial court did not establish the proper basis for its order of sanctions, we affirm the Court of Appeals on this issue.

D. We remand this case to the Court of Appeals to consider the issues it did not reach.

The Court of Appeals did not reach three outstanding issues based on its conclusions: 1) Sue's contention that a lower interest rate on a judgment could have been required; 2) Rich and Sesamie's contention that the trial court should have entered a supplemental judgment reflecting Sue's use of income from the Regency Center during a period of delay in the issuance of the trial court's final order; and 3) Rich and Sesamie's contention that they should be awarded court costs. As such, we remand this case to the Court of Appeals to consider those issues and for further proceedings consistent with this opinion.

III. CONCLUSION.

We reverse the opinion of the Court of Appeals, in part, and reinstate the jury verdicts finding that Dick lacked the requisite testamentary capacity to execute his 2008 Estate Plan and that Sue unduly influence Dick in the execution of that plan. We affirm the opinion of the Court of Appeals, in part, on its reversal of the trial court's judgment finding that Sue misappropriated funds from the income derived from the Regency Center and making an award. And we affirm the Court of Appeals opinion vacating the trial court's order sanctioning Sue and her attorneys. Finally, we remand this case to the Court of Appeals to consider the issues it did not reach and for further proceedings consistent with this opinion.

Minton, C.J.; Buckingham, Hughes, Keller, Lambert, and Wright, JJ., sitting. VanMeter, J., not sitting. Minton, C.J.; Buckingham, Hughes, Keller and Lambert, JJ., concur. Wright, J., concurs by separate opinion.

WRIGHT, J., CONCURRING: While I otherwise concur with the majority's thorough, well-written opinion, I write separately to address a concern I have with section II.C. of its opinion regarding the sanction imposed by the trial court. While I completely agree with the majority's analysis regarding the lack of a "judgment" upon which a finding of contempt could be based as to the case which originated in circuit court, contempt could have been imposed in the case which originated in district court. That case originated as a petition to probate the will and included an emergency motion for an autopsy. The district court ordered the autopsy be performed and that matter was appealed to the circuit court. The circuit court reversed the district

court's order allowing the autopsy. This certainly amounted to "a written order of a court adjudicating a claim or claims in an action or proceeding."

Because the part of the case which had been appealed from the district court concerned a "judgment," CR 59 and 62.01 applied. Therefore, until after the ten days had passed in order for the parties to ask the court to alter, amend, or vacate its judgment, the body should not have been cremated. However, that case was not made part of this appeal. While a contempt hearing could have been part of the case that originated in district court, it was not—and that case was not appealed to this Court. Therefore, I concur with the majority.

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