

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000607-MR

MILDRED CAMPBELL

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 01-CI-00155

ANDY HARDWICK

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, SCHRODER AND TACKETT, JUDGES.

JOHNSON, JUDGE: Mildred Campbell has appealed from an order and judgment of the Green Circuit Court entered on March 6, 2002, which granted Andy Hardwick's motion for summary judgment. Having concluded that there was no genuine issue as to any material fact and that Hardwick was entitled to judgment as a matter of law, we affirm.

On March 26, 1996, Lampton Porter and his wife, Ethel Marie Porter, executed a joint will. One of the material provisions of this will directed that at the death of either

Lampton or Ethel, the survivor would be entitled to all of the couple's real and personal property. Following the death of the survivor, all of the real and personal property was to be divided equally among the couple's eight grandchildren. This will also contained a provision stating that the will was contractual in nature and that it could not be revoked without the consent of both Lampton and Ethel. Ethel died and her will was ordered probated by the Green District Court on October 12, 2001.<sup>1</sup> Hardwick, one of the couple's grandchildren, was named executor of Ethel's estate.

On June 8, 2000, Lampton executed a subsequent will, which contained a provision directing that after his death, his entire estate was to be liquidated and that Campbell, his niece, was entitled to all of the proceeds from the sale. On October 1, 2001, Lampton died and the second will executed by him on June 8, 2000, was ordered probated by the Green District Court on October 9, 2001. Campbell was appointed executrix of Lampton's estate.

On October 15, 2001, Hardwick filed a complaint in Green Circuit Court seeking to have the June 8, 2000, will declared null and void, and seeking to have the March 26, 1996, joint will admitted to probate and enforced according to its provisions. Approximately five months later, Hardwick filed a

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<sup>1</sup> The date of Ethel's death is not stated in either the record or the briefs to this Court.

motion for summary judgment, arguing that the 1996 joint will met the requirements for an irrevocable will under KRS<sup>2</sup> 394.540. Hardwick argued that the 2000 will was therefore ineffective and that the prior 1996 joint will should govern the administration of Lampton's estate. On March 6, 2002, the trial court agreed with Hardwick and granted his motion for summary judgment. This appeal followed.

Campbell first argues that the 1996 joint will did not meet the requirements for a contractual will under KRS 394.540.<sup>3</sup> Specifically, she argues that because the contractual language of the 1996 joint will came at the end of the document, all of the preceding terms were unaffected by that contractual language. We disagree. Under KRS 394.540, a contract not to revoke a will can be established if, inter alia, the "provisions of [the] will stat[e] material provisions of the contract."<sup>4</sup> This statute does not limit in any way the affected terms of the will to only those provisions that follow the required

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<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> "(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."

<sup>4</sup> KRS 394.540(1)(a).

contractual language, and Campbell has cited no authority in support of her argument.

We now turn to the exact language of the 1996 joint will to determine whether the requirements of KRS 394.540 have been satisfied. The 1996 joint will expressly provided in relevant part as follows:

Both parties by executing this Joint Will do hereby realize and understand that this Joint Will is executed for mutual consideration on behalf of both parties and each realizing that same cannot be revoked without the consent of both parties.

This provision is a "material provision of the contract" within the meaning of KRS 394.540(1)(a), since it clearly states that both Lampton and his wife agreed not to revoke the will without the consent of the other. Accordingly, the requirements for a valid contract not to revoke a will under KRS 394.540 have been satisfied.

Campbell next argues that the 1996 joint will was not contractual because it contained a provision in which Lampton and his wife agreed to devise all of their real and personal property to the survivor of the two in fee simple absolute. Campbell further claims that the 1996 joint will was not contractual because Lampton and his wife held title to a portion of their real property as joint tenants with rights of survivorship. We first note that, once again, Campbell has

cited no authority whatsoever in support of either of these arguments. In addition, as we discussed previously, the statutory requirements for a valid contract not to revoke a will were satisfied in the joint will of Lampton and his wife. Accordingly, these arguments by Campbell are wholly without merit.

Finally, Campbell argues that summary judgment in favor of Hardwick was improper. Campbell claims that there were genuine issues of material fact "for a jury to decide." Presumably, Campbell bases this argument on the fact that she alleged certain affirmative defenses such as fraud, overreaching, and duress in her answer to Hardwick's complaint. However, the record shows that Campbell failed to proffer any evidence whatsoever in support of her allegations. A party opposing a properly supported motion for summary judgment cannot defeat that motion without presenting at least some affirmative evidence demonstrating that a genuine issue of material fact exists.<sup>5</sup> As in the similar case of Mansfield v. Voedisch,<sup>6</sup> Campbell has failed to meet this burden.

Because of Campbell's failure to show that there was a genuine issue as to any material fact, the only issue before the trial court in the case sub judice was the determination of

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<sup>5</sup> Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992)(citing Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991)).

<sup>6</sup> Ky.App., 672 S.W.2d 678, 680 (1984).

whether the joint will executed in 1996 met the requirements for a contractual will under KRS 394.540. The construction and interpretation of the terms of a written instrument are questions of law for the court.<sup>7</sup> As we stated above, the trial court correctly determined that Lampton and his wife's 1996 joint will met the statutory requirements for an irrevocable will. Accordingly, the trial court did not err in granting Hardwick's motion for summary judgment.

Based on the foregoing reasons, the order of the Green Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffery L. Eastham  
Greensburg, Kentucky

BRIEF FOR APPELLEE:

Morris Butler  
Greensburg, Kentucky

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<sup>7</sup> Cinelli v. Ward, Ky.App., 997 S.W.2d 474, 476 (1998); Mansfield, 672 S.W.2d at 680.