RENDERED: FEBRUARY 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000764-MR

BETTY SEXTON — APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
CIVIL ACTION NO. 00-CI-00146

ESTATE OF ILA MAE MORRISON; and
ROSEMARY HARMON, Individually and as
Executor of the Estate of
Ila Mae Morrison — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, PAISLEY and TACKETT, Judges.

HUDDLESTON, Judge: Betty Sexton[1] appeals from a summary judgment which held that Rosemary Harmon's status as a beneficiary under

[1] Although the parties' briefs refer to numerous other would-be heirs of Ila Mae Morrison as appellants, only Betty Sexton is named in the notice of appeal, and she is the only appellant properly before this Court.

the will of Ila Mae Morrison was not procured through undue influence. The court also found that Sexton lacked standing to challenge the will under the doctrine of dependent relative revocation.

Because Sexton's brief fails to provide citations to the record on appeal or citations of authority pertinent to each issue of law,[2] we adopt the facts and legal issues presented in the appellees' brief as correct. Ila Mae Morrison died in July of 2000 at the age of 83, leaving a gross estate of approximately $37,000.00. Under a will drafted in May 2000, Morrison left the majority of her estate to Harmon, excluding several members of her family. Morrison's nieces and nephews sought to have her will set aside on the theory that its naming Harmon sole beneficiary was the product of undue influence.

When asked in her deposition what specific actions Harmon did to exert undue influence on Morrison, Sexton pointed to the following:

1. [Harmon] took [Morrison] to the lawyer's to have the will drawn up two months before her death.
2. [A]round Christmas time one year [Harmon] had decorated her house a little bit and [Morrison]

[2] See Ky. R. Civ. P. (CR) 76.12(4)(v). The only substantive precedent in Sexton's brief is a citation to a case designated by Kentucky's highest court not to be published and to which we may not refer as authority. CR 76.28(4)(c).

was bragging about [Harmon] doing extra little things for her.

3. Just being there everyday with [Morrison].

The circuit court found that even if the above allegations are taken as true, they do not give rise to a claim of undue influence. Accordingly, the court granted summary judgment for Harmon.

Kentucky Rule of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[3] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[4] In ruling on a motion for summary judgment, the circuit court must view the record "in a light

[3] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

[4] Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[5]

As the Supreme Court said in Bye v. Mattingly:[6]

> Undue influence is a level of persuasion which destroys the testator's free will and replaces it with the desires of the influencer.[7] In discerning whether influence on a given testator is "undue", [sic] 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.[8] Influence from threats, coercion and the like are improper and not permitted by the law.[9] 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

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[5] Steelvest, supra, n. 3, at 480.

[6] Ky., 975 S.W.2d 451 (1998).

[7] Nunn v. Williams, Ky., 254 S.W.2d 698, 700 (1953); Williams v. Vollman, Ky. App., 738 S.W.2d 849, 850 (1987).

[8] Nunn, id., at 700; Fischer v. Heckerman, Ky. App., 772 S.W.2d 642, 645 (1989).

[9] Lucas v. Cannon, 76 Ky. 650 (1878).

otherwise refuse to do.[10] The essence of this inquiry is whether the testator is exercising her own judgment.[11]

In this case, any "influence" which may have arisen as a result of Harmon's alleged actions was not inappropriate. There is no allegation that Harmon employed threats, coercion or the like. At most, she performed acts of kindness or appeals to feeling, which Kentucky courts have looked upon approvingly in established cases. Under the Bye analysis, Harmon's actions do not rise to the level of undue influence.

In Bye, the testator was transported to the attorney who prepared the challenged will by the person alleged to have exerted undue influence.[12] However, the Court rejected this contention, finding that merely driving a testator to an attorney's office to prepare a will does not equate to the active participation in the execution of a will which would give rise to a presumption of undue influence.[13] We reach the same conclusion here.

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[10] See v. See, Ky., 293 S.W.2d 225 (1956); Rough v. Johnson, Ky., 274 S.W.2d 376 (1955).

[11] Mayhew v. Mayhew, Ky., 329 S.W.2d 72 (1959); Copley v. Craft, Ky., 312 S.W.2d 899 (1958).

[12] Bye, supra, n. 6, at 459.

[13] Id. See also Hollon's Ex'r v. Graham, Ky., 280 S.W.2d 544 (1955); Gay v. Gay, 308 Ky. 539, 215 S.W.2d 92 (1948).

The circuit court was correct in finding that no genuine issue of material fact existed as to whether Morrison's will should be set aside on the basis of undue influence. Because we have affirmed on that basis, we need not reach the question of Sexton's standing in light of the doctrine of dependent relative revocation.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gail Lyndon Williams
Columbia, Kentucky

BRIEF FOR APELLEE:

Steven B. Loy
STOLL, KEENON & PARK, LLP
Lexington, Kentucky