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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-000879-MR

CAROLYN STEPP, EXECUTRIX OF THE ESTATE OF EDGAR DAILY STEPP, DECEASED — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 98-CI-00120

BOB HALSEY; SHIRLEY COOK; JONES A. HALSEY; ROSE PERKINS; HAZEL EAKINS; BLANCHE COOK; GENEVA BOGLE; ELLIS HALSEY; CLAY HALSEY; LESTER HALSEY; WADE HALSEY; AND GENEVA BOGLE, AS EXECUTRIX OF THE ESTATE OF BEULAH STEPP — APPELLEES

OPINION

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

DYCHE, JUDGE: Carolyn Stepp, the executrix of the estate of Edgar Daily Stepp (Daily),[1] appeals from an order of the Pulaski Circuit Court dismissing a complaint seeking to invalidate the will of Daily's deceased wife, Beulah Stepp (Beulah). The case was previously before this Court and, on that occasion, was

[1] The complaint in this case was originally filed by Daily. Daily died on April 20, 2001, and Carolyn was subsequently substituted as plaintiff.

remanded for trial on Daily's claim that the appellees exerted undue influence upon Beulah when she executed a will effectively disinheriting Daily and leaving her individual property to her siblings.

Upon remand appellant sought to amend the complaint to include additional allegations of undue influence associated with (1) the appointment of Bob Halsey as Beulah's attorney in fact, and (2) the transfer of financial assets held jointly by Daily and Beulah with a right of survivorship to individual property accounts which would be distributed to Beulah's siblings under the will. Because appellant was not entitled to amend her complaint to state new causes of action on remand, and because if her challenge to the will were successful the estate would not receive any additional distribution above what has already been distributed to Daily and/or the estate pursuant to Daily's prior renunciation of the will, we affirm.

Daily and Beulah were married in 1942.[2] No children were born of the marriage. Over the course of the marriage, Daily and Beulah built savings amounting to more than two and a half million dollars. The bulk of this money was invested in certificates of deposit (CDs) at three banks in Somerset, Kentucky. They also had a joint checking account with a balance

[2] In setting forth the facts and early procedural history of the case we rely heavily upon the Opinion from the prior appeal. See Stepp v. Halsey, Case No. 1999-CA-001625-MR, Opinion rendered January 19, 2001.

of approximately $22,000.00 as of November 3, 1997. The accounts were held jointly by Daily and Beulah with a right of survivorship. In addition, Daily and Beulah owned residential property in Somerset and a farm in Indiana. For nearly all of the marriage, neither Daily nor Beulah had wills. Beulah was 78 years old as of the date of her death, while Daily was 93.

In May 1997, Beulah was diagnosed with a cancerous tumor in her brain. She underwent surgery to remove the tumor and at that time her physicians thought the operation had been a success. Initially, Beulah returned home after the operation, but soon after, she went to stay with her step-niece, Shirley Cook.

In late October 1997, Beulah's health began to decline again. Following several tests, her physicians advised Beulah and her family members to get her affairs in order. Several significant transactions occurred shortly thereafter. First, on November 5, Beulah executed a durable power of attorney naming her brother Bob Halsey as her attorney in fact. On the same day, she executed a will and named her sister Geneva Bogle as executrix. The will specifically excepted any property which was held jointly with another person with a right of survivorship. The will left Daily the sum of $1.00 and

requested that he not contest the will. Beulah left the remainder of her estate to her brothers and sisters.[3]

Immediately following his appointment as Beulah's attorney in fact, among other things, Bob Halsey visited several Somerset banks and removed approximately half of the funds that were held in the CDs. These funds were transferred to new CDs held solely by Beulah with no survivorship. The new CDs and Beulah's will were placed in a safe deposit box, with access provided only to Beulah and Bob Halsey.

Beulah's health continued to deteriorate and she died on December 26, 1997. Pursuant to the will, Geneva Bogle was named as executrix of the estate, and the will was admitted to probate shortly thereafter. On February 11, 1998, Daily renounced Beulah's November 5, 1997, will and elected to receive the share of his deceased wife's estate as provided by KRS[4] 392.020 and KRS 392.080.

Also on February 11, 1998, Daily instituted this action to challenge the will based upon undue influence and lack of testamentary capacity. He also asserted three other causes of action against Cook and the beneficiaries under the will: (1) interference with a contractual relationship; (2) interference with a prospective economic advantage; and (3)

[3] Jones A. Halsey, Rose Perkins, Hazel Eakins, Blanche Cook, Geneva Bogle, Ellis Halsey, Clay Halsey, Bob Halsey, Lester Halsey, and Wade Halsey.

[4] Kentucky Revised Statutes.

conversion. Following discovery, the action was set for a jury trial. However, at the close of Daily's case, the trial court granted a motion for directed verdict and dismissed all of the counts. Daily subsequently appealed to this Court.

On January 19, 2001, in Case No. 1999-CA-001625-MR, this Court rendered an Opinion affirming the trial court's dismissal of Daily's claims alleging interference with a contractual relationship, interference with a prospective economic advantage, and conversion, and the will contest claim alleging lack of testamentary capacity. We reversed and remanded for a new trial, however, on the issue of whether Beulah's siblings had persuaded her to execute the will by means of undue influence. Significant to the issues in this appeal, the Opinion also stated, in dicta, "[it] is not clear why Daily chose to assert these claims [the claims of interference with a contractual relationship, interference with a prospective economic advantage, and conversion], rather than to seek to set aside the transfer of assets based upon undue influence."

On April 20, 2001, Daily died. Carolyn Stepp, the wife of Daily's nephew, was named executrix of his estate. By order entered May 29, 2001, Carolyn was substituted as the Plaintiff in the case.

On May 10, 2001, Carolyn filed a motion to amend her complaint. On May 29, 2001, over appellees' objection, the

trial court granted appellant's motion to amend, but further granted the appellees twenty days following the filing of the amended complaint to respond.

On June 14, 2001, appellant filed her amended complaint. The amended complaint, among other things, for the first time asserted a claim alleging that Bob Halsey's appointment as attorney in fact had been procured by undue influence and that, consequently, the November 1997 transfers of assets pursuant to the power of attorney should be declared void. Alternatively, the amended complaint alleged that Beulah had made or approved the transfers as a result of undue influence. By bringing these claims appellant sought to restore the financial assets transferred to Beulah's individual asset accounts, which would pass to the siblings under the will, back to the status of joint survivorship accounts, which would have passed to Daily upon the death of Beulah.

On July 2, 2001, appellees filed their answer objecting to the amended complaint insofar as the amendments sought to litigate issues in addition to a challenge to the will based on undue influence. Appellees argued that this Court's January 19, 2001, Opinion limited the proceedings on remand to the sole issue of whether Beulah's will was a result of undue influence.

On October 19, 2001, pursuant to CR[5] 12.02(f), appellees filed a motion to dismiss for failure to state a claim upon which relief can be granted. The motion again alleged that the only issue remaining for litigation on remand was appellant's claim of undue influence as relates to the validity of Beulah's November 5, 1997, will. The motion further asserted that in light of Daily's renunciation of the will, no relief could be granted even if Beulah's will were to be declared invalid because, in that event, pursuant to the intestate distribution rules as set forth in KRS Chapter 91, Daily's share of the estate would be exactly the same distribution as he had already collected as a result of his renunciation of the will.

On January 2, 2002, the trial court entered an order granting appellees' motion to dismiss. The order agreed with appellees that the only issue before the trial court was whether Beulah's will was a product of undue influence. As there was no dispute that if the will were invalidated Daily's estate would be entitled to the same amount of Beulah's estate that Daily had already received as a result of his renunciation of the will, the trial court granted appellees' motion to dismiss. The trial court subsequently overruled appellant's motion to alter amend or vacate. This appeal followed.

[5] Kentucky Rules of Civil Procedure.

Appellant contends that the trial court erroneously granted appellees' motion to dismiss for failure to state a claim upon which relief can be granted because, following remand, it was permissible for her to pursue a claim that the appointment of Bob Halsey as Beulah's attorney in fact and the November 1997 transfer of assets had been procured by undue influence. Appellant contends that if this claim succeeds, then the result of invalidating the will would not be the same as the effect of Daily's renunciation of the will because the nullification of the asset transfers would result in the restoration of the assets to joint survivorship account status resulting in no estate for distribution to Beulah's siblings under the will.[6]

Citing Schrodt's Ex'r v. Schrodt, 189 Ky. 457, 225 S.W. 151 (1920), appellees argue that, following remand, appellant was not entitled to amend her complaint to allege undue influence with respect to the appointment of the attorney in fact and the asset transfers because, with reasonable diligence, appellant's predecessor, Daily, could have raised the issue on the occasion of the first trial. We agree.

Schrodt's Ex'r placed squarely before the former Court of Appeals the issue in this case – the circumstances under

[6] Appellant agrees that unless the November 1997 transfers are nullified, the mere invalidation of the will would not result in additional distributions to the estate above the amounts already collected by Daily as a result of his renunciation of the will.

which a party may interject new issues into the case following a remand by an appellate court. Schrodt's Ex'r set forth the rule as follows:

> [W]hen a case goes back from this court for a new trial, the situation of the parties and the condition of the case is the same as if the trial court, in place of this court, had granted a new trial, subject, however, to such directions as this court may have given concerning the manner in which the case shall be retried, and so the action of the trial court in permitting either of the parties to introduce into the case for the first time a new and material issue will not be interfered with by this court unless it appears that in so doing the trial court abused its broad discretion. Enc. Pleading & Practice, vol. 1. p. 489.
>
> But the right of the trial court to permit new issues to be brought into the case after it has been sent back by this court for a retrial or when a new trial is granted should not be extended to the party who succeeds in obtaining a new trial or in securing a reversal with directions for a retrial unless it is made to appear that the new issues sought by such party to be brought into the case could not in the exercise of reasonable diligence on his part have been put into the case on the first trial.
>
> If the rule were otherwise, litigation would be interminable and new trials or retrials would be without number, first upon one ground and then upon another, and parties would be encouraged to split up their rights of action or causes of defense, presenting only some of them in one trial, while holding back the other for service at a future time.
>
> . . . .

> When the parties go to trial in the circuit court, each should put into the case every cause of action or defense that in the exercise of reasonable diligence is available, and that he desires to rely on, and the one failing to do this cannot, when a new trial or a retrial is secured on his motion, thereafter inject into the case a new issue that in the exercise of reasonable diligence on his part might have been disposed of on the first trial.[7]

Schrodt's Ex'r, 189 Ky. at 463-464, 225 S.W. at 153 – 154 (emphasis added).

Here, appellant's predecessor, Daily, brought the first appeal and won a new trial over the objection of appellees. Because Daily, with reasonable diligence on his part, could have raised the undue influence issue with respect to the power of attorney and the transfer of assets upon the occasion of the first trial, the above rule prohibits appellant from bringing in those issues upon retrial.

Appellant seeks to avoid the rule by arguing that the claims of undue influence with respect to the naming of an attorney in fact and the November 1997 asset transfers are not new issues but rather, in actuality, were raised in the original complaint. However, this argument is inconsistent with arguments appellant herself presented to the trial court when

[7] While Schrodt's Ex'r, 225 S.W. at 152, refer to the now superceded Section 134 of the Civil Code of Procedure, the current Rules of Civil Procedure applicable to amending pleadings do not contain provisions inconsistent with Section 134 so as to raise doubt about the continued precedential soundness of the holding in Schrodt's Ex'r. See CR 15.01, CR 15.02, and CR 15.04.

arguing against appellees' motion to dismiss. In her "Plaintiff's Response to Defendant's Motion to Dismiss" filed on November 26, 2001, appellant stated as follows:

> However, t[he] Amended Complaint did assert a "new" cause of action suggested by the Court of Appeals. That cause being a cause of action of "undue influence" in the procurement of the power of attorney to Bob Halsey and an action to set aside the transfer of assets based upon undue influence. . . . However, the "new" cause of action can be asserted so long as it is not prohibited by the relevant statute related to limitation of actions.
>
> Specifically, the provision of the decision of the Court of Appeals entered in this action on January 19, 2001 upon which the plaintiff relies is the first full paragraph on page 7 and reads as follows:
>
> "It is not clear why Daily chose to assert these claims, rather than to seek to set aside the transfer of assets based upon undue influence."
>
> This sentence is certainly an indication that an appropriate cause of action related to the facts, events and occurrences of this action is to seek to set aside the transfer of assets based upon undue influence. This is exactly what the Amended Complaint seeks to do. As the Court of Appeals has observed, this cause of action was not asserted or litigated in the previous litigation. Therefore, unless it is prohibited to be asserted by a limitation of action, it is appropriate to be litigated now.

(Emphasis added.)

Similarly, in her motion to alter, amend, or vacate filed on January 7, 2002, appellant argued as follows:

> The plaintiff's claim is directly described in the decision of the Court of Appeals on page 7 of the decision wherein the court said, "It is not clear why Daily Chose [sic] to assert these claims rather than to seek to set aside the transfer of assets based upon undue influence."
>
> This cause of action described by the Court of Appeals was not litigated before this court previously, was not dismissed by this court, was not an issue in the Court of Appeals (who specifically found by implication that it was not litigated in the trial court) and has now been raised in the Amended Complaint as a "new" cause of action. As previously indicated as a new cause of action the only basis upon which the plaintiff should not be able to raise such a claim is the applicable statute of limitations. KRS 413.120 or KRS 413.160 are the appropriate statutes to look to in this matter and reference thereto clearly indicates that this new cause of action is not barred by time.

(Emphasis added.)

After appellees cited Schrodt's Ex'r, supra, in their response to appellant's motion to alter, amend, or vacate, appellant, for the first time, after having previously argued just the opposite, adopted the position she now assumes upon appeal, namely, that her amendments to the complaint did not amount to a new cause of action.

In support of this argument appellant cites us to paragraph 17 of the original complaint. However, that paragraph, while alleging that appellees "exercise[d] undue influence to obtain absolute control over Beulah Stepp's business and personal affairs," does not specifically seek to nullify either the appointment of Bob Halsey as attorney in fact or the November 1997 transfers. Moreover, appellant concedes in her brief that "[u]nfortunately the plaintiff did not argue this undue influence in the creation of Beulah's Estate as a separate cause of action [in the original complaint]."

We agree with this Court's Opinion of January 19, 2001, and appellant's original position before the trial court, that the amended complaint, in seeking to challenge the power of attorney and asset transfers on the basis of undue influence, states new causes of action. As previously noted, pursuant to Schrodt's Ex'r, this is not permissible.

Appellant concedes that, absent the restoration of the November 1997 transfers to right of survivorship accounts, the effect of invalidating the will would result in the same distribution as the distribution received by Daily as a result of his renunciation of Beulah's will. As the November 1997 transfers cannot now be litigated, it would serve no purpose to litigate the validity of the will.

The trial court dismissed appellant's complaint for failure to state a claim upon which relief can be granted pursuant to CR 12.02. A motion for dismissal for failure to state a claim should only be granted if it appears the pleading party could not prove any set of facts in support of his claim that would entitle him to relief. Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club, Ky., 551 S.W.2d 801, 803 (1977).

Since upon retrial, even if appellant succeeded in invalidating Beulah’s will the estate would not be entitled to any more than has already been distributed as a result of Daily’s renunciation of the will, the trial court properly dismissed the case for failure to state a claim upon which relief can be granted.

For the foregoing reasons, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ralph D. Gibson
Burnside, Kentucky

BRIEF FOR APPELLEES:

Susan J. Ham
Benny E. Ham
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