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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001069-MR

FLORAINE BRANHAM, INDIVIDUALLY, AND
AS EXECUTRIX OF THE ESTATE OF CLINTON
MAYNARD; AND ALFRED BRANHAM, HER HUSBAND — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 03-CI-00207

DONALD MAYNARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Floraine Branham, individually and as the executrix of the estate of Clinton Maynard, and Alfred Branham, her husband, have appealed from a judgment of the Pike Circuit Court entered on April 26, 2004, confirming a unanimous jury verdict which determined that the purported will of Clinton Maynard, and a deed and transfer of two certificates of deposit by him were executed either while Clinton was of unsound mind or as a result of undue influence by Floraine. Having concluded

that the trial court did not err in instructing the jury or in denying Floraine's motion to set aside the jury's verdict, and that any improper closing arguments to the jury did not constitute reversible error, we affirm.

Floraine and the appellee, Donald Maynard, are siblings, and the only children of Clinton and Edith Maynard.[1] Before Clinton died on November 27, 2002, at age 89, he had acquired an estate worth over $250,000.00, which included real and personal property, certificates of deposits (C.D.'s), bank accounts, and cash. During the last few years of his life, Clinton had severe vision problems which resulted in almost total blindness. However, during the period of time at issue in this dispute, he was able to watch television, to pay his bills, to prepare his meals, and to take care of his personal banking needs. Clinton could also recognize his children and neighbors.

Like Floraine, Donald lived in Charleston, West Virginia. He testified that after his retirement he drove to and from Pikeville, Kentucky, almost every other day in order to take care of his mother and father. He testified that his wife, Ann, and he would bring Clinton and Edith groceries, cook their dinner, clean their house, mow their grass, make repairs to

[1] Edith died on July 27, 2002. The last year of Edith's life, she suffered from Alzheimer's disease and she lived with Floraine in Charleston, West Virginia.

their house, and transport them. One of Clinton's neighbors testified that Clinton relied on Donald for everything.

Testimony was introduced that Donald accompanied Clinton to the doctor on several occasions and even inquired about his condition and the medications he was prescribed. In February 2002, when Clinton was hospitalized in Lexington, Kentucky, Donald and Ann rented a hotel room and stayed with Clinton the entire week. On a second occasion, Clinton was hospitalized at Pikeville Methodist Hospital, and again, Donald and Ann rented a hotel room and stayed with Clinton. The third time Clinton went into the hospital, Donald was again with him. Following Clinton's discharge, Clinton went home with Donald and Ann for two weeks while he was recovering. After a two-week recovery, Clinton wanted to be brought back to his home in Pikeville where he was familiar with his surroundings. Donald and Ann abided by Clinton's wishes and returned him to his own home. There was testimony that Floraine did not see Clinton regularly during that time period. According to Floraine's testimony, she only visited Clinton once while he was in the hospital. She testified that she did not know the name of her father's treating physician or the medications he was taking.

Edith died on July 27, 2002, and through her will, she bequeathed Clinton a life estate in her property with the remainder to their children, Donald and Floraine. Clinton and

Edith had their wills prepared at the same time and they included mirror language, wherein the spouse would inherit a life estate and the remainder would go to their children. There was testimony that Clinton had told his neighbor that he had drafted his will just like he wanted it.

After Edith's death, Floraine began spending more time with Clinton. On August 12, 2002, Floraine took Clinton to the law office of Joseph Justice, where Clinton signed a new will, leaving everything to Floraine, and a deed conveying his property to her. Clinton also executed a power of attorney in favor of Floraine.[2] In April 2002 Clinton also renewed a C.D. that had matured. The C.D. had been held in survivorship with Donald, but it was renewed with survivorship to Floraine. In June 2002 Clinton also had the name on his safe deposit box at the BB&T Bank changed from Donald to Floraine.

In support of his claim that Floraine unduly influenced Clinton, Donald presented evidence at the jury trial on April 22, 23, and 24, 2004, that Clinton only began to distrust Donald after Floraine began to take an interest in Clinton. Floraine contended to the contrary that Clinton retained the full mental capacity to dispose of his property any way he desired and that she had not influenced him to change his

[2] Justice made an audio recording of Clinton stating that the new will was created by his own free will and he had not been persuaded to create the new will.

will. The trial court instructed the jury to find in favor of Donald if "you believe from the evidence" that in signing the will and deed and in transferring the C.D.'s that Clinton was either of unsound mind or induced to act by undue influence exerted upon him by Floraine. Floraine argued that the jury instructions should include the clear and convincing evidence standard of proof. Relying upon Palmore,[3] the trial court determined the standard of proof to be a preponderance of the evidence.

Following the return of the jury's verdict, Floraine orally moved the trial court to set aside the jury's verdict and to enter a judgment in her favor. Subsequently, Floraine filed a memorandum in support of her motion to vacate the judgment. In an order entered on May 25, 2004, the trial court denied Floraine's post-trial motions. This appeal followed.

Floraine claims the trial court erred (1) by improperly instructing the jury since Donald was not required to prove incapacity and undue influence by clear and convincing evidence; (2) by not setting aside the jury's verdict because there was insufficient evidence to support the jury's findings; and (3) by allowing Donald's counsel to make inappropriate statements to the jury during his closing arguments.

[3] Palmore, Kentucky Instructions to Juries, § 50.01 (4th ed. 1989).

A motion for a judgment notwithstanding the verdict shall not be granted unless "there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ."[4] Its denial is reviewed under the same standard as the denial of a motion for a directed verdict. This Court's function in determining whether a trial court erred in failing to grant a motion for a directed verdict is carefully defined and narrowly circumscribed:

> "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 rendered is "'palpably or flagrantly'" against the evidence so as "to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed [emphasis omitted] [citations omitted].[5]

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[4] Bierman v. Klapheke, 967 S.W.2d 16, 18-19 (Ky. 1998).

[5] Humana of Kentucky, Inc. v. McKee, 834 S.W.2d 711, 718 (Ky.App. 1992) (quoting Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990)).

In the case before us, Ann, Donald's wife, testified that for a two-week period in February 2002 Clinton could not remember the day of the week, and that he thought every day was Sunday. Dr. Lela Maynard testified that Clinton did not understand his physical condition and could not remember what medications he was taking. Clinton's neighbor, Tom Kline, testified that he had taken Clinton to the doctor for dizziness and on a later visit to his home, Clinton could not remember how long he had suffered from the dizziness, claiming that he had only had the condition for a week when he had actually complained of it for several months.

After reviewing the numerous cases cited by the parties and numerous other cases cited by those cases, we believe the applicable law can best be summarized by this Court's discussion in Burke v. Burke.[6] In affirming a jury verdict in favor of the contestant, this Court stated:

> A survey of the law on this subject yields a series of contradictory statements and policies. On the one hand courts stoutly proclaim the policy of carrying out the wishes of the deceased, even if they are arbitrary or unfair. "[T]he courts guard jealously the rights of all rational people, including the aged, the infirm, the forgetful and the queer, to make wills sufficient to withstand the attacks of those left out and those dissatisfied with the expressed desires of the departed." Tye v. Tye, 312 Ky. 812, 229 S.W.2d 973, 975

[6] 801 S.W.2d 691 (Ky.App. 1990).

(1950); citing Kentucky Trust Co. v. Gore, 302 Ky. 1, 192 S.W.2d 749, 752 (1946). The testator must have sufficient mind to know his property, the objects of his bounty and his duties to them, Waggner v. General Association of Baptists, Ky., 306 S.W.2d 271, 273 (1957); but he is perfectly free to ignore the latter if he is otherwise of sound mind. "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." Cecil's Ex'rs v. Anhier, 176 Ky. 198, 195 S.W. 837, 846 (1917); see also Faulkes v. Brummett's Adm'r, 305 Ky. 434, 204 S.W.2d 493, 496 (1947).

It has also been said that to invalidate a will on the ground of undue influence, the contestant must show more than the mere opportunity to exercise it. Bodine v. Bodine, 241 Ky. 706, 44 S.W.2d 840, 843 (1931). There must be some specific evidence of circumstances from which it can be reasonably inferred that undue influence was in fact exercised. Copley v. Craft, Ky., 312 S.W.2d 899, 900 (1958). Furthermore, "reasonable influence obtained by acts of kindness or by argument addressed to the understanding is not in law an undue influence." Faulkes, supra. To justify setting aside a will the influence exercised must be such that it "obtains dominion over the mind of the testator to such an extent as to destroy his free agency in the disposal of his estate, and constrains him to do that which he would not have done if left to the free exercise of his judgment." Copley, supra.

After issuing these stern admonitions, however, the law reverses itself somewhat to lower the contestant's burden of proof when allegations of undue influence are coupled with an unequal or unnatural disposition,

> allegations of mental incapacity, or both. See Waggener, supra at 274; Pardue v. Pardue, 312 Ky. 370, 227 S.W.2d 403, 406 (1950). Thus, a combination of these will usually suffice to overcome a directed verdict. "[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." Gibson v. Gipson, Ky., 426 S.W.2d 927, 928 (1968).

In Burke, this Court noted that "the jury was presented with a scenario in which the entire relationship between [the decedent and the sole beneficiary], from courtship to death, was a scant three months' duration."[7] This Court went on to conclude that when this badge of undue influence (a lately developed and comparatively short period of close relationship between the testator and the principal beneficiary)[8] is combined with other badges, such as the participation of the beneficiary in the preparation of the will and some evidence of mental incapacity, the "proof was sufficient to take this case to the jury."[9] This Court acknowledged, as we do in the case before us, that "[i]t is certainly true that there was contrary evidence that [the decedent] was of sound mind and uninfluenced by anything but his own wishes[, and] [w]e are not unmindful of the possibility that the jury invalidated this will simply because

[7] Burke, 801 S.W.2d at 693-94.

[8] Id. at 694 (citing Belcher v. Somerville, 413 S.W.2d 620, 622 (Ky. 1967)).

[9] Id. at 694.

it seemed unfair. Nevertheless, 'when there is substantial evidence to support a verdict, though we of the courts may think it outweighed, we are compelled to uphold the jury's conclusions.'"[10]

In Marcum v. Gallup,[11] our highest court recognized that undue influence can often be proved only by circumstantial evidence:

> 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 desire of the maker may be proved by a chain of circumstances. Ordinarily that is the case; often of necessity. Walls v. Walls, 99 S.W. 969, 30 Ky. Law Rep. 948; Barber's Executors v. Baldwin's Executor, 138 Ky. 710, 128 S.W. 1092. As stated in Livering's Executor v. Russell, 100 S.W. 840, 844, 30 Ky.Law Rep. 1185, "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 . . . [and the jury] had a right to weigh these facts for what they were worth."[12]

The Court in Marcum stated the rule concerning the amount of evidence necessary to establish undue influence as follows:

> [I]t is a rule that if under all the circumstances, the will is unreasonable and

[10] Burke, 801 S.W.2d at 694 (citing Roland v. Eibeck, 385 S.W.2d 37, 40 (Ky. 1964)).

[11] 237 S.W.2d 862 (1951).

[12] Id. at 865.

> unnatural in its provisions and inconsistent with the obligations of the testator, slight evidence is sufficient to take the case to the jury in the absence of reasonable explanation. Thus, it was written in the leading case of Walls v. Walls, supra, 99 S.W. 969, 971, 30 Ky.Law Rep. 948, [1907] as frequently quoted, "Incapacity opens the door to undue influence, and when opportunities for such influence are shown, and the favored devisees are the beneficiaries of a will unnatural in its provisions, to the exclusion of others having equal claims at least upon his bounty, very slight circumstances are sufficient to make the question of undue influence one for the jury."[13]

In Walls, supra, it was stated that "if under all the circumstances of the case the will is unnatural in its provisions and inconsistent with the obligations of the testator to the different members of his family, the burden rests upon the propounders to give some reasonable explanation of its unnatural character."[14] That is exactly what Floraine attempted to do by presenting evidence that Donald had alienated Clinton by threatening to have him cremated against his will, by disagreeing with him over a cemetery lot and monument, and by other actions. She contended that bitterness had developed in their relationship. This conflict in the evidence obviously

[13] Marcum, 237 S.W. 2d at 865. See also Helm's Guardian v. Neathery, 226 Ky. 42, 10 S.W.2d 474 (1928); Frank's Executor v. Bates, 278 Ky. 337, 128 S.W.2d 739 (1939); Berryman v. Sidwell, 278 Ky. 713, 129 S.W.2d 154 (1939); Kiefer's Executor v. Deibel, 292 Ky. 318, 166 S.W.2d 430 (1942); Sutton v. Combs, 419 S.W.2d 775 (Ky. 1967); and Bennett v. Bennett, 455 S.W.2d 580 (Ky. 1970).

[14] Walls, 99 S.W. at 970.

presented the jury with the need to make a factual determination, i.e., did it believe Donald's actions caused Clinton to exclude him from the will, or did it believe Floraine's actions unduly influenced Clinton in making his will?

In light of the unequal disposition of Clinton's property between his two children, even the slight evidence concerning whether Clinton had the testamentary capacity to make a will and whether Floraine had exerted undue influence over Clinton during the last year of his life in order to induce him to rewrite his will and to leave his entire estate to her was sufficient to submit the case to the jury.[15] Thus, we conclude that a reasonable jury could have found that Clinton was either of unsound mind or that he had been unduly influenced by Floraine.

In support of her position that the proper standard of proof is clear and convincing evidence, Floraine relies upon Bye v. Mattingly.[16] In Bye, the Supreme Court of Kentucky stated that "there is a strong presumption in favor of the testator possessing adequate testamentary capacity. The presumption can only be rebutted by the strongest showing of incapacity."[17] The

[15] Gibson v. Gipson, 426 S.W.2d 927, 928 (Ky. 1968).

[16] 975 S.W.2d 451 (Ky. 1998).

[17] Id. at 455 (citing Williams v. Vollman, 738 S.W.2d 849 (Ky.App. 1987); and Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App. 1985)).

Court went on to state that "[t]he 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."[18]

Floraine argued to the trial court that the recent supplement to Palmore's changed the standard of proof in this type of case to clear and convincing. However, while the 2005 supplement changed Section 50.04 and now provides that a lost will must be proved by clear and convincing evidence, no modification was made to the recommended instructions at Sections 50.01, 50.02, and 50.03 concerning a testator's capacity or being subject to undue influence. Thus, without Floraine providing any other authority to support her position, and based on our earlier discussion of the law as set forth in Walls, Burke, and Marcum, we affirm the trial court's use of the preponderance of the evidence standard instead of the clear and convincing evidence standard.

Finally, Floraine claims Donald's attorney made an inappropriate closing argument to the jury by going outside the evidence and using his own mother as an example. Specifically, counsel stated that his elderly mother thought her son-in-law was coming to her house at night and shining lights in her windows, and claimed that this was irrational behavior from an

[18] Id. at 456.

incompetent person. Counsel also stated that his mother knew exactly how much money she had in the bank; however, he claimed she was incompetent with respect to certain matters. Floraine claims this argument concerning counsel's mother was inappropriate because it referenced facts that were not in the record.

Floraine's brief failed to comply with CR 76.12(4)(c)(v) because it does not state where and how this alleged error was preserved for our review. Further, after watching the entire three-day, videotaped trial, we fail to see where any objection was made to Donald's closing arguments. Regardless, any such error was not so substantial to have resulted in Floraine's adverse verdict, and thus was harmless error.[19]

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

COMBS, CHIEF JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS.

BRIEFS FOR APPELLANTS:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Joseph W. Justice Della M. Justice Pikeville, Kentucky	Marrs Allen May Pikeville, Kentucky

[19] See Conley v. Fannin, 308 Ky. 534, 215 S.W.2d 122, 123 (1948) (citing Honaker v. Crutchfield, 247 Ky. 495, 57 S.W.2d 504 (1933)) (stating that "'admission of incompetent evidence is harmless if the facts are otherwise shown by proper evidence'").

ORAL ARGUMENT FOR APPELLANTS:

Della M. Justice
Pikeville, Kentucky