RENDERED: SEPTEMBER 16, 2005; 10:00 A.M.
ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
MARCH 15, 2006 (2005-SC-0810-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001361-MR

CHARLES C. CONN, Individually
and as Executor of the Estate of
KENNETH E. CONN APPELLANT

APPEAL FROM MADISON CIRCUIT COURT
v. HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 03-CI-00842

MARJORIE CONN; and
KENNETH C. CONN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

VANMETER, JUDGE: This case is an appeal from a summary judgment of the Madison Circuit Court finding invalid a will which had been executed prior to the testator's remarriage, when statutory law provided that marriage revokes a will. We affirm.

On July 10, 1992, Kenneth E. Conn executed his last will and testament. The principle provisions of the will left all his estate to his then spouse, Jeanette, or if she

predeceased him, to his children, Kenneth C. Conn[1] and Charles Christopher Conn. Jeanette then predeceased Kenneth, who in January 1994 married Marjorie. Kenneth died on October 30, 2000, a resident of Madison County, Kentucky.

On August 30, 2001, upon Marjorie's and Charles' joint petition, the Madison District Court probated the 1992 will and a subsequent undated holographic codicil, and appointed them as co-executors. Under the codicil, Marjorie received a life estate in a Berea residence. Nearly two years later, on August 27, 2003, Kenneth, Jr. filed a complaint in the Madison Circuit Court challenging the probate of the undated codicil.[2] Although Charles was a named defendant, he sided with Kenneth, Jr., agreeing that the holographic codicil should be set aside. Charles and Marjorie then filed cross-motions for summary judgment as to whether Kenneth's 1994 marriage revoked his 1992 will. Prior to the circuit court's ruling on the motion for summary judgment, Marjorie filed an amended answer admitting that the holographic codicil was invalid. The circuit court granted Marjorie's motion, ruling that Kenneth's 1994 marriage

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[1] Kenneth E. Conn, the father and testator, will hereinafter be referred to as "Kenneth." Kenneth C. Conn, the son and plaintiff at the trial court, will be referred to as "Kenneth, Jr."

[2] Pursuant to KRS 394.240, "[a]ny person aggrieved by the action of the District Court in admitting a will to record . . . may bring an original action in the Circuit Court . . . to contest the action of the District Court."

served to revoke the 1992 will, as well as finding that the holographic codicil was invalid. Charles brings this appeal.[3]

Charles' first argument is that Marjorie is estopped from challenging the 1992 will because she earlier petitioned for probate and accepted appointment as co-executor. This argument, however, overlooks the key fact that Marjorie's petition for probate and appointment related to the 1992 will as modified by the holographic codicil, which, although later declared invalid, dramatically altered the terms and provisions of the 1992 will. As Marjorie never sought to probate the unmodified 1992 will, nor accepted a fiduciary position under it, she is not estopped from challenging that document. The cases[4] cited by Charles do not mandate a different conclusion.

Charles' second argument is that Marjorie, as the surviving spouse, does not have standing to contest the 1992 will since her sole remedy was to renounce the will. Again, as with his first argument, Charles ignores the fact that the Madison District Court probated both the 1992 will and its

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[3] Interestingly, although Kenneth, Jr. was the original plaintiff, he did not file an appeal, but he has been joined in this proceeding as an appellee. He has filed no brief in this court.

[4] *Faulkes v. Brummett's Adm'r*, 305 Ky. 434, 204 S.W.2d 493 (1947); *Eckert v. Givan*, 298 Ky. 621, 183 S.W.2d 809 (1944); *Frank's Adm'r v. Bates*, 265 Ky. 634, 97 S.W.2d 549 (1936). We note with interest Charles' citation of *Faulkes* for the proposition that a personal representative has a duty to uphold the will, in light of Charles' response to Kenneth, Jr.'s challenge to the codicil, admitting its invalidity, and simultaneously moving for summary judgment on that issue, even prior to Marjorie's concession as to its invalidity.

subsequent codicil, which arguably served to republish an otherwise invalid will.[5] Absent the codicil, the 1992 will remains revoked, and Kenneth dies intestate.

Furthermore, Marjorie did not initiate the action under KRS 394.240 challenging the will. The record indicates that Marjorie was satisfied with the provisions for her benefit under the will and codicil as originally probated, since she did not renounce and elect her share under KRS 392.080. The rationale underlying the cases holding that a spouse has no standing to contest his or her spouse's will is that under KRS 392.080, a surviving spouse has an adequate remedy in renunciation in the event he or she is dissatisfied with the provisions of the will.[6] Thus, as stated in *Egbert v. Egbert*,[7] "a widow cannot contest her husband's will if without such contest she can obtain the same substantial benefits by renouncing the provisions of the will and electing to take under the statute[.]"

In the instant case, Marjorie was apparently happy with the portion of Kenneth's estate she was devised under the will and codicil as originally probated. By choosing to wait

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[5] KRS 394.100.

[6] *Harlow v. Harlow*, 551 S.W.2d 230, 232-33 (Ky. 1977); *Mercer v. Smith*, 107 S.W. 1196, 1197 (Ky. 1908); *Henderson v. Thomas*, 129 S.W.3d 853, 856 (Ky.App. 2004).

[7] 186 Ky. 486, 488, 217 S.W. 365, 365 (1920).

more than six months to challenge the codicil, Kenneth, Jr. and, evidently, Charles as well, sought to deny Marjorie the benefits under the will and codicil, as well as her right to renounce.[8] Because Marjorie cannot now obtain the same substantial benefits which would have been available to her by renouncing the will, under the limited factual circumstances of this case, she is not precluded from challenging the validity of the 1992 will. Her action of challenging the will without the codicil, in response to an action which challenged probate of the codicil, is not the functional equivalent of taking an action which was previously waived.[9]

The main issue for consideration on this appeal is the effect of the 1998 amendment of KRS 394.090. At the time the will was executed, and at the time of remarriage, the statute provided that "[e]very will shall be revoked by the marriage of the person who made the will[.]" Additionally, KRS 394.080 provided that "[n]o will or codicil, or any part thereof, shall be revoked, except: (1) [a]s provided in KRS 394.090 . . . ."

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[8] Under KRS 392.080, a spouse has six months to renounce, but if a will contest is filed within the six months, the period within which the spouse may exercise the right to renounce is extended to six months following the resolution of the will contest.

[9] As noted by the court in *Smith v. Commonwealth*, 904 S.W.2d 220, 222 (Ky. 1995), "[o]ne who opens the book on a subject is not in a position to complain when his adversary seeks to read other verses from the same chapter and page."

However, effective July 15, 1998, both statutes were amended.[10] The revised KRS 394.090 provides "[a] will shall not be revoked by the marriage of the person who made the will" and KRS 394.080 was revised to delete the reference to KRS 394.090. These versions of the statutes were in effect on Kenneth's date of death and the date of probate.

Charles makes the relatively straight-forward argument that the validity of a will is determined as of the date of death of the testator. He cites *Welsh v. Robison*[11] for the proposition that a statute which provided that divorce revoked a will had no effect on the will in question because the statute had been repealed and was not in force as of the testator's death. However, the holding in *Welsh* was expressly overruled in *Winebrenner v. Dorten*,[12] which held that the *repeal* of the statute revoking a will in the event of divorce would apply only to those wills executed after the effective date of the new statute.[13] In other words, *Winebrenner* held that the law in effect at the time, providing that some action revoked a will,

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[10] 1998 Ky. Acts 408.

[11] 702 S.W.2d 455 (Ky.App. 1986).

[12] 825 S.W.2d 836, 837 (Ky. 1991).

[13] *Id.*

would control, absent an express legislative directive to the contrary.[14]

Charles also cites the well-known rule that a will speaks as of the decedent's death in support of his argument that the law in effect at the time of Kenneth's death should control.[15] In *Fryxell v. Clark*,[16] this court addressed that rule of construction and explained that it applied to identify those items which were devised or bequeathed under a will, and not to the question of whether a will is valid.

In this instance, the statute governing the revocation of wills at the time Kenneth executed his will and remarried unambiguously provided that marriage revokes a will. The fact that the statute was revised in 1998 does not change the result, as KRS 446.080(3) states that "[n]o statute shall be construed to be retroactive, unless expressly so declared." In addition, a will which has been revoked "shall be revived only by reexecution or by a codicil executed in the manner required for making a will . . . ."[17] At any point prior to 1998, any attorney moderately competent in estate planning would have advised Kenneth that his will was revoked. It would have been a

[14] *See also Fryxell v. Clark*, 856 S.W.2d 892, 894 (Ky.App. 1993).

[15] *See* KRS 394.330 ("[a] will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator . . . .")

[16] 856 S.W.2d 892, 894 (Ky.App. 1993).

[17] KRS 394.100.

simple and inexpensive matter to execute a codicil republishing the 1992 will. As Kenneth never revived his will which had been revoked by operation of law, it follows that his 1992 will was void.

The judgment of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Robert Lyons, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEE MARJORIE CONN:

Bobby L. Amburgey
Mt. Vernon, Kentucky