

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001866-MR

MELVIN C. HUBBARD

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CI-01082

SHERRY WEINEL, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF MARY C. HUBBARD; RICHARD
KING; THOMAS KING; SHIRLEY WILL

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Melvin Hubbard appeals from an order of the Campbell Circuit Court dismissing his will contest action seeking to set aside the will of his deceased wife, Mary Catherine Hubbard. Because we agree with the trial court that

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Melvin's sole remedy under the circumstances of this case was to renounce his wife's will, we affirm.

Melvin and Mary were husband and wife at the time of her death on September 6, 2004. Mary died testate and her will, which was executed on August 10, 2004, was probated in Campbell District Court. The only provision for Melvin contained in the will was the marital residence. Since the residence was owned in survivorship, Melvin would have received fee title to this realty anyway, so, in effect, he received nothing under the will. Save for the residence, Mary's will left her entire estate to her four children by a previous marriage: Richard King, Tommy King, Shirley Will, and Sherry Weinel. Mary's will named Sherry Weinel as executrix of her estate. Sherry filed the will for probate on September 17, 2004.

It is undisputed that Melvin never renounced the will pursuant to KRS² 392.080(1). However, on August 9, 2005, Melvin filed a complaint in Campbell Circuit Court captioned "Petition to Contest the Order of Probate of the Last Will and Testament of Mary Catherine Elizabeth Hubbard." The petition alleged that Mary lacked the testamentary capacity to have executed the will and/or that the will was the product of undue influence, and sought to have the will adjudged invalid.

On April 12, 2006, the trial court entered an order dismissing Melvin's petition upon the basis that *Henderson v. Thomas*, 129 S.W.3d 853 (Ky.App. 2004), holds that a surviving spouse's sole remedy under the circumstances at bar is to renounce the deceased spouse's will pursuant to KRS 392.080(1) and, consequently, Melvin could not file a will contest pursuant to KRS 394.240. On May 10, 2006, the trial court entered an order denying Melvin's motion to alter, amend, or vacate. This appeal followed.

² Kentucky Revised Statutes.

Before us Melvin contends that the trial court erred in dismissing his petition pursuant to *Henderson v. Thomas*.

We construe the trial court's dismissal to be pursuant to CR³ 12.02(f). The standard of review applicable to a dismissal of a complaint under CR 12.02(f) for failure to state a claim is as follows: "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" *James v. Wilson*, 95 S.W.3d 875, 883-884 (Ky.App. 2002) (internal quotation omitted).

Thus we accept for purposes of our review that Mary lacked the testamentary capacity to execute a will and/or that the will was the product of undue influence. Further, as previously noted, it is undisputed that Melvin did not renounce the will pursuant to KRS 392.080(1). Finally, we note that there is no realty at stake because Melvin and Mary's residence was owned in survivorship.

In *Henderson v. Thomas*, *supra*, Ralph and Ruth Henderson were married at the time of Ruth's death. Ruth's will divided all of Ruth's personal property equally between her two daughters, and left Ralph nothing; as in the case at bar, there was no realty at stake. As in the case at bar, Ralph did not attempt to renounce the will pursuant to KRS 392.080(1). Instead, as in the case at bar, Ralph filed suit in circuit court demanding, among other things, that Ruth's will be set aside so that he could ultimately take his intestate curtesy share of her property as her surviving spouse pursuant to KRS

³ Kentucky Rules of Civil Procedure.

392.020. The *circuit court* in Henderson dismissed the case upon the same basis as the trial court in this case – Ralph’s failure to renounce the will. The *Henderson* decision addressed the issue as follows:

The crux of [Ralph’s] suit is his entitlement to the surviving spouse's statutory share in the decedent's property created by KRS Chapter 392. In that chapter, the legislature has provided the surviving spouse with a "dower" or "curtesy" interest in the decedent's estate which he or she can assert, if there is a will, only by renouncing the will and releasing what is given to him or her under the will, if anything. The circuit court's dismissal in the instant case rests upon [Ralph’s] failure to follow, substantially or otherwise, the renunciation steps outlined in KRS 392.080(1), which states, in relevant part, that

When a husband or wife dies testate, the surviving spouse may, though under full age, release what is given to him or her by will, if any, and receive his or her share under KRS 392.020 [surviving spouse's interest section] as if no will had been made.... Such relinquishment shall be made within six (6) months after the probate.... If, within those six (6) months, an action contesting the will is brought, the surviving spouse need not make such relinquishment until within six (6) months succeeding the time when the action is disposed of.

Contrary to [Ralph’s] arguments, Kentucky cases hold that the surviving spouse's failure to renounce the will results in the loss of the right to claim the statutory share in the decedent's estate. This is true even when the will makes no provision for the surviving spouse. *Hedden v. Hedden*, 312 S.W.2d 891, 893 (Ky. 1958); *Hannah v. Hannah*, 824 S.W.2d 866, 868 (Ky. 1992).

.....

When a husband or wife dies testate, the renunciation process outlined in KRS 392.080(1) is the exclusive remedy by which the surviving spouse may make a claim to the statutory share. *Harlow v. Harlow*, Ky., 551 S.W.2d 230, 232-233 (1977). Since the relief [Ralph] is seeking here is his elective share, he cannot contest the will to get it. *Eckert v. Givan*, 298 Ky.

621, 183 S.W.2d 809 (1944); *Egbert v. Egbert*, 186 Ky. 486, 217 S.W. 365 (1920).

Id. at 855-856 (footnote citations moved to text).

We are unable to distinguish the present case from *Henderson*. Here, as in *Henderson*, the deceased spouse died testate, there was no realty at stake,⁴ the surviving spouse failed to renounce the will, and the surviving spouse sought to set aside the will and take his statutory intestate curtesy share. While in *Henderson* Ralph's rationale basis for setting aside the will was apparently based upon fraud, as relevant to the issues at hand, we discern no difference between attempting to set aside a will upon the basis of fraud versus attempting to set it aside based upon the lack of testamentary capacity and/or undue influence.

In summary, we believe the trial court properly interpreted and applied *Henderson*, and affirm its dismissal of Melvin's petition to set aside Mary's will.

ALL CONCUR.

BRIEF FOR APPELLANT:

Peter J. Summe
Fort Wright, Kentucky

BRIEF FOR APPELLEE:

David L. Drake
Independence, Kentucky

⁴ We note the fact that no realty is at stake because if a spouse dies intestate, under KRS 392.020 the surviving spouse takes one-half of the surplus real estate of the deceased spouse, whereas under KRS 392.080(1), the surviving spouse takes only one-third of such real estate. (The surviving spouse takes one-half of surplus personalty under either statute.) Thus we note that in a case where realty is at stake, if there is provable fraud, undue influence, or lack of testamentary capacity associated with the execution of the will, the strict application of *Henderson v. Thomas* would result in the anomaly that the surviving spouse could not seek his or her rightful one-half share of the realty under KRS 392.020. Thus we do not construe *Henderson* as applicable when realty is at stake *and* the will is invalid because of fraud, undue influence, or lack of testamentary capacity.